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Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation

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Conventionally, debate over the use of legislative history hinges on the participants' views regarding the importance, or even existence, of legislative intent. Those who dismiss the concept of legislative intent as chimerical or view any such intent as unimportant reject reference to legislative history. Those who believe that discerning legislative intent serves as the touchstone of interpretation embrace reliance upon legislative history. Professor Bell proposes a new approach, the public justification approach, that severs the connection between legislative history and the concept of legislative intent. He argues that legislative explanations of statutes merit legal recognition apart from their probative value as evidence of legislators actual subjective desires precisely because the legislature has proclaimed those statutory justifications publicly. Legislatures have a normative, perhaps even quasi-constitutional, obligation to explain the statutes they enact. Such an obligation follows from the people's status as sovereigns and the right of human beings to be treated as autonomous. Drawing on underenforced constitutional norms theory, Bell argues that courts should encourage the legislature's fulfillment of its obligation to explain by crediting legislature's public justifications of statutes.

After exploring the premises of two major interpretive approaches, new textualism and interpretivism, Professor Bell sets forth the premises underlying his public justification approach. He describes a methodology in which courts may rely upon limited portions of legislative history, primarily committee reports and statements of the floor managers during legislative debate, to interpret a statute. The approach rejects new textualism, arguing that the text of some legislative history, as well as the text of the statute, is relevant, without creating the methodological problems intentionalism has produced by its theoretical focus on subjective intent. Bell illustrates his public justification approach by analyzing two major United States Supreme Court cases: (1) Chisom v. Roemer, *501 U.S. 380 (1991), in which the Justices split 6-3 on whether the provisions of the Voting*

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Rights Act, allowing plaintiffs to challenge the discriminatory effect of voting practices, applied to judicial elections, and (2) the classic United States v. Holy Trinity Church, *143 U.S. 457 (1892), the major case establishing the legitimacy of referring to legislative history.*

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I. INTRODUCTION

To almost everyone with legal training, the concept embodied in the title of this Article, "legislative history without legislative intent," is surely inconceivable nonsense. (Of course, I chose the phrase for that reason.) Legislative history seems inextricably intertwined with the concept of legislative intent—examining legislative history makes sense only if one wishes to determine legislative intent. The contestants on both sides of the current battle over using legislative history may agree on little, but they seem to agree on this point.

Those who advocate the use of legislative history argue that determining legislative intent is the goal of statutory interpretation, and the legitimacy of referring to legislative history seems to follow without much argument. That is, legislative history merely serves as a tool to find illusive legislative intent, but, in itself, lacks significance. Those who attack legislative history also view it as inexorably coupled with the concept of legislative intent. Thus, they argue against the use of legislative history by attempting to show that "legislative intent" does not provide a proper basis for interpreting statutes. Alternatively, they argue that "legislative history" provides poor evidence of "legislative intent," and thus holds scant value because it is useful only as evidence of intent.

In this Article, I show that one can accept the arguments that legislative intent is chimerical and that legislative history provides a poor tool for discovering any legislative intent that exists, and yet continue to believe that some legislative history retains an important place in the interpretive enterprise.

The reigning methodology of statutory construction involves the search for legislative intent. As the Supreme Court has proclaimed, the touchstone of interpretation is finding legislative intent.[1] Courts initially relied not only on the text

[1] *See* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (courts' objective in construing a statute is to ascertain the congressional intent and give effect to the legislative will); Marcus v. Hess, 317 U.S. 537, 542 (1943); United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50,

of the statute but also on a very limited range of legislatively-produced documents, primarily committee reports and statements of the floor manager of the relevant legislation, to discern legislative intent. Courts justified that approach by relying upon a "delegation-assent" argument—Congress delegates the task of formulating legislation to committees and when it votes on the statute it votes to approve (or disapprove) the work of the committee, including the committee's interpretation of the statute.

Two problems emerged. First, judicial practice outstripped this justification for using legislative history, and courts began to use almost anything they could find to discover legislative intent. As one author quipped, courts started "fumbling about in the ashcans of the legislative process for the shoddiest unenacted shreds and patches of intention."[2]

Second, textualists challenged the concept of legislative intent. They argued that only the vote on a statute by the legislative body had legal significance and that such a vote expressed approval of only the statutory text, not any committee's intent. Intentionalist scholars have not produced a terribly convincing response to this challenge. For example, they have not provided a basis for viewing legislators as voting on anything other than the text of the statute. This Article supplies the missing argument, while distinguishing the types of legislative history that courts should consider from those they should not. Members of Congress should be viewed as having an obligation to vote on both the text of the statute and institutional explanations of those statutes. This duty derives from the concomitant duties of legislatures to explain statutes and avoid misleading the public.

New textualism, intentionalism, and my approach rest upon contrasting premises that I shall set forth briefly here and elaborate upon later. The New Textualist[3] Approach rests on three premises. First, the legislature's vote on a statute is the only significant event in the legislative process. This reflects the view that the legislative process merely provides a forum for the expression of preferences. It also reflects a failure to consider Congress as an institution that is greater than its individual members. Second, the vote on a statute is a vote only on the text of the statute. Third, rarely will members of the legislature share the same subjective intent with respect to a statute. (New textualists believe that this third point does not undermine their own theory of interpretation because legislators have a duty to vote

53 (1942) ("The question here, as in any problem of statutory construction, is the intention of the enacting body."); United States v. American Trucking Ass'n, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes the function of the courts is easily stated[;] [i]t is to construe the language so as to give effect to the intent of Congress.").

[2] CHARLES P. CURTIS, IT'S YOUR LAW 52 (1954).

[3] William Eskridge coined the term. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) (defining new textualism as the view "that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant").

based on the ordinary meaning of the text of a statute, thus differences in subjective intent, or even in legislators' actual understanding of the text, are irrelevant.) The new textualist methodology is objective[4]—it requires a determination of the meaning that a reasonable person would accord to text, and the only legally relevant text is the statute.[5]

According to the Intentionalist Approach, at least as described by its critics, the vote on a statute is the only event of legal significance in the legislative process. Thus intentionalism, like new textualism, seems to regard the legislative process as nothing more than a mechanism for aggregating preferences. However, contrary to new textualists, intentionalists view the vote for a statute as the enactment of the subjective intent of a majority of legislators or some select smaller group of legislators (either members of the relevant standing committee, the drafters of the legislation, the typical legislator who helped form the victorious majority, *i.e.*, the typical majority voter, or the legislators whose votes were necessary for the bill's passage but were most ambivalent, *i.e.*, swing voters). Also contrary to new textualists, intentionalists believe that the members of the victorious majority will often share a subjective intent. Their methodology is subjective—at base they attempt to discern the subjective intent of some person or group.

The delegation-assent approach seeks to expand the number of legally-significant events beyond floor actions by according committee decisions significance. Advocates of such an approach regard committees as agents whose

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[4] I use the words "objective" and "subjective" to distinguish approaches that accord legal significance to an actor's conduct from those that accord such significance to the actor's intentions. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 83–85 (1975); KENT GREENAWALT, LAW AND OBJECTIVITY 109–11 (1992). The former is an objective approach because a court uses a standard that is external to the actor, such as the "reasonable person." The latter is a subjective approach because the standard seeks to evaluate the internal motivations of the actor. Thus, under an objective approach, the interpreter examines the text produced by the legislature from a perspective external to the members of the legislature. For example, an objective approach would focus upon a reasonable person's interpretation of the statutory text. Under a subjective approach, the interpreter examines the text from the perspective of the internal motivations of the legislators. *See generally* ROBERT E. KEETON, JUDGING 90, 152–54 (1990) (comparing subjective and objective approaches). This distinction resembles that used in discussions of the standard of care in torts. *See* 3 F. HARPER ET AL., THE LAW OF TORTS § 16.2, at 389–90 (2d ed. 1986) (discussing judicial reference to the "reasonably prudent person" in similar circumstances); *see also* OLIVER WENDELL HOLMES, THE COMMON LAW 108–10 (1881) (discussing standards of liability); RESTATEMENT (SECOND) OF TORTS §§ 283, 283B (1965) (discussing standards of conduct).

[5] Nonstatutory texts may serve other functions. For example, legislative history may increase citizens' ability to participate in government by clarifying legislative policies. Moreover, it may enhance Congress's influence over administrative agencies by enabling Congress to recommend policies without legally constraining agencies. Nonetheless, new textualists believe that they need not consider these functions served by legislative history when construing statutes.

actions are then approved by their principal—the legislature. However, their failure to provide a convincing basis for finding such assent undermines their approach.

The approach proposed in this Article focuses on institutional obligations and institutional actions: the responsibility of Congress as an institution to explain statutes as well as enact them, and the actions Congress takes to explain those statutes in the form of committee reports and floor manager statements. As a result, this approach views the vote on a statute as a vote on the text plus certain documents comprising the "public justification" of the statute. In addition, because members have a duty to consider the public justification of a statute when they vote, the lack of a joint subjective intent becomes unimportant because members can be viewed as constructively assenting to the text of the statute and the accompanying institutional explanatory materials. Thus, the approach is objective, like new textualism, focusing on the reasonable interpretation of text rather than subjective intentions of legislators. However, the approach in this Article expands the text that must be recognized as relevant to interpretation to include institutional explanations as well as statutory text.[6]

A modified version of the classic H.L.A. Hart-Lon Fuller hypothetical about a park in which vehicles are prohibited can show the differences in the three theories.[7] Imagine the following problem:

A city ordinance provides that "no motor vehicles are allowed in Founders' Park." A court must decide two lawsuits: one seeking a declaratory judgment allowing the operation of motor boats in the park, and the other seeking a declaration that a war monument consisting of a World War II jeep must be removed from the park.

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[6] Some scholars advocate this approach. *See* David B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 220 (1992) ("What legitimizes legislative history as a source of legislative intent is not so much the probative value of this history, but instead, the democratic fiction that the history of a statute has been accepted by Congress as a body. Congress should be understood, so this argument goes, to vote upon a legislative package (text + history) and not merely the text alone."); *see also* Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1156 (1992) (noting "legislators view legislative 'intent' as the policies represented in the statutory text and explained by the legislative leaders for any particular bill"); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888–89 (1930) ("Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another."); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION 355–56 (Andrei Marmor ed., 1995) (under this theory legislative history becomes like text—it matters not why the person voted for it (even if they were mistaken), the words bind them).

[7] *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). *See generally* Bernard W. Bell, *"No Motor Vehicles in the Park": Reviving the Hart-Fuller Debate to Introduce Statutory Construction*, 48 J. LEG. ED. 48 (1998).

The ordinance's adoption followed a series of accidents in which cars or motorcycles struck pedestrians on roadways in Founders' Park. After the accidents, a citizens' group drafted a proposed ordinance providing that "no cars, trucks, motorcycles, vans, tour-mobiles, or other motor vehicles are allowed in Founders' Park." A member of the city council introduced the proposal for consideration by the council, emphasizing the series of roadway accidents in explaining the need for the ordinance. The ordinance was referred to a committee, which amended the proposed ordinance to generally prohibit motor vehicles, without listing specific types of vehicles. The committee's report focuses on the ordinance as a solution to the road accident problem.

The proposed ordinance reported by the committee was briefly debated in council, which enacted the ordinance by a vote of eighteen to thirteen. During the debate, the Chairperson of the Committee that had amended the ordinance said that the ordinance would solve the problem of the accidents that had occurred. Two supporters of the ordinance asserted that the ordinance would finally require the removal of a jeep monument from the park because jeeps are motor vehicles. Two other supporters asserted that the ordinance would enhance safety throughout the park (on and off the park's roads) and, in addition, address environmental concerns by reducing pollution caused by vehicles powered by motors, including motor boats. One opponent asserted that such a ban on motor boats would be unwise.

Further information about the motor boat issue is revealed in an affidavit submitted to the court by the majority leader of the council. In the affidavit, she asserts that a group of ten members feared that the courts might apply the ordinance to motor boats, but the group ultimately decided not to raise the issue for fear that the council would have rejected an amendment expressly exempting motor boats. The majority leader's affidavit also asserts that, in her judgment, such a clarifying amendment would have been defeated.

The new textualist, intentionalist, and public justification methodologies suggest three different approaches. The new textualist would urge the judge to focus on the dictionary meaning of the words "motor vehicle" and ignore the legislative history entirely. Discovering that "motor vehicles" are defined as "self-propelled wheeled vehicle[s] not running on rails,"[8] the judge would conclude that the jeep must be removed, but motor boats can continue to operate.

The intentionalist would urge the judge to interpret the ordinance by seeking to discover the council's "intent" through analysis of legislative history. The judge might review all the materials discussed above. Having done so, he would probably surmise that a majority of the council did not really believe that the ordinance required removal of the jeep. He might also conclude that the ordinance prohibited motor boats, citing the statements of the only two proponents that addressed the motor boat issue, and noting that nothing in the legislative record, committee

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[8] WEBSTER'S II: NEW RIVERSIDE UNIVERSITY DICTIONARY 772 (1984).

reports, chair's statement, or sponsor's statement, conflicts with the views expressed by those two proponents. He might also consider, and cite in support, the majority leader's affidavit.

Under the public justification approach, the judge should consider only the text of the ordinance and the institutional statements justifying the statute, *i.e.*, the committee report and the committee chair's comments. A reasonable person who reads the statute and the institutional justification would conclude that the ordinance embodied a policy of preventing the operation of self-propelled vehicles on roads within Founders' Park. Because that rationale applies to neither immobile nor off-road vehicles, immobile jeeps and mobile motor boats are permitted.[9]

In Part II of this Article, I shall make the case for viewing at least some legislative history as legally significant text entitled to judicial consideration. The argument seeks to divorce the rationale for the use of legislative history from the attempt to determine the subjective views of all or some portion of the enacting legislators, *i.e.*, "the legislative intent." In particular, I will argue that legislatures should be viewed as having a duty to explain statutes, and that statutes should be interpreted to further publicly acknowledged, rather than undisclosed, policies. In Part III, I will discuss the premises and methodology of new textualism and intentionalism. In Part IV, I will discuss the premises and methodology of the public justification approach. Finally, in Part V, I will discuss the relevance of the public justification approach to two ongoing interpretive controversies.

II. THE DUTY TO EXPLAIN

A. *The Basis of the Duty*

We view legislative history as having value only as evidence of the subjective

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[9] These approaches all assume that courts should act as agents of the legislature and, accordingly, effectuate its will. Under other approaches, the courts, as "readers" of statutes, may legitimately create meaning. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 20–21 (1988) (advocating "nautical" interpretation, which views statutes as constantly undergoing transformation to account for the views of legislators and judges at the various times the statute is interpreted, rather than "archeological" interpretation, which focuses on a statute's original meaning); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–29 (1990) (recommending a "practical reasoning" approach that combines elements of agency approaches and evolutive approaches); Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 636–46 (1996) (recommending an approach that combines elements of an agency approach and a meaning-creating approach). However, evolutive and agency theories can be combined. *See* Gonzalez, *supra*, at 718–29 (discussing a two-step process of interpretation involving both "interpretative judgment and policy discretion"); Eskridge & Frickey, *supra*, at 321–22, 345–60 (advocating a "more modest approach" to statutory interpretation that is based upon "practical reason"). This Article assumes acceptance of agency conception.

intent of legislators. However, statements can be accorded significance apart from their value as evidence of the speaker's subjective intent. Promises illustrate this point. A person making a promise creates an obligation for himself, regardless of whether he intends to keep the promise at the moment of utterance.[10] The recipient of the promise can justifiably rely upon it without determining whether the promise actually reflected the subjective intent of the promisor. As Kent Greenawalt notes, "[t]he individual who promises creates social obligations for himself and confers social claims on others;" such obligations are created and claims conferred whether or not the promisor intended to act as promised.[11] Legislative history should be recognized as possessing significance apart from its value as evidence of legislators' subjective intent, much like promises have independent significance. In other words, legislative explanations should have some legal effect whether or not they actually reflect any legislator's state of mind.

A legislature's explanation of a statute itself merits recognition as an act of legal significance. Two normative principles compel such a conclusion. First, legislatures, like other governmental institutions, have a normative obligation to explain, as well as enunciate, their commands.[12] Second, government must not mislead its citizens.

1. *Entitlement to an Explanation*

The first principle, that legislatures have a duty to explain their commands as well as enunciate them, follows from the respect governments in the United States owe to the public. The respect due the public has two bases. Citizens' status as sovereigns in the United States Government (and the other governmental entities within the United States) provides one such basis. Such respect is also required because members of the public are affected by legislative decisions (regardless of whether they are also viewed as sovereigns). As shown below, people, both as citizens and individuals affected by statutes, are entitled to an explanation of

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[10] *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 160 (1978) [hereinafter LYING] ("[I]n making a promise, I set up expectations, an equilibrium; should I break my promise, I upset that equilibrium and fail to live up to those expectations; I am unfair, given what I had promised and what I now owe to another."); SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 120 (1982) [hereinafter SECRETS] (discussing a promise as an obligation that demands respect and allegiance and referencing the work of philosopher Hugo Grotius). *See generally* E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 36–42 (1998) (discussing various theories explaining the binding nature of promises).

[11] *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 63–65 (1989).

[12] *See* RICHARD E. FLATMAN, POLITICAL OBLIGATION 88 (1972) ("[I]t [is] obvious that we can ask for justification as to why [laws] were passed.... [I]t is clear that reasons can be given and that we expect them to be given for or against particular legal rules.").

statutes.

First, the relationship between citizens and government imposes upon legislatures a normative obligation to explain statutes. Citizens are sovereign within the United States government, and government entities, including legislatures, merely act as agents or trustees of sovereign citizens on their behalf.[13] Indeed, the Founding Fathers identified this principle as one of their major contributions to political thought. As Cass Sunstein has noted, "[t]he placement of sovereignty in 'We the People,' rather than the government, may well have been the most important American contribution to the theory of politics."[14] Indeed, Madison argued in the Federalist Papers that popular sovereignty was the essence of republicanism—in a republic, "government . . . derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period" of time.[15]

Accordingly, legislators derive their authority from the populace as a whole. The people as a whole have established a Constitution that provides for the delegation of limited powers to Congress[16] and provides that such power can be exercised for a limited duration until legislators again submit themselves for election.[17]

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[13] *See* THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) ("The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."); *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 761–66 (1994) (discussing the strong element of popular sovereignty in the Constitution); Gonzalez, *supra* note 9, at 636–46 (explaining the central idea of popular sovereignty is that "the people are the one and only sovereign in civil society"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2, at 2 (2d ed. 1988) ("That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism."). *See generally* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 11, 15, 18–19, 36, 60, 70, 75, 84–85, 106 (1948) (asserting the proposition that "[w]e are the sovereign and the legislature is our agent," and elaborating upon the implications of that proposition for freedom of expression).

[14] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at xvi (1993).

[15] THE FEDERALIST NO. 39, at 240–41 (James Madison) (Clinton Rossiter ed., 1961).

[16] *See* THE FEDERALIST NO. 49, at 313–14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived."); *see also* TRIBE, *supra* note 13, § 5-2, at 298 (discussing how the final version of the Constitution specifically enumerated the powers to the national government); *see, e.g.*, United States v. Lopez, 514 U.S. 549, 552, 566 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

[17] *See* U.S. CONST. pmbl. ("We the People . . . do ordain and establish this Constitution for the United States of America."); *Id.* amend. X ("The powers not delegated to the United States by

As citizens' agents or trustees, government institutions at least owe a duty to explain to those citizens the basis for action taken in their name.[18] By refusing to explain its actions to citizens, a government entity, in effect, asserts superiority over and lack of accountability to the citizenry.[19] The significance of the citizenry's status as the source of the government's authority can be appreciated by contrasting two situations. In one, a command is given or an action taken by someone who does not derive their power from the person commanded or affected by the action. In the second, the person giving the command or taking action derives his authority from the person being commanded or affected.[20]

For instance, a military officer ordinarily has no obligation to explain an order to a subordinate because he does not derive his authority from the subordinate.[21]

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the Constitution, nor prohibited to it by the states, are reserved to the States respectively, or to the people."); THE FEDERALIST NO. 39, *supra* note 15, at 241 ("[W]e may define a republic to be... a government which derives all its powers directly or indirectly from the great body of the people and is administered by persons holding their offices during pleasure for a limited period.").

[18] *See* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 5–6 & n.*, 19–20, 76–78, 114, 118 (1992). *See generally* Burke Marshall, Foreword, *in* GOLDSTEIN, *supra*, at xvii, xix–xx (Goldstein's book "takes the sovereignty of the people literally and seriously, and derives from that their right to be told what is going on, and why, in the judicial branch."). Goldstein argues that the U.S. Supreme Court has an obligation to explain its constitutional decisions in written opinions, rather than merely announcing a constitutional rule. *See, e.g.*, GOLDSTEIN, *supra*, at 19–20, 118. For instance, he argues that in the second *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown* II), addressing remedial issues, the Court had an obligation to justify its decision that African-American victims of segregated school systems had no right to immediate desegregation. *See* GOLDSTEIN, *supra*, at 76–78, 127. Goldstein rests this obligation to explain on the citizenry's sovereign status. *See id.* at 5–6 & n.*, 19–20. *See generally* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 739 (1949) ("[T]he court was... faithful to the democratic tradition [when it wrote] in words that all could understand why it did what it did. That is vital to the integrity of the judicial process.").

[19] *See* Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985); ALVIN W. GOULDNER, THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY 102–03 (1976); MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 20–22 (1983); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 243 (1987).

[20] *See* Carl J. Friedrich, *Authority, Reason, and Discretion*, *in* NOMOS I: AUTHORITY 28, 30–31, 35–36, 40–42, 44–45, 48 (1958); *see also* CARL J. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 203 (2d ed. 1963) [hereinafter THE PHILOSOPHY OF LAW]; Charles W. Hendel, *An Exploration of the Nature of Authority*, *in* NOMOS I: AUTHORITY, *supra*, at 3, 17; Mark E. Warren, *Deliberative Democracy and Authority*, 90 AM. POL. SCI. REV. 46–48, 55, 57 (1996).

[21] *See* Uniform Code of Military Justice art. 90 & 92(b), 10 U.S.C. §§ 890(2), 892(2) (1994); *see also* Chappell v. Wallace, 462 U.S. 296, 299–300 (1983) (In denying enlisted personnel a *Bivens* remedy against their superiors, the Supreme Court said: "The inescapable demands of

Similarly, a parent may refuse to explain commands to a minor child, particularly a relatively young child, because the child is not the source of the parent's authority.[22] Moreover, prison inmates have a limited entitlement (if any) to an explanation of the rationale of prison regulations because the authority to promulgate those regulations is not derived from the inmate.[23]

Alexander Meiklejohn provided an example from a more political context: in a country controlled by an occupying power, such as post-World War II Germany and Japan, the citizens are not entitled to an explanation of the occupying powers' dictates.[24] While asserting that there is no obligation to justify any command under those circumstances may be extreme, certainly the governing authorities have less of an obligation to provide such explanations than they would if they derived their authority from the citizens as a result of elections (rather than having attained their position by military power).

By contrast, in some relationships one can demand explanations. If a couple hires a babysitter, who allows the child to stay up past the child's bedtime, the parents are entitled to an explanation. Corporate officers have an obligation to justify corporate actions and corporate expenditures to shareholders.[25] Federal

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military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."); *cf.* MEIKLEJOHN, *supra* note 13, at 84–85 (no freedom of speech in the military because it is not a community governed by all of its members); ALFRED LORD TENNYSON, *The Charge of the Light Brigade*, *in* SELECTED POETRY 118 (Norman Page ed., 1995) ("Their[s is] not to reason why, their[s is] but to do and die.").

[22] *See* THE PHILOSOPHY OF LAW, *supra* note 20, at 204. Tort law also reflects such extraordinary parental authority over children. In particular, parents have traditionally enjoyed immunity from suit by their children for tortious acts committed in the course of raising or supervising them. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 10.2, at 375 (2d ed. 1988); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 904–05 (5th ed. 1984). This immunity has in part been based on a concern about infringing upon parents' discretion with respect to child-rearing. *See* CLARK, *supra*, at 377.

[23] *Cf.* MEIKLEJOHN, *supra* note 13, at 85 (Where there is control without consent, such as in prisons and asylums, there is "no political ground for the demand that discussion within the institution shall be free from abridgement.").

[24] *See id.* at 85. Of course, this assumes, presumably, that the occupation of the country is consistent with international law.

[25] Such an obligation is not judicially enforced (except that shareholders may bring suits that at least require management to show that they exercised due care in their actions on behalf of the corporation). Nevertheless, "[a] shareholder has a fundamental right to be intelligently informed about corporate affairs," 5A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2213, at 335 (perm. ed. rev. vol. 1995). Moreover, shareholders generally have rights to access to corporate records that nonshareholders do not share—a right that can be traced to the principle that corporate directors and officers are agents who owe their authority to shareholders. *See id.* at 336; *see also* RUSSELL B. STEVENSON, JR., CORPORATIONS

agencies have an obligation to explain their actions to Congress—they ordinarily cannot refuse to send representatives to testify at congressional hearings or refuse to discuss their reasons for actions.[26] Individual legislators surely have an obligation to explain their votes to their constituents.[27] In each of these instances, the person taking action derives his authority from the person due an explanation.[28]

Moreover, a government that refuses to disclose information to the public treats citizens as outsiders. As Joseph Vining has argued, "disclosure, absence of deception, almost defines what it means to be *inside* rather than *outside* an entity."[29] The same notion was captured by Woodrow Wilson, in complaining about the

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AND INFORMATION: SECRECY, ACCESS, AND DISCLOSURE 152 (1980) ("The right of inspection grew originally out of judicial feelings that shareholders, as equitable owners of the assets of their corporations, were entitled to know how the directors who had been appointed to run the business were conducting its affairs."); *see, e.g.*, Parsons v. Jefferson-Pilot Corp., 426 S.E.2d 685, 688 (N.C. 1993).

[26] Indeed, the legislature's right to control administrative agencies may justify compelling agencies to assert reasons for their actions and adopt standards to govern their exercise of authority. *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971); Sun-Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 517 P.2d 289, 294 (Or. Ct. App. 1973); *see also* Freedom of Information Act, 5 U.S.C. § 552(d) (1994) (The Freedom of Information Act "is not authority to withhold information from Congress."). Of course, there is controversy regarding the degree to which agencies can withhold information from Congress at the behest of the President, who is a constitutional officer independent of Congress. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS: CASES AND MATERIALS 311–37 (1996); Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADM. L. REV. 109, 111 (1996).

[27] *See* Bond v. Floyd, 385 U.S. 116, 136 (1966); Common Cause v. Bolger, 574 F. Supp. 672, 677, 679, 683 (D.D.C. 1982), *aff'd* 461 U.S. 911 (1983); Bowie v. Williams, 351 F. Supp. 628, 631 (E.D. Pa. 1972); MEIKELJOHN, *supra* note 13, at 75; YUDOF, *supra* note 19, at 46–47; 2 THE WORKS OF JEREMY BENTHAM 312 (Richard Doane ed., 1837); 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, 554–58 (1994).

[28] The government's duty to provide information is particularly evident with respect to financial expenditures. Thus, the Statement and Account Clause of the Constitution requires the executive branch to render accounts periodically. *See* U.S. CONST. art. I, § 9, cl. 7; United States v. Richardson, 418 U.S. 166, 198–201 (1974) (Douglas, J., dissenting); United States v. Richardson, 465 F.2d 844, 850–51 (3d Cir. 1972), *rev'd*, 418 U.S. 166 (1974); *Richardson*, 465 F.2d at 871–72 (Adams, J., dissenting); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 460 (Jonathan Elliot ed., 2d ed. 1836) (statement of George Mason), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 292–93 (Philip B. Kurland & Ralph Lerner eds., 1987).

[29] JOSEPH VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN 43 (1986); *see also* GOLDSTEIN, *supra* note 18, at 116. *See generally* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 973–74, 984–85, 990–91, 993–95 (1989).

secrecy of congressional committee proceedings. He wrote:

> I say that until you drive all those things into the open, you are not connected with your government; you are not represented; you are not participants in your government. Such a scheme of government by private understanding deprives you of representation, deprives the people of representative institutions. It has got to be put into the heads of legislators that public business is public business.[30]

Indeed, the Framers of the Pennsylvania Constitution of 1776 noted this duty to explain legislative provisions explicitly, including in that Constitution a requirement that "for the more perfect satisfaction of the public, the reasons and motives for making laws shall be fully and clearly expressed in the preambles."[31]

Some First Amendment theorists have grounded the protection of free speech in the sovereignty of the people and the consequent need to ensure that the people can learn about government activities.[32] Such arguments support a duty of explanation. Alexander Meiklejohn was one of the most systematic exponents of such a theory.[33] Meiklejohn argued that American government is controlled by "the people"[34] and that to intelligently control the government, the electorate,[35] not

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[30] WOODROW WILSON, THE NEW FREEDOM 85 (William E. Leuchtenburg ed., 1961) (1913); *see also id.* at 82–86; JAMES RUSSELL WIGGINS, FREEDOM OR SECRECY 19 (1964).

[31] PA. CONST. of 1776, Plan or Frame of Government § 15.

[32] Some of these theorists argue that the First Amendment's sole purpose is to facilitate self-government. *See* MEIKLEJOHN, *supra* note 13, at 79. One can recognize other bases for the First Amendment, *see* GREENAWALT, *supra* note 11, yet still accept the implications of Meiklejohn's argument that Government should have extremely limited power over speech because of the First Amendment's role in self-governance. *See* Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 311 n.55 (1982).

[33] *See* MEIKLEJOHN, *supra* note 13, at 79; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253–55 [hereinafter *First Amendment is an Absolute*]; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 554–58; Saxbe v. Washington Post Co., 417 U.S. 843, 860, 862–64 (1974) (Powell, J., dissenting); Branzburg v. Hayes, 408 U.S. 665, 726–27 (1972) (Stewart, J., dissenting). In *Saxbe*, Powell bases the right of media access to news sources on "the ability of our people through free and open debate to consider and resolve their own destiny." *Saxbe*, 417 U.S. at 862. Because "public debate must not only be unfettered . . . [but] informed," the First Amendment implicates the right to receive information as well as disseminate it. *See id.* at 862–63. However, Powell was not addressing any affirmative governmental obligation to provide information. *See id.* at 861. In *Branzburg*, Justice Stewart grounded the immunity of news reporters from testifying about their sources on the "[e]nlightened choice by an informed citizenry . . . upon which an open society is premised," and the consequent need to protect the ability to gather information as well as disseminate it. *See Branzburg*, 408 U.S. at 726–27 (Stewart, J., dissenting). Thus, like Justice Powell in *Saxbe*, Justice Stewart did not view the journalists' claim in *Branzburg* as one requiring the provision of information by the government.

[34] MEIKLEJOHN, *supra* note 13, at 11–15, 18–19, 36, 60.

merely government officials, must have access to all important information and debate.[36] Meiklejohn noted that the protection of speech is integral to any government in which the people exercise sovereignty.[37] However, Meiklejohn primarily focused on challenging the doctrine that a "clear and present danger" could justify suppressing private citizens' speech.[38] Thus, he envisioned a limited affirmative role for government with respect to speech. The government could act as moderator, controlling the "time, place, and manner" of discussion so that the discussion did not devolve into a cacophony of meaninglessness.[39] The government should also encourage discussion by both providing citizens a general education, so that they can take part in governing, and establishing fora in which the citizenry can discuss public issues.[40] Meiklejohn does not discuss any governmental duty to explain its acts.[41]

Cass Sunstein makes a similar argument when he relates the First Amendment to the needs of citizens as governing sovereigns.[42] In his view, the First Amendment requires the government to do more than refrain from interfering with communication between private parties regarding matters of government; it imposes an affirmative obligation on the government to publicize its activities.[43] Concurring and dissenting opinions in cases involving media access to prisons and courts,

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[35] *See id.* at 27 ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also id.* at 26, 75.

[36] *See id.* at 75.

[37] *See id.* at 55–56, 75.

[38] *See id.* at 29–77.

[39] *See id.* at 24–27.

[40] *See id.* at 19–20; *First Amendment is an Absolute*, *supra* note 33, at 245, 257, 260–61.

[41] Indeed, Yudof argues that Meiklejohn concentrates only on private communications and does not sufficiently consider the danger of the government "falsifying consent" or "falsifying majorities." *See* YUDOF, *supra* note 19, at 155–56.

[42] *See* SUNSTEIN, *supra* note 14, at xvii, 18–22, 34–35, 37.

[43] *See id.* at 105–07; YUDOF, *supra* note 19, at 10. Ultimately, Sunstein contends that the rejection of the view that the First Amendment limits a government's ability to withhold information is justified by the limited institutional capacity of the courts. *See* SUNSTEIN, *supra* note 14, at 106–07. In particular, he argues that "courts have singularly poor tools for deciding when secrecy is appropriate." *Id.* Indeed, this appears to be at least in part the reason the Supreme Court refused to establish a right of access to government institutions and information. *See* Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978); Branzburg v. Hayes, 408 U.S. 665, 703–06 (1972) ("The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."). Interestingly, Mark G. Yudof comes to a similar conclusion about restraining government manipulation of information—while such manipulation has implications for democracy, institutional considerations suggest that the political branches of government, not the judiciary, should limit such practices. *See* YUDOF, *supra* note 19, at 179, 188–90. *See generally id.* at 178–90.

particularly Justice Stevens's dissent in *Houchins v. KQED, Inc.*,[44] rely upon a similar argument. Justice Stevens and others have argued that the public has a right to discover the manner in which the government operates public institutions, such as prisons. Therefore, government officials should not have absolute discretion to prevent the public and media from entering such institutions to observe their operation.[45] Justice Stevens and others derive this right of access from the people's role in self-governance.

These theories, like my argument that legislatures have a duty of explanation, are grounded in citizens' status as sovereigns and their right to learn about their government's activities.[46] In other words, these theories incorporate a view of the importance of information about government in a democracy. A subtle difference remains between those theories and mine. Meiklejohn's, Sunstein's, and Stevens's arguments focus upon government either divulging information that already exists or allowing others to observe government operations or proceedings that will actually occur, they do not require the affirmative development of explanations (or the production of anything that would not otherwise exist).[47]

Thus, the people could have a right of access to all legislative proceedings and all of the facts that served as a basis for legislative deliberation, without a legislature providing any coherent rationale setting forth its collective explanation for its action.[48] However, drawing such a line makes little sense—the populace is no less

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44 438 U.S. at 18–40.

45 *See id.* at 31–32, 35–38 ("Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586–87 (1980) (Brennan, J., concurring).

46 Indeed, some have argued that the legislature's role in publicizing government activities, its informing function, is more important than its legislative role. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT 198 (2d ed. 1885). *See generally id.* at 195–98; JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 81–84 (Currin V. Shields ed., 1958).

47 *See supra* note 33.

48 Indeed, some have suggested that a competition between the public and government is enshrined in the Constitution—the government cannot prevent the public from learning information that a nongovernmental source wants to divulge, but the government has no obligation to make any information public. *See* Pell v. Procunier, 417 U.S. 817, 834 (1974); ALEXANDER BICKEL, THE MORALITY OF CONSENT 79–83 (1975); Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975).

I reject this argument, in part for reasons stated by Cass Sunstein. *See* SUNSTEIN, *supra* note 14, at 106–07. The nature of the information, rather than whether a private party or a government agent has control over it, is the relevant issue. It is problematic to say that the First Amendment prohibits a party from publishing harmful government information known to be stolen, but that the First Amendment provides no protection for the person providing the document to the publishing party. If the First Amendment is, at least in part, intended to ensure democratic government, some minimal access is necessary, as courts have held with regard to trial

entitled to know the rationale for decisions than the facts underlying governmental actions or the statements made by representatives during legislative deliberations.[49] Indeed, there may be no sharp distinction between rules and their justifications—the latter are really intertwined with the former.[50]

Moreover, there may be little practical difference between the right to information, the right of access to proceedings, and the right to an explanation of government policy. To the extent that there are institutional reasons for action, and government policy is not merely a coincidental confluence of separate interests, the

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proceedings. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577–78 (1980). Moreover, whether information should or should not be in the public domain should hardly turn on such a random calculation as which institutions are most clever—the government in keeping information secret or private institutions, such as the news media, in ferreting out information. That is, whether information is public, should not turn on such things as whether a particular government program includes a government employee who is disgruntled enough to risk criminal prosecution. For instance, it is difficult to imagine that whether crucial military information can be published turns on whether it happened to get into the hands of private media, or whether important information with no harmful effects is available to the public turns on whether the government official in control of the information is proficient at keeping it secret.

Moreover, even if the government-media competition theory is right as a purely constitutional matter, it should be rejected as a normative principle governing the conduct of legislatures and other governmental institutions. Indeed, Congress has recognized that openness in government is good as a normative matter (apart from any strict First Amendment requirements of access). *See* Government in the Sunshine Act § 2, Pub. L. No. 94-409, 90 Stat. 1241 (1976) ("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking process of the Federal Government."). For example, Congress recognized such an open government principle by passing the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1994)), the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. 2 §§ 1–15 (1994)), and the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1994)). The House and Senate have adopted rules requiring committee proceedings be open to the public. *See* S. Rule XXVI, cl. (5)(b) (1991) (visited Mar. 25, 1999) <http://www.senate.gov/~rules/srules.htm>; H.R. Res. 5, 106th Cong. (1999) (enacted) (visited Mar. 24, 1999) <http://www.lcweb.loc.gov/global/legislative/hrules/106/rule10.html> (House Rules X, cl. 4(a)(1)(C) & XI, cl. 2(g)(1)).

[49] Indeed, Congress enacted the Sunshine Act to make possible greater knowledge of government decisions and their underlying rationales than made possible by the Freedom of Information Act. *See* S. REP. NO. 94-354 (1976), *reprinted in* SENATE COMMITTEE ON GOVERNMENT OPERATIONS AND HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, GOVERNMENT IN THE SUNSHINE ACT: SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS 200–01 (1976) [hereinafter SOURCE BOOK]; H.R. REP. 94-880, at 33 (1976), *reprinted in* SOURCE BOOK, *supra*, at 544; *President's Remarks Upon Signing S.5 into Law*, 12 WKLY. COMP. PRES. DOC. 1333 (Sept. 13, 1976), *reprinted in* SOURCE BOOK, *supra*, at 831.

[50] The tenuousness of such a distinction is clear with regard to law established by courts in judicial opinions. Perhaps the distinction is somewhat less tenuous with regard to statutory law, but even in that context the difficulty of making such a distinction does not disappear.

reasons motivating legislators become similar to a fact that exists, rather than an affirmative obligation to formulate an explanation that would not otherwise have been developed.[51]

A duty to explain also follows from the principle that people affected by a governmental decision deserve some explanation of that decision. Treating another fairly requires explaining decisions that adversely affect that person's interests. For instance, Laurence Tribe notes that:

> [B]oth 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.[52]

Similarly, Jerry Mashaw states that "a reason must be provided as a constitutional minimum," otherwise an individual "is treated as a being for who reasons are unimportant—an obvious affront to his self-respect."[53] Frank I. Michelman makes a similar point. In discussing certain procedural demands upon government,

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[51] Civic Republicans argue that deliberation may often lead legislators to adopt statutes based on rationales for which a fairly broad consensus exists. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–51 (1988). For those who believe that a majority of legislators actually share certain purposes when enacting legislation, the argument that legislatures should not be allowed to mislead the public has particular power—requiring an explanation only requires legislators to divulge something that already exists (albeit not necessarily in written form).

[52] TRIBE, *supra* note 13, § 10-7, at 503 (emphasis added). Additionally, Tribe has commented:

> [L]aws, unlike naked commands, must be understandable to those affected. A citizen whose basic liberty is subject to control is always entitled to some answer (as a matter of minimum rationality-substantive due process) when she asks *why the control is being enforced at all*, just as she is entitled to be told (as a matter of procedural due process) *why the control applies to her*.

Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 302 (1975) (emphasis added); *see also* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 571 (1985); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1292 (1975); Morgan, *supra* note 32, at 348 ("Requiring legislators to explain their actions to affected individuals would also show greater respect for citizens as persons [—] [i]t is not only frustrating but also dehumanizing to be subjected to legislative mandates which are unsupported by explanations."). The concern about treating people as ends in themselves, rather than means, appears in Kant's writings. *See* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS § 245 (1785).

[53] Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 928 (1981).

including the provision of explanations, he notes:

> [A] demand for [such] procedures might issue from a certain kind of ideal conception of social relations and political arrangements, expressing revulsion against the thought of life in a society that accepts it as normal for agents representing the society to make and act upon decisions about other members without full and frank interchange with those members, a kind of accountability to them, even if not legal accountability.[54]

Similarly, Kadish and Kadish note:

> [T]he principle that people must justify undertaking an action when others are affected is based on a system of values and not on logical necessity[;] [i]t flows from an underlying commitment that other people are entitled to be treated as autonomous and free beings rather than as manipulable things—a commitment that has informed . . . the entire Western liberal tradition.[55]

Many have made similar arguments.[56]

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[54] Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* NOMOS XVIII: DUE PROCESS 126, 128 (J. Roland Pennock & John W. Chapman eds., 1977).

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

[56] *See, e.g.*, GREENAWALT, *supra* note 4, at 154 ("The litigants in legal cases, especially losing ones, have an important stake in *reasoned justification*. So also do the participants in other branches of government and the community at large." (emphasis added)); John Ladd, *The Place of Practical Reason in Judicial Decision*, *in* NOMOS VII: RATIONAL DECISION 126, 144 (Carl J. Friedrich ed., 1964); Hans A. Linde, *Due Process in Lawmaking*, 55 NEB. L. REV. 197, 206 (1976) ("The sense of obligation to justify an exercise of power is essential in a democracy."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995) ("[G]iving reasons is still a way of showing respect for the subject.").

The view that respect for citizens imposes upon government in general, and legislatures in particular, a duty to explain commands has a long history. Plato can be read to suggest such a point in discussing the importance of preambles. *See* PLATO, THE LAWS 178–88 (Trevor J. Saunders trans., 1970). On the surface, Plato argued that providing a justification for a command, such as a statute, in addition to giving the command itself, increases obedience. In other words, a law that sets forth its justification will be more effective. *See id.*; KADISH & KADISH, *supra* note 55, at 633, 658. However, the example he uses to illustrate the point suggests that dignity is also an important aspect of government authorities providing justification. Plato contrasts the manner in which a doctor provides treatment to a slave and a free man. To the slave, a person who is presumably not entitled to full dignity, *see* DAVID HELD, MODELS OF DEMOCRACY 14, 23 (1987), the doctor obtains the required information, makes his diagnosis, and then without providing any explanation of his reasons for the treatment, merely tells the slave patient the treatment he prescribes. In ministering to the free person—a person who is entitled to full dignity—not only does the doctor prescribe a treatment, but he discusses with the patient the reasons for the treatment. This difference certainly suggests that the need to explain can be viewed as a dignitary issue as well as one involving the efficiency of government. Ultimately, however, Plato leaves to the lawgiver the

Indeed, in some situations, the respect due those affected by a decision may provide a more cogent justification for a duty to explain than the concept of popular sovereignty. Because courts, and to a lesser extent administrative agencies, are subject to only indirect popular control, in those contexts a popular sovereignty argument for a duty to explain seems somewhat strained. The argument for an explanation based on respect, however, fully applies to courts and agencies, regardless of the attenuated nature of popular control.[57]

Thus, even when decisionmakers do not derive their authority from the consent of those over whom they have authority, some obligation to explain their decisions remains. Accordingly, even in the parent-child, jailor-inmate, and occupying power-occupied country situations discussed above, some normative obligation to explain exists.

2. *The Right Not to Be Misled*

A second argument for the political significance of institutional explanations of statutes can be made from the premise that government should not mislead the governed, at least in a democracy.[58] Even if governments must possess some authority to keep limited secrets, their power to mislead the general public is surely limited.[59] An open refusal to divulge information is surely a less serious affront to the public than the intentional provision of erroneous information.[60]

Lying shows an even greater disrespect for the status of citizens as sovereigns than does refusing to supply an explanation at all. Moreover, governmental deception can produce "falsified consent."[61] Democracy is legitimate only if people

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decision as to whether to provide an explanation, indicating that he has not accepted the dignitary theory. *See* PLATO, *supra*, at 188.

57 Nevertheless, Professor Goldstein makes an argument for an obligation to explain based on popular sovereignty even with respect to the Judiciary. *See* GOLDSTEIN, *supra* note 18, at 6–7, 115–16.

58 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 95 (2d ed. 1986); Douglas, *supra* note 18, at 754.

59 Obviously government agents may lie to individuals in conducting undercover criminal operations, but such reasons for lying rarely apply to general statements to the general public. *See* LYING, *supra* note 10, at 186–87 (even undercover techniques should be openly debated and decided upon in advance).

See generally id. at 174–91 ("[O]nly those deceptive practices which can be openly debated and consented to in advance are justifiable in a democracy." (emphasis omitted)); DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 11–33, 38–39 (1987); Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception As an Investigative Tool*, 60 U. PITT. L. REV. (forthcoming Spring 1999).

60 *See* LYING, *supra* note 10, at 186–88; SECRETS, *supra* note 10, at xv, 27.

61 *See* Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) ("[T]he legitimacy of [a] chosen

vote or otherwise consent based on their true preferences, rather than those manufactured by government manipulation of information. Of course, citizens themselves do not vote on proposals and exercise only indirect control over government—they vote on representatives only periodically. Thus, citizens, in their capacity as sovereigns, do not ordinarily directly rely on rationales provided by government. However, citizens are expected to influence legislatures between elections by communicating with government officials.[62] If citizens do not know the reasons for governmental actions, they cannot effectively lobby government. Moreover, the true explanations of legislative decisions may affect people's attitudes toward the structure of the governmental process in general. For instance, the populace's perception of the reasons that generally motivate a majority of legislators to act might shape their attitudes with respect to the desirability of altering the campaign finance system or the rules governing lobbying. In short, where a government has reasons for taking certain actions, that government has an obligation to avoid misleading the public by misstating the rationale for its action.

Accordingly, the courts should not condone a legislative practice of acting for one reason, but publicly proclaiming another.[63] Thus, when private reasons differ from public ones, the public reasons should receive more respect precisely because they are public. Proclaiming reasons is a public act that has significance beyond what it reveals about the secret motivations of legislators. We should not condone legislative deceit. Thus, if government offers official justifications that vary from the real reasons for government action, the official statements should be privileged over the actual purposes because they have a better democratic pedigree.

Thus, if a legislature really enacts a statute to protect a particular industry, but publicly presents it as a consumer-protection statute, such deception should not be honored in the course of interpreting the statute.[64] If courts are to effectuate any

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policy rests on the consent, if not the consensus, of the governed; excessive or questionable efforts by government to manufacture consent of the governed call the legitimacy of its action into question."); YUDOF, *supra* note 19, at 15, 145, 152–57; LYING, *supra* note 10, at 179, 182 (stating that lying allows "power bypassing the consent of the governed" and gives government leaders "free reign to manipulate and distort the facts and thus escape accountability to the public").

[62] The contemporary understanding is that this is the essence of the right to petition the government. *See* U.S. CONST. amend. 1. *But see* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998) (describing petitioning as a specialized form of seeking sovereign action that should be distinguished from contemporary communications between representatives and voters).

[63] Similarly, a government should not claim it is acting on a coherent rationale for its action when there is none. If a decision merely results from the accidental confluence of completely independent and possibly conflicting desires (as public choice theory suggests most legislative decisions are), proclaiming a coherent rationale is misleading.

[64] Some argue that such deceit occurs frequently. *See* SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE 44, 51–52

purposes, they should effectuate the publicly-offered purposes, not the private ones, even if the private rationale served as more of a motivating factor for legislators. For example, to take a slightly modified version of the facts underlying a noted case,[65] suppose a legislature enacts a statute prohibiting optometrists from conducting eye examinations. The legislature may publicly justify the statute, in the legislative history, as a public health measure, even if most legislators really wished to shield ophthalmologists from competition. Disregarding the publicly-stated purpose and acting on the basis of the secret reasons motivating the legislature furthers this legislative deceit. The court would not condone such deceit if, instead, it acted on the basis of the publicly-stated justification. Thus, in interpreting that statute, a court should accord more weight to the public health justification, than to the secret economic justification.[66]

This contrasts with the approach Professor (now Judge) Easterbrook recommends. Easterbrook argues that the statutory text more likely captures the essence of the actual secret deal between various groups interested in a piece of legislation. Any public explanation merely provides a facade. Courts should honor the text because the actual secret intentions of the parties to the legislation deserves more respect than their publicly-expressed intentions.[67] Thus, in the example above, the text of the statute more likely reflects the actual legislative agreement, and thus the text, and not the publicly-stated consumer protection purpose, deserves the focus of judicial attention. If an ambiguity arises, the interpretation of the statute should not turn on the consumer protection rationale. Easterbrook's approach should be rejected because even if institutional explanations are a form of deceit, Easterbrook's approach condones that deceit.[68] While less true to legislators' actual

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(1992); SUNSTEIN, *supra* note 14, at 243–44; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232 (1986).

[65] *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[66] *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 82 (1991).

[67] Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–18 (1984).

[68] Indeed, one note writer's argument highlights the difference in views based on a concern about deceit. The note writer, who advocates ignoring legislative history, argues that Congress should not have the burden of disavowing legislative history. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1023 (1992) [hereinafter *Why Learned Hand*]. The note writer argues:

> Because it is possible to put statements in these records without winning majority support, Congress must statutorily negate statements in the legislative histories to ensure that those sentiments do not help mold the development of the law. Removing the burden from Congress of effectively having to "veto" legislative history fully respects the time constraints

intent, interpretation that exalts public rationales would avoid condoning deceit.[69] (Similar problems, in which the focus on descriptive accuracy may lead to normative concerns of condoning the undesirable, arise in tort law.)[70]

In short, the official explanation of legislative action should have a legal significance of its own, apart from being mere evidence of intent. Whether or not the public explanation is congruent with the legislators' private motivations, that official statement itself is entitled to respect and can provide a basis for adjudicating difficult questions of interpretation.

B. *Governmental Recognition of an Obligation to Explain*

Government entities generally act as if they have an obligation to explain their

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that limit Congress's ability to generate statutory directives.

Id. The author's view reflects his lack of concern about the discrepancy between the public explanation of statutes, and the statutes themselves. Valuing public justification requires exactly the opposite approach: Congress should have the burden of negating statements in legislative documents, and such endeavors are a valuable use of time.

[69] Public choice theorists may argue that the above argument assumes that statutes have purposes. They view such an assumption as fatal because public choice theory asserts that group decisions lack coherent purposes. My "duty of candor" argument does not assume that public purposes exist. Public pronouncement of purposes justifying legislation that lacks coherent purposes (but rather merely reflects the coincidental confluence of the interests of independent groups), is also misleading. The argument that misleading the public is wrong applies when there are reasons for actions as well as when there are no reasons for actions.

[70] Calculations of life expectancy of African-American plaintiffs provide one example. Such calculations can be based on race-based tables showing a shorter life expectancy for African-Americans relative to Caucasians. Such a calculation may be more accurate, but results in different damage awards for otherwise similar persons based solely on race. Use of general life expectancy tables would be less accurate, but would not condone treating people differently on the basis of race (and would not accept shorter life expectancies that are likely tied to racial discrimination). *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 81–83, 95–97, 111–16 (1994). For a recent study linking the quality of medical care to race, see Kevin A. Schulman et al., *The Effect of Race and Sex on Physician's Recommendation for Cardiac Catherization*, 340 N.E. J. OF MED. 8 (1999). *See generally Nightline: America in Black and White—Health Care, The Great Divide* (ABC television broadcast Feb. 24, 1999), *available in* 1999 WL 6416286. The same issue arises with regard to whether certain false statements should be treated as actionable defamation. If a person falsely asserts that someone is African-American or gay, should the subject of the statement receive damages? Providing damages may compensate the subject of the statement for real harm to the subject's reputation among her peers, but condones racist or anti-gay attitudes of the "victim" and her peers. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 24–25, 26, 29, 33–35, 37, 39, 48 (1996). *See generally* Note, *The Community Segment in Defamation Actions: A Dissenting Essay*, 58 YALE L.J. 1387 (1949).

actions. Congress has explicitly imposed such an obligation on agencies. Under the Administrative Procedure Act, agencies, when promulgating regulations, must provide "a concise general statement" of the "basis and purpose" of the regulation.[71] Congress, likewise, often provides explanations of statutes in legislative history[72] and in formal preambles. Moreover, Congress appears to recognize that some legislative documents, such as committee reports, provide to the public Congress's justification for the statutes it enacts.[73] The judiciary clearly views itself as having an obligation to justify final judgments and significant subsidiary rulings.[74] Indeed,

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[71] 5 U.S.C. §§ 553(c) (1994); *see also id.* § 555(e) (decision in agency adjudication denying relief must be accompanied by "a brief statement of the grounds for denial"). Admittedly, the requirement is not solely based on a desire to show respect for citizens. Legislators have many other reasons to require agencies to explain their actions. *See* Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 517 P.2d 289, 293–94 (Or. Ct. App. 1973).

[72] Schauer asserts that legislative drafters "typically" give no reasons. *See* Schauer, *supra* note 56, at 636–37; *see also* MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 210 (1988) (referring only to state and local legislative bodies). Yet Schauer's assertion seems erroneous because with respect to federal legislation, Congress provides a great deal of explanatory material.

[73] Judge Wald argues that legislative history "is not gossip from the back corridors[;] it is the materials in which Congress institutionally explains to its members, to the public, and to judges what it thinks it is doing." *Interbranch Relations: Hearings Before the Joint Comm. on the Organization of Congress*, 103d Cong. 81 (1993) [hereinafter *Interbranch Relations*] (testimony of the Honorable Patricia M. Wald). I will argue below that the courts increasingly view as legislative history those materials that cannot properly be considered "institutional" explanations. *See infra* note 263 and accompanying text.

At least Congress recognizes such use of legislative history and has taken no steps to discourage it (such as declaring legislative history an inappropriate basis for construction of statutes). *See* EDWARD F. WILLETT, JR., HOW OUR LAWS ARE MADE 15 (1990) ("Committee reports are perhaps the most valuable single element of the legislative history of the law. They are used by courts, executive departments and agencies, and the public generally, as a source of information regarding the purpose and meaning of the law."); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 871–72 (1992).

[74] For instance, most lawyers and scholars agree that courts must explain their decisions. *See* Rochin v. California, 342 U.S. 165, 170 n.4 (1952); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 51 (1996); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 839 (1991); William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L.J. 113, 139 (1992); Robert B. Seidman, *Justifying Legislation: A Pragmatic Institutionalist Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 7 n.15 (1992). The need of the deciding court to provide a basis for further review, *see Harris v. Rivera*, 454 U.S 339, 345 (1981), does not fully explain this obligation because even courts of last resort have such an obligation. Indeed, *ipse dixit*, a judicial statement that lacks reasoning to support its conclusion, is disfavored. *See* Michael Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2022 (1994). Nevertheless, there is no judicially enforceable constitutional requirement that courts explain their decisions. *See Harris*, 454 U.S. at

judicial explanations of rulings possess legal significance—courts will ordinarily adhere to the crucial reasoning set forth in the decision, as well as the decision itself, in future cases.[75]

Of course, some federal government institutions do not provide explanations, at least with respect to some of their actions. Such failures to explain do not undermine the proposition that federal government institutions, in general, and Congress in particular, explain their actions. The situations in which government institutions do not explain their decisions differ significantly from the act of passing legislation or promulgating rules of significance that govern future conduct. Frederick Schauer has noted several instances in which government decisionmakers do not offer any justification for their actions (yet are generally considered to be acting properly).[76] I will discuss the two examples Schauer provides that might appear to be the most troubling—the practice of juries not offering reasons for their verdicts, and the Supreme Court's practice of denying petitions for certiorari without explanation.

The practice of juries rendering verdicts without explanation may be attributed to our view that jury verdicts neither control a wide range of cases nor set forth binding standards of behavior. A jury verdict does not have a formal legally-binding effect on subsequent decisionmakers, except with respect to the same controversy.[77]

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344 & n.11; Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) (administrative agencies); *id.* at 472 (Stevens, J., dissenting); Morgan, *supra* note 32, at 322–24, 333–38 (administrative agencies).

[75] Notwithstanding the lack of a formal reason-giving requirement, the "reasons statements" provided by courts, *i.e.*, opinions, are not only considered part of the judicial decision, but are also considered a part of the law. *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes*, 93 MICH. L. REV. 1, 105 (1994); Dorf, *supra* note 74, at 2035–37 & nn.142–45 (stating "courts do not accept the facts-plus-outcome view of holdings," but also acknowledging contrary views); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 25–28 (1988); Victoria R. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1435–47 (1997) (suggesting the legal community currently overemphasizes "reasons statements" in derogation of the decisions themselves). For informative discussions of the legal effect and the importance of judicial opinions as statements of reasons, see Dorf, *supra* note 74, at 2022–24, 2029–30; Schauer, *supra* note 56, at 633.

[76] *See* Schauer, *supra* note 56, at 634; *see also* SUNSTEIN, *supra* note 74, at 136.

[77] In addition, jury decisions are not viewed as creating law. Rather, juries find facts, or, at most, apply the law to the facts of a particular case. *See* Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1867 & n.1 (1966). Of course, juries do make some findings of mixed law and fact, such as whether an alleged tortfeasor's act departs from the standard of care. *See* KEETON ET AL., *supra* note 22, § 37, at 235–38. The practice of having jurors render verdicts without explanation can also be explained by the burden a reason-giving requirement would impose upon the laypeople that

Thus, the failure to provide explanations of jury verdicts does not undermine the citizenry's ability to control government in the way that failing to justify generally-applicable statutes does.

The denial of certiorari can be viewed as a decision because the Court leaves in place the lower court's judgment. However, it is really a refusal to exercise authority to decide a case.[78] In addition, a denial of certiorari has no binding legal effect (and thus it too does not undermine citizen control of government).[79]

C. *The Nature of the Duty to Explain*

The legislative duty to explain, which I posit, finds support in several constitutional principles. The proposition that legislatures must justify their actions follows, as a corollary, from the constitutional principle that the people are sovereign and the government is their agent.[80] The proposition may also be implicit in the Equal Protection Clause.[81] Arguably, the Clause requires all government entities to justify the distinctions they make between citizens. Indeed, some have argued that the courts should enforce such a principle by requiring explicit justification of statutory classifications.[82] The Due Process Clause, too, may well provide a basis for an explanation requirement, as one of the procedural protections implicit in due process.[83] However, to date courts have rejected such an argument in both the legislative[84] and the judicial context.[85] The right to petition government

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comprise juries.

[78] *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.7, at 239 (7th ed. 1993).

[79] *See id.*; *see, e.g.*, United States v. Carver, 260 U.S. 482, 490 (1923). Many of Schauer's other examples of decisions for which governmental decisionmakers need not offer reasons, *see* Schauer, *supra* note 56, at 634, can be explained by the limited significance of the decisions. Routine evidentiary rulings, which trial judges often do not explain, generally do not resolve cases (much less impose general obligations on the populace). Other situations, such as summary appellate orders, may involve significant decisions, but essentially incorporate reasons given elsewhere, as when an appellate court summarily affirms a lower court decision for the reasons given by a lower court.

[80] *See supra* notes 12–17 and accompanying text.

[81] U.S. CONST. amend. XIV.

[82] *See infra* notes 98–106 and accompanying text.

[83] *See* Board of Regents v. Roth, 408 U.S. 564, 587–92 (1972) (Marshall, J., dissenting); Morgan, *supra* note 32, at 344–53; *supra* notes 52–56 and accompanying text.

[84] *See* United States R.R. Bd. v. Fritz, 449 U.S. 166, 179 (1980); *In re* Baldwin, 70 B.R. 612, 615 (B.A.P. 9th Cir. 1986); Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 193. Indeed, in reviewing the constitutionality of legislation under the rational basis test, the Court disregards the importance of the legislative explication of a statutory rationale. The Court will uphold a statute on the basis of hypothetical reasoning not relied upon by the legislature or evident in the legislative history. *See* TRIBE, *supra* note 13, § 8-7, at 582; Gerald Gunther,

may support such a requirement—as suggested earlier, citizens may find it difficult to petition effectively if they lack the right to demand an explanation of a statute's justification.[86] The First Amendment also supports a requirement of explanation, if one takes a structural view of the provision;[87] however, such a conclusion would

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Foreword: In Search of Evolving Doctrine on a Changing Court, 86 HARV. L. REV. 1, 21, 33, 47 (1972). However, the Court sometimes conducts more stringent review. *See* TRIBE, *supra* note 13, §§ 17-2, 17-3, at 1681, 1684; Gunther, *supra*, at 33.

[85] There is no judicially enforceable constitutional requirement that courts explain their decisions. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 472 (1981) (Stevens, J., dissenting); Harris v. Rivera, 454 U.S. 339, 344 & n.11 (1981); Morgan, *supra* note 32, at 333–38. Nor, for that matter, does the Due Process Clause require administrative agencies to explain their decisions. *See Dumschat*, 452 U.S. at 467 (Brennan, J., concurring); Morgan, *supra* note 32, at 322–24.

[86] The Journal Clause of the Constitution, U.S. CONST. art. I, § 5, cl. 3, requiring that "[e]ach House shall keep a journal of its proceedings, and from time to time publish the same," may support a duty to explain, or at least may give legislative history constitutional stature. *See* Murial Morrisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585, 588 n.14, 598 (1994) ("The Constitution requires the development and publication of congressional proceedings; it is, therefore, difficult to justify prohibiting judicial use of legislative history, which has become the contemporary manifestation of constitutional publication mandates."); 1 FRANCIS NEWTON THORPE, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1765–1788, at 501 (De Capo Press 1970) (1901).

This argument suffers from three problems. First, the Journal requirement may have been devised merely to help ensure the accountability of individual legislators, not Congress as an institution. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 840, 841, at 610–11 (William S. Hein & Co., 5th ed. 1994) (1833) ("The object of the whole clause is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."). The Constitution's enumeration of the matters that must appear in the Journal, the "ayes and nays" on regular bills, *see* art. I, § 5, cl. 3, and veto overrides, and presidential veto messages, *see* art. I, § 7, cl. 2, suggests that the focus of the Clause is on the accountability of individual elected official for their votes. If the Journal Clause is focused on the responsibility of individual legislators, the Clause could not easily be read to require Congress to generate an institutional justification for the statute. Second, the early Congressional journals did not provide much of an explanation, only a record of proposals and the votes on those proposals. A review of the Senate and House Journal for the First Congress shows the sketchy nature of the information recorded in the journals. *See* 1, 3 *Documentary History of the First Federal Congress of the United States of America* (Linda Grant DePauw ed., 1972) (reprinting the Senate journals from March 1789 through March 1791 and the Journal of the House of Representatives from March 1789 through March 1791). Indeed, proceedings in the Senate were initially secret. *See* Gerald L. Grotta, *Philip Freneau's Crusade for Open Sessions of the U.S. Senate*, 48 JOURNALISM Q. 667 (1971). Third, for most of the nation's first one-hundred years, the Court considered the use of legislative history illegitimate to interpret statutes. *See* Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1025–33, 1064–68, 1079–84 (1991).

[87] *See supra* notes 32–45.

seem to conflict with the Supreme Court's view of the First Amendment's scope.[88]

In any event, the duty I posit need not be viewed as an explicit constitutional mandate. Indeed, the duty should operate differently from constitutional rules. Rather than authorizing invalidation of statutes, it should operate as an underenforced constitutional norm[89]—the duty I posit forms a basis for interpreting statutes.

Courts refuse to directly enforce some constitutional principles because of institutional competence concerns, but may encourage observance of those constitutional principles by the manner in which they interpret statutes. For instance, the Court encourages sensitivity to the potential unfairness of retroactive lawmaking by employing certain clear statement rules in interpreting statutes.[90] Thus, while Congress possesses broad power to enact retroactive legislation, the Court will not construe a statute to operate retroactively unless Congress clearly so states its intent.[91] Indeed, courts sometimes leave unenforced explicit constitutional

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[88] *See* Houchins v. KQED, Inc., 438 U.S. 1, 12–16 (1978) (plurality and Stewart, J., concurring); *see also* Pell v. Procunier, 417 U.S. 817, 834–35 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 849–50 (1974). The Court's rejection of a right to access in *Houchins* and *Saxbe* presumably precludes the Court from finding that the First Amendment requires the government to explain its actions. *See supra* text accompanying notes 46–51.

[89] The concept of "underenforced constitutional norms" was popularized by Professor Lawrence Sager. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978). The concept is now widely discussed. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 286–87 (1994); SUNSTEIN, *supra* note 74, at 107; TRIBE, *supra* note 13, § 17-1, at 1674; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57, 62–67 (1997).

[90] *See* Eskridge & Frickey, *supra* note 89; *see also* FARBER & FRICKEY, *supra* note 66, at 70 n.22 (discussing underenforced.constitutional norms). Several clear statement canons further federalism concerns. *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 96 (1989) (holding that a federal statute will not be construed to abrogate the states' Eleventh Amendment immunity from suit in federal court, unless the statute clearly provides for such abrogation); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (same); Board of Educ. v. Rowley, 458 U.S. 176, 190 n.11 (1982) ("Congress, when exercising its spending power, can impose no burden upon the states unless it does so unambiguously."); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (holding federal statutes will not be construed as imposing a condition on a grant of federal money to the states, unless Congress clearly states in the statute that it is imposing a condition on the grant).

In *Law and Public Choice*, Farber and Frickey note that underenforced constitutional norms "may well be binding upon legislators, administrators, and judges but because of institutional differences has far more practical relevance outside the judiciary." FARBER & FRICKEY, *supra* note 66, at 70 n.22.

[91] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 285–86 (1994) (finding "no clear evidence of congressional intent that section 102 of the Civil Rights Act of 1991 should apply

provisions, like the Republican Form of Government Clause, because of institutional competence concerns.[92] Yet, judicial nonenforcement does not absolve Congress from its duty to comply with the Republican Form of Government Clause or other unenforced constitutional provisions.

Two institutional competence concerns counsel against establishing a judicially-enforced reason-giving requirement.[93] First, requiring legislators to state their reasons for enacting statutes may lead to intrusive judicial review of the quality of those reasons. Indeed, precisely such intrusive review developed after Congress required agencies to provide "a concise general statement" of the "basis and purpose" of each regulation promulgated.[94] Enforcement of this Administrative Procedures Act reason-giving requirement for informal rulemaking has led to rigorous review of the substance of agency decisions and imposed a means-ends

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to cases arising before its enactment"); DANIEL E. TROY, RETROACTIVE LEGISLATION 27–28, 32–33, 40–43 (1998).

[92] The Constitution requires that Congress guarantee each state a "republican form of government," but the judiciary invokes the "political question" doctrine to dismiss, without consideration, claims that Congress has breached that duty. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912); *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 42–45 (1849). Thus, for institutional reasons, namely the judiciary's inability to address particular types of issues, courts do not enforce some constitutional obligations. *See* SUNSTEIN, *supra* note 14, at 107, 151; TRIBE, *supra* note 13, § 3-13, at 99, 101.

Indeed, most legal obligations established by constitutional or other rules of legislative procedure are not judicially enforced. Courts often cite the Rules Provision of the Constitution in support of their refusal to review such alleged violations of the procedural rules governing the legislative process. *See* U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the rules of its proceedings. . . ."); *see, e.g.*, United States v. Durenberger, 48 F.3d 1239, 1243 (D.C. Cir. 1995); Gregg v. Barrett, 771 F.2d 539, 549 (D.C. Cir. 1985); Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983); Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory (unpublished manuscript on file with author). Nevertheless, the courts' refusal to entertain procedural challenges to legislative proceedings does not absolve Congress from its political (rather than legal) obligation to comply with the procedural requirements imposed by the Constitution, statutes, and congressional rules.

For an argument that even textually-documented constitutional obligations relating to separation of powers or federalism should not be judicially enforced, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Also, for an argument that courts must sometimes take this approach to protect their own integrity as principled adjudicators, see BICKEL, *supra* note 58.

[93] Moreover, a constitutional argument for an explicit requirement would be vulnerable to the claim that it requires judicial creation of rights that are not anchored in the text of the Constitution. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971); William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

[94] *See* Administrative Procedure Act, 5 U.S.C. § 553(c) (1994).

reasoning approach on agencies.[95] Second, the judiciary can add little to the political process (which itself leads legislators to proclaim reasons for enacting statutes). Thus, John Hart Ely agrees that legislatures should publicly justify to citizens the legislation they enact, thereby fostering the democratic process. He rejects the argument that courts should establish and enforce a reason-giving requirement because the judiciary will probably not improve upon the pressures the normal political process places upon legislators to provide explanations.[96] However, these institutional competence concerns about judicial enforcement of a reasons-giving requirement do not mean that Congress has any less of a duty to justify statutes.[97]

Thus, the duty to explain statutes would be used solely for purposes of statutory interpretation. Some theorists have argued that legislatures should be required to provide justifications for statutes and legislate consistently with such justifications, on pain of having all or part of the statute judicially-invalidated. Gerald Gunther and Susan Rose-Ackerman have advanced such theories. Gunther bases his argument on the Constitution's Equal Protection Clause. He argues that courts should uphold statutory classifications against equal protection challenges only upon the reasons explicitly stated by an authoritative governmental institution or official (such as a

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[95] *See* JERRY A. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 457, 480, 717 (3d ed. 1992); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 662–63 (1996); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 262–63, 289–90, 293–94, 308–09 (1987); Shapiro, *supra* note 84, at 184–89; Paul R. Verkuil, *Crosscurrents in Anglo-American Administrative Law*, 27 WM. & MARY L. REV. 685, 705 (1986).

[96] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 125–31 (1980); *see also* Linde, *supra* note 56, at 230–32 (stating that a requirement of articulation of reasons will lead to hypocrisy and reasons invented solely to satisfy courts). Mark V. Tushnet believes that an articulated reasons requirement is unworkable because frequently legislators enact statutes solely to facilitate their re-election to the same office or election to a higher one. *See* TUSHNET, *supra* note 72, at 210.

[97] The approach to statutory interpretation argued here is strikingly similar to Peter Tiersma's description of some courts' approach to interpreting a principal's silence when advised of actions an agent took in his name. *See* Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 41–42 (1995). Tiersma says:

> [T]here are some cases in which courts identify a "duty to speak" but without creating or enforcing an obligation, as evidenced by the fact that a "breach" of this duty does not directly entitle the plaintiff to recover damages. Rather, the "duty to speak" is crucial here primarily because the behavioral norm is used to interpret the silence of the person in question. In other words, violating such a norm does not directly lead to legal sanctions, but the courts recognize the norm and draw certain inferences from the fact that it was not adhered to.

Id. (citations omitted).

statement of the legislature in enacting the statute).[98] Gunther argues that making every statute's constitutionality depend upon the reasons given for its enactment will improve the legislative process by ensuring that legislators consider the burdens or costs of their actions.[99]

Rose-Ackerman argues that courts should ensure that statutes correspond with their stated purposes.[100] In particular, she argues that courts should insist upon two types of consistency in legislation. First, if legislatures produce statements of purpose, courts should insist that the provisions of the statutes be consistent with those publicly-stated purposes. If they are not, the court should invalidate any provision of the statute that conflicts with the statutory statement of purpose.[101] This proposal for what Rose-Ackerman calls "internal consistency" is designed to encourage more informed debates about policy trade-offs and publicize legislative efforts to further the interests of narrow interest groups.[102] She also suggests a second form of consistency, "budgetary consistency," whereby courts would address the conflict between statements of purpose and budgetary appropriations.[103] Thus, if Congress passed a statute requiring the government to remove all lead-based paint from public housing projects by January 1, 2002, and appropriated insufficient funds to satisfy such a goal, a court would invalidate the statute.[104] Such invalidations, or the prospect thereof, will encourage legislative candor so that beneficiaries and taxpayers "know what has been agreed upon by the legislature." In addition, such an approach will encourage deliberation by forcing legislators to

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[98] *See* Gunther, *supra* note 84, at 21, 28, 32, 44–46. Justice Brennan perhaps embraced such an approach in *Kassel v. Consolidated Freightways, Corp.*, 450 U.S. 662 (1981), and *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). *See* TUSHNET, *supra* note 72, at 210 & n.56. Hans Linde has argued that this is merely another form of judicial imposition of value judgments upon the political system that are not based in the text of the Constitution. *See* Linde, *supra* note 56, at 252–53. *But see* FARBER & FRICKEY, *supra* note 66, at 123.

[99] *See* Gunther, *supra* note 84, at 44–47. However, under Gunther's approach, the statute's rationale need not be set forth by the legislature; the executive branch can explain the statute's purpose. *See id.* at 47.

[100] *See* ROSE-ACKERMAN, *supra* note 64, at 43–79; Susan Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 352 (1988). Rose-Ackerman's approach does not appear to be Constitution-based.

[101] *See* ROSE-ACKERMAN, *supra* note 64, at 44–62; Rose-Ackerman, *supra* note 100, at 352.

[102] *See* ROSE-ACKERMAN, *supra* note 64, at 46 (arguing that her approach will "assure that information about legislative bargains is more widely available to the electorate"); Rose-Ackerman, *supra* note 100, at 352.

[103] *See* ROSE-ACKERMAN, *supra* note 64, at 63–79; Rose-Ackerman, *supra* note 100, at 353.

[104] *See* ROSE-ACKERMAN, *supra* note 64, at 70; Rose-Ackerman, *supra* note 100, at 353.

confront the fiscal consequences of their actions.[105] In short, "[e]ach consistency test attempts to increase the accountability of the legislature to the voting public and to improve deliberation within Congress."[106]

Unlike the Gunther and Rose-Ackerman approaches, the duty to explain would not provide a basis for invalidating statutes.[107] It would merely serve as a basis for ascribing legal significance to any explanation offered.[108]

Reliance on a duty to explain accords proper respect to congressional judgments. Courts have traditionally shown respect for legislative judgments regarding substantive issues, by according deference to those judgments. Legislative judgments regarding legislative procedures are also entitled to similar respect.[109] Thus, courts should adopt only hesitantly interpretive methods that exhibit disapproval of Congress's mode of legislating.[110] The new textualist approach

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[105] *See* ROSE-ACKERMAN, *supra* note 64, at 70, 72–74 ("My focus is then on whether representatives have misrepresented to voters the policy commitments implied by [certain] statutes."); Rose-Ackerman, *supra* note 100, at 353.

[106] Rose-Ackerman, *supra* note 100, at 354.

[107] By requiring judicial invalidation of statutes, the Gunther and Rose-Ackerman theories create problems. Given the seriousness of the judicial invalidation of statutes, their theories will presumably take effect only when the substantive provisions of statutes and their stated effects wildly diverge. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1324–25 (1998). Thus, in many cases, the Gunther and Rose-Ackerman approaches may have little direct effect—except perhaps to lead to more honest preambles. The approach I suggest will assume relevance in a broader range of cases. Whenever questions about the reach of a statute arise, the publicly-presented rationales will influence the statute's construction more than the secret rationale of the statute.

Moreover, the Rose-Ackerman budgetary consistency principle threatens to frustrate majorities who support the broad purposes set forth in the statute by allowing legislative minorities to repeal (or significantly revise) statutes by obstructing efforts to fund the program. Thus, those who oppose the purposes enunciated in the statute can secure its repeal without having to overcome the obstacles that those wishing to repeal statutes must ordinarily confront.

[108] Jonathan Macey makes a purely instrumental argument for privileging publicly-stated explanations of statutes—privileging such statements will most often lead to interpretations that favor the interest of the whole public rather than narrow interest groups. *See* Macey, *supra* note 64; *see also* FARBER & FRICKEY, *supra* note 66, at 82 (endorsing Macey approach). Macey accepts public choice theory and recommends privileging publicly-stated explanations to discourage narrow self-interested legislation. Macey never suggests that public explanations have any greater intrinsic worth than private ones. Unlike Macey, I argue that public explanations have a better democratic pedigree than undisclosed motivations—thus my argument is not an instrumental one. (For a discussion of the relative merits of instrumentalist and essentialist theories of statutory interpretation, see Bernard W. Bell, *Metademocratic Theory and Separation of Powers*, 2 N.Y.U. J. LEG. & PUB. POL'Y 1, 3–20 (1998)).

[109] *See* Bell, *supra* note 108, at 29–33.

[110] *See* 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

shows disrespect for congressional judgments regarding the legislative process.[111] For instance, new textualists dismiss the use of committee reports because of the level of staff involvement in the preparation of those reports, even though Congress has clearly made a judgment that staff involvement does not undermine the usefulness of committee reports.[112]

At the same time, legislative judgment regarding the legislative process and the significance of various documents does not, by itself, provide a sufficient basis for interpretive theory.[113] First, legislators' beliefs or preferences regarding interpretive methodology cannot be reliably discerned. Indeed, members of Congress may not have given great thought to the subject. Thus, reliance on perceived congressional desires or preferences regarding interpretive methodology will inevitably result either in courts adopting the interpretive methodology they think best (because reasonable legislators would presumably prefer the best interpretive methodology) or continuing to apply current judicial practices (because Congress has arguably acquiesced to those practices). Second, the judiciary has some legitimate interest in interpretive methodology. Purporting to base decisions about interpretive methodology solely on legislative practice or preferences does not acknowledge this judicial interest.

The duty to explain that I propose avoids both of these extremes—the duty is consistent with legislative practice but is not based solely on intuiting legislators' view of appropriate legislative process or proper interpretive method. Certainly Congress has not disavowed any obligation to explain statutes (and generally has acted somewhat consistently with such an obligation).[114] Thus, adopting this principle certainly shows no disrespect for legislative judgment. On the other hand, the arguments set forth above show that the obligation to explain rests on more than mere acceptance of Congress's view of appropriate interpretive theory.

D. *Objections*

At least three objections can be raised to my claim that courts should view

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(1990); Bell, *supra* note 92.

[111] *See* Wald, *supra* note 110, at 306–07; Bell, *supra* note 92.

[112] *See* Wald, *supra* note 110, at 306–07.

[113] *See* Bell, *supra* note 108, at 34–36.

[114] In 1976, the House and the Senate changed their rules so that congressional committee proceedings would be open, asserting the belief that citizens were not merely entitled to knowledge of statutory enactments, but also to the reasons for those statutory enactments. *See* S. REP. NO. 94-354, at 5–6, *reprinted in* SOURCE BOOK, *supra* note 49, at 200–01. Congress is aware of, and has allowed to progress unchecked, reliance by courts and the public on legislative history, and particularly committee reports, as authoritative explanations of statutes. *See infra* note 327 and accompanying text.

legislatures as having a duty to explain statutes and interpret statutes in light of that duty. First, imposing such a duty on legislatures equates the legislature with the judiciary, that is, it suggests that legislatures should operate like courts. Because legislatures and courts serve different functions, imposing a court-type duty of explanation upon legislatures is arguably inappropriate. Second, legislatures can provide no explanations for statutes because institutional reasons for statutes almost never exist, *i.e.*, group choice will often lack a coherent rationale. Third, even if legislatures have an obligation to explain statutes, such explanations should be set forth in the statute, not in other documents. Otherwise, legislatures can encroach upon the judicial power. I will address each of these three objections in turn.

1. *Turning Legislatures Into Courts*

First, courts and legislatures arguably should make decisions on different bases—courts should act on principle and legislatures should act on preferences or expediency.[115] Reason-giving serves to constrain the judicial decisionmaking process so that judges' own individual policy preferences do not dominate their decisionmaking.[116] Legislatures, which should act on the basis of preferences need no such constraint.[117] Indeed, if legislatures act on preferences, they may be unable to satisfy any duty to explain.[118] As Mark Tushnet observes, reason-giving requirements seek to transform "legislators who are assumed in general to be

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[115] *See* BICKEL, *supra* note 58, at 95 ("The system . . . encourages each institution in acting as it does—on principle in one institution, often on interest and expediency in [ ]others. . . ."); *see also* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13–14 (1979).

[116] Judges should not base their decisions on their individual predilections, and must base their decisions on principle rather than expediency. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that judicial branch can only exercise "judgment," not "will"); BICKEL, *supra* note 58, at 24–28, 68–69, 95; SUNSTEIN, *supra* note 74, at 59, 82; GREENAWALT, *supra* note 4, at 153–54. Indeed, a central feature of judging, captured by the concept of judicial restraint, is that judges make decisions largely based on the preferences of others, embodied in precedents, constitutions, or statutes, and attempt to avoid making decisions based on their own preferences. *See* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 979 (1995); Correia, *supra* note 6, at 1132–33; J. Harvey Wilkinson, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 792–809 (1989); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 597 (1995) (describing the conventional conception of judicial restraint and suggesting its fancifulness). Reason-giving effectuates such a constraint. *See* Dorf, *supra* note 74, at 2029, 2040 ("As we have seen, judicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions."). *See generally* Schauer, *supra* note 56, at 651–59.

[117] Unlike courts, legislatures may make decisions that need not be fully consistent with each other. *See* ROSE-ACKERMAN, *supra* note 64, at 47–49.

[118] *See* TUSHNET, *supra* note 72, at 213.

creatures of will" into beings of reason.[119] Such a concern may be dismissed. We require an element of reasoned decisionmaking even in the legislative process.[120] Legislation is legitimate only if it has some principled rationale.[121]

Judicial decisions construing the Constitution require that statutes reflect the judgment of the legislature, not merely the legislature's unreasoned will or preferences. Statutes must have some rational design. Thus, the Supreme Court has held that the Due Process Clause of the Constitution requires that every statute have a "rational basis," *i.e.*, some rational relationship to a public purpose.[122] The Court has explained that legislation must be an "exercise of judgment," not "a display of arbitrary power."[123] Indeed, the Court has, on occasion, invalidated statutes under this "rational basis" test.[124]

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[119] *Id.* at 213. Linde describes the legislative process that would exist if legislatures took seriously a requirement that they act in accordance with "means-ends" rationality, and argues that such an altered legislative process is undesirable and not required by the Due Process Clause. *See* Linde, *supra* note 56, at 222–24, 226–28.

[120] *See* GREENAWALT, *supra* note 4, at 153–54; Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 15 (1979).

[121] Indeed, this concept that statutes should reflect some coherent principle, rather than an arbitrary deal worked out by legislators, is a major tenet of civic republicanism. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2193 (1990); Sunstein, *supra* note 51, at 1544. The view that legislation must reflect a coherent principle need not rely on civic republicanism. Farber and Frickey agree that legislatures must act with some deliberation. *See* FARBER & FRICKEY, *supra* note 66, at 123, 138; *see also* RONALD DWORKIN, LAW'S EMPIRE 93, 178–84 (1986) (analyzing "checkerboard statutes"); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TULANE L. REV. 849, 851, 867 (1980) (arguing that the Constitution as a whole requires legislation that is public-regarding—legislation that can make a coherent and plausible claim to serve some public, rather than merely private, interest).

[122] *See* Moore v. City of East Cleveland, 431 U.S. 494, 547–48 (1977) (White, J., dissenting); Mathews v. DeCastro, 429 U.S. 181, 185 (1976); JOHN ARTHUR, WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY 174–75 (1995); TRIBE, *supra* note 13, § 8-7, at 582–83. The Court has also grounded this rationality requirement on the Equal Protection Clause in the Constitution, U.S. CONST. amend. XIV, § 1. *See* TRIBE, *supra* note 13, §§ 16-2, 16-5, at 1439–43, 1451.

[123] *Mathews*, 429 U.S. at 185 (citing Helvering v. Davis, 301 U.S. 619, 640 (1936)); *see also* ARTHUR, *supra* note 122, at 175; Bilionis, *supra* note 107, at 1323–27.

[124] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633–36 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47, 450 (1985); Hooper v. Bernadillo County Assessor, 472 U.S. 612, 618–23 (1985); Plyler v. Doe, 457 U.S. 202 (1982); *see also* TRIBE, *supra* note 13, § 16-3, at 1444. *See generally* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999).

Of course, this requirement rarely results in the invalidation of statutes. *See* TRIBE, *supra* note 13, § 8-7, at 582. However, the feebleness of the restraint reflects no lack of allegiance to the

Moreover, when statutes implicate fundamental rights, such as freedom of speech and freedom of religion, or when statutes implicate suspect or semi-suspect classifications, such as race and gender, the courts demand more than mere rationality.[125] In such cases, statutory provisions that implicate fundamental rights, suspect classifications, or semi-suspect classifications must substantially further the statutory purpose. In particular, the Court generally applies "strict scrutiny," under which the legislative provision must further a compelling state interest by the least restrictive means.[126] In such circumstances, legislatures obviously have an obligation that extends far beyond that implicit in public choice theory; a legislature has an obligation to agree on purposes and consider whether the means they have adopted are more restrictive than necessary to achieve those purposes.[127]

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principle that statutes must have public purposes, but rather a concern that the judiciary is an inappropriate institution to determine what should be considered a public, rather than a private, purpose—that is, courts are not the appropriate institution to determine the proper goals of government. *See id.* §§ 8-7, 16-2, at 582–84, 1440; Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 682–83 (3d Cir. 1991); Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1412 (1978); Linde, *supra* note 56, at 207–22. Indeed, the Founding Fathers believed that the political processes they had established would ensure that laws would have some purpose. *See infra* notes 128–30 and accompanying text.

[125] *See* JAMES WILLARD HURST, DEALING WITH STATUTES 99–102 (1982); TRIBE, *supra* note 13, §§ 16-6, 16-7, 16-13, 16-14, at 1451–54, 1465–74.

[126] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235–37 (1995); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 601–02 (5th ed. 1995).

The Court also engages in "intermediate scrutiny" in which the Court's scrutiny of the legislative classification is more rigorous than that under the "rational basis" test, but less rigorous than that under "strict scrutiny." *See* TRIBE, *supra* note 13, § 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).

[127] Many state constitutions more explicitly require that legislation must be an exercise of judgment rather than an exercise of arbitrary power. The constitutions of some states require that legislation or public expenditures have a public purpose. *See, e.g.*, N.C. CONST. art. V, § 2(1); N.D. CONST. art. IV, §§ 43, 44; N.H. CONST. pt. 2, art. 5; UTAH CONST. art. VI, § 26. Occasionally, state courts invoke such constitutional provisions to invalidate state laws. *See, e.g.*, Stanley v. Department of Conservation & Dev., 199 S.E.2d 641, 653, 655–58 (N.C. 1973), *overruled by* Maready v. City of Winston-Salem, 467 S.E.2d 615, 620–23 (N.C. 1996); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 556 & n. 67 (1988) [hereinafter *The Collaborative Model*]. Some state constitutions contain other provisions that preclude groups from obtaining advantages by using raw political power to enact legislation, such as provisions that prohibit or limit special legislation (legislation that applies to a limited number of citizens), forbid the use of government credit for private purposes, outlaw the provision of government gifts, and proscribe non-uniform taxation. *See id.* at 555–56; WILLIAM D. POPKIN, MATERIALS ON LEGISLATION 813–25 (2d ed. 1997). States have also attempted to structure the

Indeed, the Framers' design of the legislative and executive branches embodies the judgment that legislation should rest on some principled basis—the Framers structured the electoral and legislative processes to induce enactment of rational laws.[128] For instance, they designed the electoral process in such a way that more learned citizens would moderate the passions of the electorate.[129] The Framers, most notably Madison, also relied upon the size of the country, and the consequent diverse interests of legislative constituencies, to preclude agreement on unprincipled, expedient statutes and allow the enactment of only well-considered statutes designed to further the public good.[130] In short, viewing legislatures as having an obligation to explain statutes does not compromise the legislative function of resolving preferences.

2. *Statutes Lack Purposes*

A second criticism of the proposed duty of explanation, based on one of public choice theory's teachings, rests upon the theory that group choice often cannot embody any coherent underlying purposes.[131] If group choice often cannot embody

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political process so as to ensure that legislation has some rationale, rather than merely being an exercise of political power. *See, e.g.*, State v. Paulus, 688 P.2d 1303, 1309 (Or. 1984); *The Collaborative Model*, *supra*, at 553–59.

[128] *See* THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 22, 24 (1993). *But see* James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 434–36 (1996) (disputing theory that Framers contemplated and intended a "deliberative democracy").

[129] *See* THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961) ("[I]t is the reason alone, of the public, that ought to control and regulate the government . . . [t]he passions ought to be controlled and regulated by the Government."); GARY WILLS, EXPLAINING AMERICA: THE FEDERALISTS 226 (1981); Sunstein, *supra* note 51, at 1559–60; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 506–18 (1969).

[130] *See* THE FEDERALIST NOS. 10, 51 (James Madison) (Clinton Rossiter ed., 1961); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 51–52 (1996). In addition, bicameralism and presentment were designed so that laws were not merely an expression of preferences driven by passion, but were reasoned, deliberate decisions. *See* Manning, *supra* note 95, at 649–50. The Senate in particular was supposed to lead to more reasoned and deliberate decisions. *See* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1937); THE FEDERALIST NO. 162, at 379–80 (James Madison) (Clinton Rossiter ed., 1961); Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1, 23 (1996).

[131] Another aspect of public choice theory, interest group theory, advances the proposition that legislatures are more likely to respond to the preferences of small groups united by a common interest, than larger, more diffuse groups. *See* FARBER & FRICKEY, *supra* note 66, at 21–33. I do

any coherent underlying purpose, then requiring legislatures to provide explanations for statutes will require legislators to mislead the public, because the explanations would falsely imply the existence of a coherent policy. If the legislature merely wishes to establish the rights and obligations stated in the statutory text it enacts, then any explanatory text will invariably state the "legislative purpose" less accurately than the statutory text itself. I will first outline the public choice argument for the proposition that group choice often inherently lacks a coherent underlying rationale, and then argue that such public choice concerns do not undermine my theory.

Public choice theory purports to show that group decisionmaking cannot systematically reflect the preferences of the individual members of that group.[132] If participants have at least three different sets of preferences, arrayed in a particular manner, one of two scenarios will arise. First, the group may never adopt any proposal because each proposal can always be defeated by a competing proposal (even if that competing proposal has previously been rejected). Endless "cycling" will occur; that is, the group will perpetually consider and vote for each of the proposals in turn, never ultimately agreeing on any of them. Alternatively, the group can reach a decision if someone first establishes an agenda that determines the order in which competing proposals will be voted upon (thus precluding the resurrection of rejected proposals). For instance, if the group must choose between three proposals, the group will first select between two of the proposals, and then would select between the most popular of the first two proposals, and the third proposal. Though the group avoids the cycling problem, this solution creates a new problem—the group's decision will be determined by the order in which the proposals are considered. Thus, the person who sets the agenda (the "agenda-setter") can manipulate the group.[133]

The conclusion that outcomes depend on the order in which a group considers proposals has other implications. It implies that statutes lack purposes, that is, statutes are not crafted to pursue some underlying legislative purposes.[134]

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not discuss interest group theory. However, Jonathan Macey has shown that a practice of privileging legislative history and refusing to effectuate secret deals is, at the very least, consistent with "interest-group" theory. *See* Macey, *supra* note 64, at 230–33.

[132] *See* FARBER & FRICKEY, *supra* note 66, at 38–42; Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949, 950–52 (1990); Pildes & Anderson, *supra* note 121, at 2128–40. The seminal work in the field of public choice theory is KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (rev. ed. 1963).

[133] Members of Congress recognize the power of agenda-control. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 11–12 (4th ed. 1996).

[134] *See* FARBER & FRICKEY, *supra* note 66, at 40–42; Pildes & Anderson, *supra* note 121, at 2138–40, 2205 (setting forth the argument that because collective choice lacks meaning, statutes lack meaning, and thus statutes should be construed literally); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1,

Legislatures do not enact statutory text because that text reflects any coherent legislative view of statutory ends and means. Rather, statutory text is adopted only because the vote happens to be held in a particular order. If the vote were held in a different order, a different, possibly conflicting, statute pursuing different aims of a different coalition of legislators, would emerge.[135] Thus, the process does not reflect means-ends reasoning, *i.e.*, setting goals and then determining the means to achieve those goals; statutes are merely the serendipitous result of the order in which the legislature voted upon the various statutory proposals, and the combinations of various groups' desires regarding those proposals.[136]

Thus, according to public choice theorists, group choice is unintentional and accidental—something that no one designed. The typical legislative majority consists of a random coalition of smaller groups whose votes happened to coincide without any agreement on their part (except for the fortuitous coincidence of the groups voting for the same statute).[137] Some scholars suggest that such haphazard legislative decisionmaking makes reference to legislative history inappropriate.[138]

The public choice view that statutes lack purposes should be rejected for two

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51 (1991); Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

[135] *See* FARBER & FRICKEY, *supra* note 66, at 40; Eskridge, *supra* note 3, at 642–43; Pildes & Anderson, *supra* note 121, at 2135–36, 2138–39; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 447 n.148 (1989).

[136] Thus, the enactment of a statute has no more meaning than the election of Jane Smith as governor of a state. Few would suggest that the "purpose" of the candidate's election was to pursue a particular policy that the candidate advocated (at least if the election was not dominated by one overarching issue). Indeed, it is possible for a candidate to win an election even if a majority of voters opposes each of the positions she took in the campaign. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 127–28 (1956); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 63–64 (1990).

[137] This argument challenges the Legal Process School. The Legal Process School asserted that legislatures were rational, in the sense of identifying goals and crafting statutes to pursue those goals, and that accordingly courts should construe statutes to further the statutes' underlying purposes. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378–79 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Eskridge & Frickey, *supra* note 9, at 332–33; Sunstein, *supra* note 135, at 434–35. A contemporary of Hart and Sacks makes a similar point. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950) ("A statute merely declaring a rule, with no purpose or objective, is nonsense."). Currently, Ronald Dworkin takes a similar position. *See* DWORKIN, *supra* note 121, at 342–45 ("A community of principle does not see legislation the way a rulebook community does, as negotiated compromises that carry no more or deeper meaning than the text of the statute declares.").

[138] *See* Pildes & Anderson, *supra* note 121, at 2138–40, 2205 (noting the views of some scholars that, because collective choice lacks meaning, statutes lack meaning, and therefore, statutes should be construed literally); Shepsle, *supra* note 134, at 249.

reasons:[139] (1) public choice theory assumes that the preferences of individual legislators do not change as a result of their participation in the legislative process, and (2) public choice theorists' factual predictions, namely that cycling will constantly afflict legislatures, have proven wrong.

First, public choice theory assumes that the preferences of representatives, which will determine their votes on legislation, are fully formed and unchangeable before they participate in the legislative process.[140] Thus public choice theory assumes that no aspect of the legislative process—such as hearings, mark-up sessions, floor debates, party caucuses, and informal contacts with other members—will affect any legislator's preferences.

The assumption that preferences are exogenous to the legislative process, *i.e.*, fully formed and unchangeable before the legislative process begins, deserves skepticism. Indeed, many have argued that participation in the legislative process does affect the preferences of individual legislators, and thus may affect their votes.[141] Public choice theorists and civic republicans have, for years, joined issue over this question.[142]

Second, the public choice prediction that legislatures will be beset by cycling majorities has proven erroneous. Cycles do not seem to occur frequently in the

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139 Moreover, even if the "legislative irrationality" or "chaos" prong of public choice theory were accepted, preferences will often be arrayed so that cycling will not occur even in the absence of agenda control. *See* Hovenkamp, *supra* note 132, at 967.

140 In other words, public choice theorists view legislator preferences as "exogenous" to the legislative process. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1700 (1988); Pildes & Anderson, *supra* note 121, at 2176, 2179, 2190. Thus, public choice theorists dismiss legislative debate and deliberation as "inconsequential" "mood music." Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149, 152 (1994).

141 *See, e.g.*, SUNSTEIN, *supra* note 14, at 246–47; Pildes & Anderson, *supra* note 121, at 2175–83.

142 *See* Pildes & Anderson, *supra* note 121, at 2175–83; Sunstein, *supra* note 51, at 1574–75. Civic republican theorists posit that there is a public interest, or at least it is possible to have a consensus about the public interest, and that such a consensus can be reached through deliberation. *See* Gardner, *supra* note 128, at 428–31; Sunstein, *supra* note 51, at 1550, 1554–55. In particular, during deliberation, representatives hear other perspectives that may alter their views. *See* Sunstein, *supra* note 51, at 1549, 1574–75. Indeed, Richard H. Pildes and Elizabeth S. Anderson argue that agreement on the rationale of the statute is ordinarily essential to enacting a statute. *See* Pildes & Anderson, *supra* note 121, at 2178, 2199. Pildes and Anderson acknowledge that at times decisions must be made even though legislators can reach no agreement on principles. They note that some statute's memorialize an agreement to disagree. *See id.* at 2166–71. *See generally* SUNSTEIN, *supra* note 74, at 36, 39–40. Thus, deliberation is a crucial element of the legislative process—not inconsequential "mood music"—and the legislative process should be structured to foster deliberation. *See* Sunstein, *supra* note 51, at 1539, 1581–82; Sunstein, *supra* note 135, at 457–58, 471, 476.

legislative process.[143] For instance, Congress rarely cycles through radically different alternatives. Of course, this absence of cycling could reflect the exercise of agenda control by the House and Senate leadership.[144] If so, those believing that statutes have purposes cannot take comfort in the paucity of cycling because the "purposes" underlying the statutes would be those of the agenda-setter, not those of a majority of the legislators.[145] However, several theorists have identified other reasons for the rarity of cycles.

Preferences may not be arrayed in ways that produce cycles because representatives take into account the preferences of others and make judgments about which options best advance the welfare of the country or, at the very least, the welfare of their own constituents.[146] This contrasts with public choice theorists' assumption that representatives consider only the subjective preferences of their constituents.[147] The view that legislators do more than express constituent

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143 *See* FARBER & FRICKEY, *supra* note 66, at 47–48; Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 TEX. L. REV. 1541, 1553–54 (1993); Hovenkamp, *supra* note 132, at 956 & n.14.

144 The House leadership (particularly the Speaker of the House) and the Rules Committee have considerable agenda-setting power. Perhaps the most powerful agenda-setting tools are special rules governing debate, which may prohibit all amendments to a bill, limit the amendments to a bill, set the order in which amendments will be considered, or adopt certain unusual procedures concerning the timing and effect of voting. *See* OLESZEK, *supra* note 133, at 138–50. These rules, however, are subject to a vote by the membership, *see id.* at 150–51, 165, but here too the Rules Committee and the House leadership set the agenda—they decide the details of the special rule that will be submitted. The House leadership certainly uses these agenda control devices, and, indeed, employs them with increasing frequency. *See id.* at 142 tbl.5-4; BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 20–26 (1997) (describing use of special rules as agenda control); STEVEN S. SMITH & CHRISTOPHER J. DEERING, COMMITTEES IN CONGRESS 183–89 (2d ed. 1990).

The Senate leadership has fewer agenda control devices. Limiting the amendments that can be offered requires the consent of every member of the Senate (*i.e.*, "unanimous consent"). *See* OLESZEK, *supra* note 133, at 213, 238. However, unanimous consent agreements rarely impose such limitations, *see id.* at 214, and limiting debate requires the vote of a supermajority—the votes of sixty Senators are needed to limit debate to an additional thirty hours. *See id.* at 254, 259.

145 Farber and Frickey argue that avoidance of cycles by legislative leaders' exercise of agenda control is not problematic. *See* FARBER & FRICKEY, *supra* note 66, at 50 & n.25.

146 As noted earlier, cycles only occur when the preferences of competing subgroups are arranged in a particular manner. *See supra* text accompanying notes 132–33.

One scholar has also asserted that ideological issues tend not to produce preferences that cycle. *See* Grofman, *supra* note 143, at 1555–59.

147 *See* FARBER & FRICKEY, *supra* note 66, at 22–23; Hovenkamp, *supra* note 132, at 954. However, public choice theorists also argue that interest group competition dominates the legislative process because legislators must satisfy interest groups to win reelection. *See* FARBER & FRICKEY, *supra* note 66, at 23. To the extent that such a theory has merit, interest groups may coordinate the preferences of members across electoral district lines. *See* Hovenkamp, *supra* note

preferences more accurately reflects political theorists' and legislators' view of the role of democratic representatives.[148] Often then, each representative votes not merely on the basis of his constituents' subjective preferences (formed with only their own individual interests in mind), but on a judgment about the welfare of his constituents (or perhaps even the country as a whole).[149] Such judgments about welfare tend to produce preferences that are less likely to result in cycles than preferences that reflect subjective desires, *i.e.*, tastes.[150]

132, at 965–66.

[148] Theorists have long debated whether representatives should act upon their constituents' preferences or interests. *See* GERHARD LOEWENBERG ET AL., HANDBOOK OF LEGISLATIVE RESEARCH 99–100 (1985); J. Roland Pennock, *Political Representation: An Overview*, *in* NOMOS X: REPRESENTATION 13–18 (J. Roland Pennock & John W. Chapman eds., 1968); Hanna Fenichel Pitkin, *The Concept of Representation*, *in* REPRESENTATION 17–22 (Hanna Fenichel Pitkin ed., 1969). Rarely do theorists conclude that the representative has a duty to pursue only one of the competing conceptions of legislators' duties. Rather, most theorists conclude that the representative should pursue some combination of the two approaches. *See* Pitkin, *supra*, at 14–16. *See generally* THOMPSON, *supra* note 59, at 99–111.

Legislators' behavior appears to combine both perspectives. Legislator voting behavior cannot be explained solely by constituency desires. *See* LOEWENBERG ET AL., *supra*, at 491–96 (reviewing the literature as of the early 1980s). While constituency preferences do appear to play some role in legislators' voting behavior, *see id.* at 492, 495, party affiliation and the personal views of legislators also appear to have a role (indeed, more of a role than constituency preferences). *See id.* at 492. *See generally* SAMUEL C. PATTERSON ET AL., REPRESENTATIVES AND REPRESENTED 138–53 (1975) (presenting study of Iowa legislature). Anecdotal evidence supports these conclusions. *See, e.g.*, ELIZABETH DREW, SENATOR 113–15 (1979).

[149] A member of Congress may have an obligation to pursue the good of the nation, and not merely his constituency. *See* United States Term Limits Inc. v. Thornton, 514 U.S. 779, 803–05 (1995) ("In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation . . . Representatives and Senators are as much officers of the entire union as is the President."); *see also* SUNSTEIN, *supra* note 14, at 242. *See generally* Pennock, *supra* note 148, at 21–24; Pitkin, *supra* note 148, at 215–18. If members of Congress feel an obligation to give substantial weight to the interests of the country as a whole, they are even more likely to agree on policies, because, presumably, some of the differences in legislators' preferences are related to differences in their districts.

[150] *See* Hovenkamp, *supra* note 132, at 954–62. *See generally*, Grofman, *supra* note 143, at 1547–51 (distinguishing judgments from tastes).

For instance, suppose a group of forty acquaintances can spend an afternoon together at either a movie, an amusement park, or an art museum. An individual's own preferences among the choice of outings may differ from his position regarding the type of outings the group should select. The individuals will more likely take into account the desires of others and be amenable to a discussion of the choice if the issue is what the group should do rather than what he wants to do individually. Indeed, the individual's decision about what he wants to do is the type of decision one would make in a "market," and the individual's decision about what the group should do is more like the type of decision we view as political. *See* FARBER & FRICKEY, *supra* note 66, at 52; KADISH & KADISH, *supra* note 55, at 15–17, 18–20 (1973) (arguing that the roles an individual

In addition, legislators may make decisions about voting on particular proposals in order to avoid cycles or prevent undesirable outcomes.[151] A group of legislators may decide to vote for their second-choice policy rather than their first-choice in order to form a majority for the second-choice policy. They may do so because they wish to avoid one of two undesirable results: (1) further cycling, or (2) the group's selection of their third choice (as a result of the order of the voting). In this situation, the legislative outcome is not random; it is not an accidental result that no one designed. The majority vote for the winning policy reflects agreement on policy among the majority of the legislators, not just an agreement on the text of the statute.[152]

For some, the above considerations may not provide a full answer to the public choice critique. Even legislator preferences that have been influenced by legislative deliberation and which reflect considerations of public welfare (rather than mere constituent desires), may be arrayed in a manner that produces cycles. Some may argue that such preferences are no less likely to produce cycles than "exogenous" preferences based on subjective desires.[153] Nevertheless, the considerations set forth above do provide a sufficient basis to entertain serious doubts about the public choice critique, and thus allow us to put aside that critique. In short, public choice theory should not lead to a rejection of the argument that legislatures must explain statutes.

3. *Any Statement of Purposes Should Be Included in Statutory Text*

A critic might argue that even if the legislature has a duty to provide a

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plays determine the reasons that the person can consider to justify action); SUNSTEIN, *supra* note 14, at 246.

Moreover, to the extent that a representative votes on the basis of his constituents' interests, and not their preferences, his votes are more likely to reflect judgments that are subject to deliberation and verification by facts. Preferences, which are purely a matter of taste, are much less subject to change by others. *See generally* Hovenkamp, *supra* note 132, at 955–62.

[151] *See* FARBER & FRICKEY, *supra* note 66, at 52; Grofman, *supra* note 143, at 1566–68; Hovenkamp, *supra* note 132, at 963–65.

[152] Admittedly, a substantial number of legislators comprising the majority would have chosen another policy if those who shared their preference had been numerous enough to form a majority, and, thus, there were no need to compromise with others to obtain some of their goals. This does not disprove the existence of an agreement on more than the text of the statute between legislators who initially had different preferences. Rather, it shows that legislators sometimes agree on "second best" preferences, in light of the divurgent "first choice" preferences of all the legislators in the chamber.

[153] *See, e.g.*, POPKIN, *supra* note 127, at 108; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 242 (1985).

justification for statutes, that justification must appear in the text of the statute.[154] Certainly, many statutes contain preambles, and those preambles can set forth statutory purposes and interpretive guidance.[155] Of course, preambles are notoriously vague and much less helpful than committee reports and statements of committee chairs.[156] Because words are indeterminate and legislatures cannot envision all future situations,[157] legislatures are entitled to provide rationales for statutes to guide courts interpreting those statutes, without making such principles legally binding. Legislatures' lack of prescience means that legally-binding explanations might not aid the courts in deciding a large number of cases, yet compel decisions that the legislature did not desire.[158] Thus, for instance, Ronald

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[154] *See Why Learned Hand*, *supra* note 68, at 1021.

[155] *See* 1 NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 23.03, at 322–24 (5th ed. 1992); 2A SINGER, supra, § 47.04, at 145–50; Note, *Legal Effect of Preambles—Statutes*, 41 CORNELL L.Q. 134, 134–38 (1955) [hereinafter *Legal Effect of Preambles*]; *Why Learned Hand*, *supra* note 68, at 1021 & n.77. And indeed, the Pennsylvania Constitution of 1776 required that statutory justifications appear in the preamble of every law. *See supra* note 31, at § 15.

Courts accord preambles some interpretive weight. *See, e.g.*, *Legal Effect of Preambles*, *supra*. However, because preambles customarily precede a statute's enacting clause, they have no binding effect. *See id.*; SENATE RULE NO. 14.8, 102D CONG., 1st Sess. (1991), *reprinted in* 1992 SENATE MANUAL 13 (requiring separate vote on preamble).

[156] *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, *in* 2 THE RECORD 232 (1947); ELY, *supra* note 96, at 128; Linde, *supra* note 56, at 231. Moreover, preambles themselves must be interpreted. *See* Anthony D'Amato, *Can Regulators Constrain Judicial Interpretation of Statutes*, 75 VA. L. REV. 561, 570 n.30, 582 n.54 (1989); *see also* Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1–2 (1986); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 406–07 (1985). Of course, sometimes committee reports are vague or do little more than repeat the statutory language.

[157] *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); DICKERSON, *supra* note 4, at 154; JOHN LOCKE, TWO TREATISES OF GOVERNMENT 203–04 (Thomas Cook ed., Hafner Publ'g Co. 1947) (1690); FREDERICK SCHAUER, PLAYING BY THE RULES 36 (1991); SUNSTEIN, *supra* note 74, at 125; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1248 n.6 (1996); Manning, *supra* note 95, at 647; Mayton, *supra* note 74, at 127.

Indeed, an archetypal example of the problems produced by excessive specificity is the Delaney Clause barring the sale of foods that contain potential carcinogens. *See* Federal Food, Drug and Cosmetic Act, §§ 706, 706(b)(5)(B), 52 Stat. 1058 (1938) (codified as amended at 21 U.S.C. § 379(e) (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. As a result, the statute appears to require the FDA to ban many beneficial substances, such as saccharine. The problems with specificity are also shown by the line of cases in which the Supreme Court has employed irrebuttable presumption analysis. *See* Vlandis v. Kline, 412 U.S. 441 (1973); TRIBE, *supra* note 13, § 16-34, at 1618–25. *See generally* SUNSTEIN, *supra* note 74, at 133–34, 141–43 (discussing the Court's irrebutable presumption analysis).

[158] *See* LOCKE, *supra* note 157, at 204; SUNSTEIN, *supra* note 74, at 184; J.M. Balkin,

Dworkin and Alexander Bickel have noted the usefulness of providing nonbinding guidance when text is necessarily indeterminate.[159] William N. Eskridge, Jr. argues that several types of information "fit" much better in committee reports than in the statute.[160] In addition, at least the process of approving statutory commentary is subject to a democratic process—legislators and chief executives can assent or dissent on the basis of such commentary. The alternative—unelected interpreters, such as courts or administrative agencies, attempting to intuit legislative policies—is not democratic. The political branches of government cannot overturn such judicial or administrative intuitions unless they can overcome inertia and pass a second statute.[161]

Some argue that allowing legislatures to provide nonstatutory interpretive guidance to courts violates the separation of powers doctrine by allowing legislatures to exercise both legislative and judicial powers.[162] Under the doctrine, allowing any governmental institution to exercise more than one of three powers—the legislative, the executive, or the judicial—threatens the rights of individual citizens.[163] Thus, a legislature should not possess the authority to exercise both

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Deconstructive Practice and Legal Theory, 96 YALE L.J. 743, 777 (1987); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 73 (1983).

159 *See* BICKEL, *supra* note 58, at 104 (stating that the Founding Fathers, in drafting the Constitution, concentrated on "may" rather than "must"); DWORKIN, *supra* note 121, at 344–45 (describing the difference between promises and statement of intentions, and noting that both are legitimate).

160 *See Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 71, 84 (1990) [hereinafter *Statutory Interpretation and the Uses of Legislative History*] (testimony of William N. Eskridge).

161 *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 735–36 (1992). McNollgast shows that failure to overrule a court or agency decision can occur even if a majority of legislators disagrees with the decision. *See id.*

162 *See* Pierce v. Underwood, 487 U.S. 552, 566 (1988); OFFICE OF LEGAL POL'Y, U.S. DEP'T. OF JUSTICE, USING AND MISUSING LEGISLATIVE HISTORY 5, 33–34, 39–40 (1989) [hereinafter USING AND MISUSING LEGISLATIVE HISTORY]; DICKERSON, *supra* note 4, at 157; M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 37, 43–44, 63–64 (1998); Eskridge, *supra* note 3, at 673; Felix Frankfurter, *Foreword: A Symposium on Statutory Construction*, 3 VAND. L. REV. 365, 366–68 (1950); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 355–56 (1985).

Legislative and judicial power must be separated. *See* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); 1 WILLIAM BLACKSTONE, COMMENTARIES *58–59 (1765); MONTESQUIEU, THE SPIRIT OF THE LAWS 77, 150, 152, 158 (Thomas Nugent trans., 1949); VILE, *supra*, at 44; Manning, *supra* note 95, at 638–48.

163 *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 11, 104 (Tulane Studies in Political Science

legislative and judicial functions.[164] But allowing legislatures to provide nonstatutory interpretive guidance when they enact statutes does not create the dangers that the Framers of the Constitution sought to avoid by separating judicial power from legislative and executive powers.

First, preventing legislators from exercising judicial powers preserves the rule of law, *i.e.*, the impartial administration of the law.[165] Governments must enact general rules that apply to all citizens to ensure equal treatment of all citizens.[166] At the same time, governments must apply general rules to specific individual controversies. General rules should be established by political branches of government accountable to the electorate, but if these same politically accountable institutions also apply the general principles to particular cases, they may begin to apply the rules arbitrarily in response to political pressure.[167] Thus, the legislature should act in generalities and courts should resolve specific controversies.[168]

Secondly, legislatures may not exercise judicial power because the rules of conduct should be established before a citizen acts. The resolution of a particular case should not give the rulemaker an opportunity to alter the relevant rules on a basis not disclosed before the person acted.[169] Thus, the separation of judicial and legislative power reflects concerns about retroactivity.[170]

Vol. IX 1965); Manning, *supra* note 95, at 640–41, 674–75.

[164] *See* USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 33–34, 39–40.

[165] *See* GWYN, *supra* note 163, at 127–28 n.1; *see also* USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 35–36, 42–43, 56, 71, 106–07, 118.

[166] *See* GREENAWALT, *supra* note 4, at 142–43; F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153–54 (1960); JOSEPH RAZ, THE AUTHORITY OF LAW 215–16 (1979); SCHAUER, *supra* note 157, at 135–37; SUNSTEIN, *supra* note 74, at 112–13; Mayton, *supra* note 74, at 135.

[167] *See* RAZ, *supra* note 166, at 216–17.

[168] *See* FRANZ NEUMAN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 28–31, 34–36, 42 (1957); VILE, *supra* note 162, at 23, 44, 63–64 (discussing the views of Aristotle and John Locke); WOOD, *supra* note 129, at 454; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989). Indeed, many state constitutions prohibit legislatures from enacting "special laws," *i.e.*, laws regarding particular individuals or small groups of individuals, or severely limit the power of legislatures to enact such special legislation. *See* POPKIN, *supra* note 127, at 819–22; 2 SINGER, *supra* note 155, § 40, at 186–335.

[169] *See* GREENAWALT, *supra* note 4, at 142; GWYN, *supra* note 163, at 71, 74; LOCKE, *supra* note 157, at 190–91; RAZ, *supra* note 166, at 214; SUNSTEIN, *supra* note 74, at 21, 44, 104; VILE, *supra* note 162, at 329; Manning, *supra* note 95, at 669–70; *see also* NEUMAN, *supra* note 168, at 36–37.

[170] If any institution is to have this power to resolve controversies retroactively, it should be an institution that does not make the rules and is not politically accountable. *See* Cass, *supra* note 116, at 951, 963, 968–69, 994–95.

However, legislatures have broad powers to enact retroactive statutes, as long as those retroactive statutes do not change criminal statutes or abrogate contracts. *See* Usery v. Turner Elkhorn Mining Corp., 428 U.S. 1, 29–30 (1976); Flemming v. Nestor, 363 U.S. 603, 610–11

Provisions of nonstatutory legislative guidance do not compromise the legitimate distinction between legislative and judicial functions. Typically, the interpretive guidance provided by legislatures in legislative history is broad-based, covering a wide range of cases, and both promulgated and made publicly available before a controversial situation arises. Legislative history generally addresses broad categories of behavior, not the specific circumstances of particular individuals. Thus, the provision of legislative guidance tends not to implicate "rule of law" concerns. Moreover, the nonstatutory legislative guidance presents no retroactivity problem. Ordinarily, legislatures promulgate nonstatutory interpretive guidance before cases are adjudicated under the statute, and make such guidance available to those affected by the statute as well as the public in general. Thus, citizens face little danger of suffering adverse legal consequences merely because of the unknown subjective views of the legislature; the judiciary determines legal rights and obligations on the basis of text—albeit not just statutory text—available to those subject to the statute.[171]

In any event, courts need not disregard legislative history to retain the adjudicatory power. Even though the judiciary currently accords weight to legislative history, the judiciary continues to apply the law to particular factual controversies. Moreover, legislative history merely provides guidance, the judiciary makes the ultimate decision as to: (1) whether the statutory text contains sufficient ambiguity to justify reliance on legislative history, and (2) whether, even in light of the legislative history, the statutory text can bear the construction that Congress's explanation suggests. Thus, the legislature's provision of interpretive guidance separate from the statutory text does not impermissibly encroach upon the judicial power.

(1960). *See generally* TROY, *supra* note 91, at 47–82; The Committee on Federal Legislation, *Retroactive Application of Federal Legislation*, *in* 51 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 836 (1996) (discussing the constitutional limits of Congress's power to enact retroactive legislation). The Ex Post Facto and Bill of Attainder Clauses prohibit retroactive criminal statutes, *see, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 274 n.28 (1994) (discussing the Ex Post Facto Clause); Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 847–51 (1984) (discussing Bill of Attainder Clause), and the Contracts Clause restricts legislative abrogation of contracts, *see* NOWAK & ROTUNDA, *supra* note 126, § 11.8.

[171] While some have questioned the availability of certain esoteric aspects of legislative history, *see* W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408–09 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377–78; Allison C. Giles, Note, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEO. L.J. 359, 377–80 (1990), committee reports and statements made in debates are easy to obtain, *see* FARBER & FRICKEY, *supra* note 66, at 93 n.11.

III. NEW TEXTUALISTS VERSUS INTENTIONALISTS

The duty to justify statutes now allows us to reexamine the two major interpretative approaches, namely textualism (and more particularly new textualism) and intentionalism; and, ultimately, that reexamination will provide a basis for a third approach.

A. *New Textualism*

Led by Justice Antonin Scalia, a group of judges and scholars, dubbed "the new textualists," have urged the courts to abandon the use of legislative history in interpreting statutes.[172] As noted earlier, textualism rests upon three premises. First, the only significant element of the legislative process is the vote of each legislative chamber on proposals before it (and, of course, the signing or veto of legislation by the chief executive). Second, legislators vote only on the text of the statute, not any accompanying explanatory materials or their own subjective intent. Third, legislative majorities rarely, if ever, share a common subjective intent regarding the statutes they enact. Though the new textualist methodology has been challenged, as leading to stilted interpretations of statutes and increasing the discretion of interpreters relative to lawmakers, these three premises have remained unchallenged.

Nevertheless, the first two premises are problematic. The first premise ignores the institutional nature of Congress. More particularly, it fails to recognize that Congress has an institutional obligation to explain statutes and may act as an institution in ways other than holding votes on legislation. The second premise conflicts with the normative principle that legislatures have an obligation to explain statutes as well as enact them. Moreover, the third premise, while sound, can be turned against the textualist—a majority of legislators will be no more likely to know the precise language of a proposed bill and agree on its meaning than share the same subjective intent. However, the manner in which new textualism can avoid such an argument, by positing a duty to vote on statutes based upon their reasonable meaning, points the way to an alternative approach founded upon legislators' obligation to base their votes upon the explanations of statutes as well as their text.

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[172] *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); Chisom v. Roemer, 501 U.S. 380, 404–05 (1991) (Scalia, J., dissenting); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring); Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring); Shepsle, *supra* note 134; Starr, *supra* note 171, at 371. Bradley Karkkainen provides an extensive list of Scalia opinions applying the new textualist approach. *See* Bradley S. Karkkainen, *Plain Meaning*, 17 HARV. J.L. & PUB. POL'Y 401 (1994). The new textualist credo is based, at least in part, on public choice theory.

1. *New Textualist Premises*

a. *The Only Significant Action in the Legislative Process Is the Vote of Each Chamber on Legislation*

New textualism, as well as public choice theory, assumes that the only significant element of the legislative process is the vote of each legislative chamber on proposals before it.[173] Early public choice scholars viewed legislatures merely as arenas in which individual representatives assembled and registered their preferences.[174] The legislature merely aggregated those preferences.[175] Thus, public choice scholars viewed the legislative process very much like the electoral process—the process by which citizens "gathered" to express their preferences by voting.[176] Accordingly, such theorists did not view legislatures, like Congress, as institutions that existed apart from elected representatives. Thus, the early public choice models did not examine legislative committees, legislative leadership structures, or behavioral norms.[177]

This focus on individual representatives rather than the legislature as an institution[178] requires an exclusive focus on voting in legislative chambers. In a democracy, the preferences of all representatives, like the preferences of all voters

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[173] *See generally* Wald, *supra* note 110, at 307 (New textualism "assumes that Congress can act in its official capacity only when a majority formally assents to a product or even a process by means of a formal vote.").

[174] *See* FARBER & FRICKEY, *supra* note 66, at 44; JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 4–5 (1989); Shepsle & Weingast, *supra* note 140, at 151.

[175] *See* Frank Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 627 (1985); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 134 (1989); Pildes & Anderson, *supra* note 121, at 2144, 2176, 2178–79, 2190; Sunstein, *supra* note 51, at 1543, 1548.

[176] *See* Oregon Educ. Ass'n v. Phillips, 727 P.2d 602, 612–14 (Or. 1986); Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1555–56, 1568 (1990); Sager, *supra* note 124, at 1414–15. Of course, this view oversimplifies the electoral process; elections follow a nominating process and political campaigns, which limit the electorate's choices and ultimately influence their votes.

[177] *See* MARCH & OLSEN, *supra* note 174, at 4–5; Shepsle & Weingast, *supra* note 140, at 151. Now, the models do incorporate committee structures, *see infra* note 186, but this development has not been incorporated by the new textualists, *see id.*

[178] Public choice also disregards the institutional existence of legislatures in another way, by positing that the legislatures largely translate the preferences of competing interest groups into political power. *See* KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 402 (1986); Easterbrook, *supra* note 67, at 14–18, 22; Macey, *supra* note 64, at 227–33.

in elections, must be accorded equal weight; thus, the majority rules.[179] Representatives are equal only when they vote.[180] In the preliminaries to the vote, members of a legislature wield very unequal influence.[181] For instance, members of legislative committees will have greater influence over the shape of proposals than other legislators, and the power of some members to prevent a vote altogether will afford them greater influence over the proposals presented to the chamber.[182] Accordingly, to the new textualist the process by which a particular legislative proposal is selected over others for consideration of the chamber should be irrelevant to the interpretive project. For the new textualist, in other words, identifying the drafter of the proposal and determining his views are irrelevant, as is ascertaining the collective understanding of a legislative committee, which studied and perhaps modified the legislative proposal. Indeed, under public choice theory, those who frame issues for voting by the legislative chamber, such as drafters and congressional committees, are "dictatorial" agenda controllers that possess the power to manipulate the members of the chamber and thus defeat democratic choice.[183] Accordingly, giving special weight to the views of legislators who crafted the proposal submitted to the chamber would give additional power to agenda-setters, whose control over the legislative agenda already ensures them a degree of power inconsistent with democracy.[184]

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[179] *See* ARTHUR, *supra* note 122, at 54–55; DAHL, *supra* note 136, at 31, 34–35, 64, 67 & n.3 (1956); FARBER & FRICKEY, *supra* note 66, at 61 (stating that under Arrow's theory, "the fundamental assumption is 'democracy = majority rule'"); H.B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 62–64, 67, 125–26, 178, 182 (1960); PETER SINGER, DEMOCRACY AND DISOBEDIENCE 29, 32, 35 (1973); Pildes & Anderson, *supra* note 121, at 2133–34 & n.39.

[180] *See* DAHL, *supra* note 136, at 66; SMITH & DEERING, *supra* note 143, at 10, 171; McNollgast, *supra* note 161, at 707–08 & n.5, 720–21, 724–25.

[181] *See* DAHL, *supra* note 136, at 66.

[182] *See* FARBER & FRICKEY, *supra* note 66, at 56 (discussing committees as "gatekeepers"); McNollgast, *supra* note 161, at 707, 720–21, 724–25 (discussing "veto players" and "veto gates").

[183] *See* DAHL, *supra* note 136, at 43, 66, 69, 70, 73; Hovenkamp, *supra* note 132, at 950–51; Mashaw, *supra* note 175, at 126–27, 134–35; Pildes & Anderson, *supra* note 121, at 2131–32, 2137–38; Shepsle, *supra* note 134, at 245–47.

[184] Though the new textualists have not expressly articulated the above logic, it is implicit in their approach, as reflected in their focus on voting members' reasonable understanding of the statute, not the understanding of the drafter (whether a legislator or a private citizen) or the members of the committee that revised the legislation. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989). For example, in *Green v. Bock Laundry*, Scalia asserted:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute.

The focus on individual legislators, which seems to require disregarding all activities other than voting in the legislative chamber, is problematic. Institutions matter. Congress is an institution greater than the sum of 535 individual Representatives and Senators who serve in the House and Senate at any one time. In particular, analyzing the House of Representatives as 435 members taking a series of votes that express their own individual preferences, without considering legislative debate, party structure, the committee system, standard operating procedures, and institutional norms, is flawed and unrealistic. These structures form an integral part of congressional behavior. Moreover, Congress must perform some functions as an institution—institutional responsibilities separate from the responsibilities of individual legislators. Of these institutional functions, two of the most relevant for our purposes of evaluating competing theories of statutory interpretation are Congress's acquisition of information and refinement of legislative proposals. Congress performs these functions by delegating to committees the task of obtaining information needed to legislate and formulating coherent proposals, subject to the approval of the entire legislative chamber. Under this view, the work of congressional committees deserves special weight.[185]

In Part IV, I will show that the duty to justify statutes, which I have discussed previously, is an institutional duty, and that Congress does routinely act as an institution to fulfill that duty.[186]

Id. (emphasis added). In short, the view of a member who drafted the legislation or participated in the detailed study of the legislation in committee is worth no more than that of any other member.

This contrasts with the Supreme Court's approach. In *Zuber v. Allen*, 396 U.S. 168, 186 (1969), the Court explained that committee reports merit more attention than individual legislators' statements during floor debate because the committee engaged in the study and drafting of legislative proposals. *Accord* HURST, *supra* note 125, at 42 & n.27.

[185] *See* SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935); HURST, *supra* note 125, at 37; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1344–47 (1990). *See generally* Breyer, *supra* note 73, at 858–60, 863–64.

[186] More recent scholars in the public choice tradition, positive theorists, have added sophistication to their models to begin to take account of the above described neo-institutional critique. *See, e.g.*, Shepsle & Weingast, *supra* note 140. The new textualists do not appear to incorporate these insights and thus seemingly do no really address the neo-institutionalist critique of public choice. However, one can presume their response. The goals of political science and law differ. Political scientists (at least positive theorists and their neo-institutionalist counterparts) seek to describe the operation of the legislative process. Thus, for instance, they seek to determine whether some legislators exercise more influence than others. For such purposes obtaining a realistic view of Congress holds importance. *Law*, on the other hand, seeks to determine the legal obligations that the legislature has created. A legislature can create law only by a vote among equals, and such votes take place only on the floor of the legislative chamber. Nevertheless, the new textualists have not made a compelling case that interpreting statutes requires adoption of their

b. *A Vote Is Only a Vote on the Text of the Statute, Not the Explanatory Materials*

New textualists argue that the text of a statute forms the only valid basis of statutory law and that the subjective desires of legislators, even a majority of legislators, do not constitute binding law.[187] If an opinion poll revealed a common desire among a majority of legislators, that desire would not be law.[188] Rather, the new textualists note, the Founding Fathers designed the legislative process so that even legislative majorities would encounter difficulty in transforming their subjective intentions into binding statutory law.[189] New textualists emphasize the requirements of bicameralism and presentment as obstacles to translating legislative desires into binding law.[190] Desires become legally binding only when memorialized in a statutory text that is approved by both the House and the Senate and then either signed by the President or, if vetoed, approved by two-thirds of the House and the Senate.[191] Legislative history lacks legitimacy because it does not undergo this constitutionally-mandated enactment process.[192]

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unrealistic view that legislatures are merely the sum of their members.

[187] *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); Pennsylvania v. Union Gas Co., 491 U.S. 1, 30–31 (1990) (Scalia, J., concurring in part, dissenting in part); INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring); Sunstein, *supra* note 135, at 429–31; Zeppos, *supra* note 185, at 1313 & n.70.

[188] *See In re* Sinclair, 870 F.2d 1340, 1342–44 (7th Cir. 1989) (Easterbrook, J.) ("An opinion poll revealing the wishes of Congress would not translate to legal rules. Desires become rules only after clearing procedural hurdles, designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 538–39 (1983). Presumably, even if a statute were enacted, an opinion poll showing the interpretation of the statute shared by a majority of the representatives would not create legal obligations.

[189] *See In re Sinclair*, 870 F.2d at 1342–44; United States v. Taylor, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring); USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 47–49; Easterbrook, *supra* note 75, at 445.

[190] However, new textualists rarely mention numerous other hurdles to enacting legislation such as the power of committee chairs, the House Rules Committee, the congressional leadership, and the availability of the filibuster. Perhaps the new textualists ignore these procedural hurdles because they make their argument in constitutional terms. However, the focus is fully consistent with their belief that floor votes are the only important legislative events.

[191] Many state constitutions provide that "law" can be made only by way of a "bill." With respect to the federal government and the other states, one can argue by negative implication that the only means for the legislature to enact law is by a "bill." *See* DICKERSON, *supra* note 4, at 10 & n.9.

[192] Though some argue that the Constitution proscribes the use of legislative history, most reject that view. *See* Eskridge, *supra* note 3, at 670–76 (the argument that courts must ignore

However, this argument assumes that the vote on a statute is a vote only on the statute's text. Committee reports do in a sense undergo the constitutionally–mandated bicameralism and presentment processes. Committee reports can be, and often are, considered by the various legislative actors (*i.e.*, the House, the Senate, and the President), and could become the focus of the various legislative actors' consideration of a proposed statute. Either branch of Congress can refuse to pass a bill based on statements in the legislative history explaining the bill's provisions.[193] The President can refuse to sign a bill whose text he finds acceptable if he objects to statements in the committee report regarding the statute's meaning.[194] Indeed, many have suggested that legislators are often more likely to focus on the committee report and the bill manager's statements than the text of the statute.[195]

Thus, the new textualists' argument really rests on their view of the meaning of legislative votes. If the vote on a statute merely constitutes the approval of the text of the statute, then only the text has undergone the constitutional process of bicameral approval and presidential consideration. If the vote on the statute constitutes approval of the text and certain documents or statements explicating the statute, then both the text and the expository materials have undergone the constitutional process.

For example, W. David Slawson argues that legislative history lacks democratic legitimacy because "[w]hat most legislators think they are considering, most of the time, is just a bill's language."[196] Slawson and the new textualists provide no empirical support for such a proposition. Indeed, given the frequent use of legislative history by administrative agencies and courts, legislators probably vote

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legislative history fails as a pure constitutional argument); Breyer, *supra* note 73, at 863–64; *Why Learned Hand*, *supra* note 68, at 1007. Nevertheless, even if the use of legislative history is not proscribed by the Constitution, perhaps the Constitution's bicameralism and presentment requirements suggest that the Court should disregard legislative history in interpreting statutes.

[193] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457 (1989).

[194] *See id.*

[195] *See* HENRY J. FRIENDLY, BENCHMARKS 215–16 (1967); ERIC REDMAN, THE DANCE OF LEGISLATION 140 (1973); Brudney, *supra* note 75, at 28, 53, 57, 58 & n.230, 63; Farber & Frickey, *supra* note 193, at 448; Spence, *supra* note 86, at 599 & n.73; Zeppos, *supra* note 185, at 1311–14; Jerrold Zwirn, *Congressional Committee Reports*, 7A GOV'T PUBLICATIONS REV. 319, 320 (1980). Indeed, there are occasions where the text has been misleading because the chamber relied upon the report, not the text of the bill. *See* ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 115–16 (1982).

[196] Slawson, *supra* note 171, at 405; *see also* DICKERSON, *supra* note 4, at 159; Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 645 (1995); *Why Learned Hand*, *supra* note 68, at 1007.

on the basis of the statute's legislative history as well as its text.[197] In any event, the more important question is whether legislators *should* vote only on the text of a statute without regard to key aspects of the legislative history.

As I will argue in Part IV, the existence of an obligation to explain suggests that legislators should not view their vote as an expression of assent or dissent regarding only the text of the statute.[198] If the legislature has an obligation to explain and provides an official explanation, the legislators have a corresponding duty to vote based on those explanations. Thus, their votes should constitute not only approval of the text of the statute, but also institutional explanatory materials, such as committee reports and floor manager statements.

The contrasting views regarding whether a vote on the statute constitutes a vote on the text or a vote on the text and explanatory materials produce contrasting views of legislators' obligations in voting on a bill. Under the view that legislators merely vote on the statutory text, a representative may responsibly vote for a statute without acceding to the institutional explanations in documents like the corresponding committee reports.[199] Under the philosophy that legislators vote on the text and the institutional explanations of the statute, such a representative should at least publicly

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[197] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 269 (1985); Wald, *supra* note 110, at 307.

Slawson also argues that judicial reliance on text rather than legislative history is justified because statutory text is available to legislators and legislative history is not. *See* Slawson, *supra* note 171, at 404–05, 408. First, the text of the statute or pending amendments may not be available at the time of the vote. *See* Chadha v. INS, 462 U.S. 919, 926 (1983) (citing 121 CONG. REC. 4080) (noting the resolution requiring deportation of Chadha not available to members when it was voted on); *Congressional Control of the Administration of Government: Hearings, Investigations, Oversight, and Legislative History (Panel III)*, 68 WASH. U. L.Q. 595, 614–15 (1990) [hereinafter *Congressional Control of the Administration of Government*] (statement by L. Gordon Crovitz); Roger H. Davidson, *What Judges Ought to Know About Lawmaking in Congress*, *in* JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 90, 111 (Robert A. Katzmann ed., 1988); Raymond Hernandez, *Cry for Help: 'Paul, How Do I Vote?'*, N.Y. TIMES, July 13, 1996, § 1, at 24 (the New York legislature); *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 143 (noting that text of late-session omnibus bills sometimes unavailable). Second, committee reports, sponsor statements, and floor manager statements are often available as well as the text of statutes. *See infra* notes 311–12 and accompanying text.

Slawson also argues that legislators cannot keep all of a complex statute's legislative history in their heads—but they also cannot remember everything in a 1000 page statute; in fact, it may be easier for them to remember the more readable legislative history.

[198] *See* Breyer, *supra* note 73, at 864 (stating from an institutional point of view the legislator has no different responsibility with respect to committee reports, floor statements, or statutory text).

[199] Pildes and Anderson argue that a legislator could not vote on a public policy without, of necessity, assuming some view of the policy's rationale. *See* Pildes & Anderson, *supra* note 121, at 2147–58, 2178, 2181, 2183, 2193–96, 2199–2200. Generally, however, the new textualist position regarding legislator's responsibilities set forth above is not disputed.

dissent from the institutional justification presented in support of the statute.[200]

Thus the new textualists' argument depends upon their conception of the vote on a statute as merely an approval or disapproval of the statutory text; if the vote on the statute should be viewed as the approval or disapproval of something more, the new textualists' arguments lose force.

c. It Is Unlikely That There Will Be One Subjective Intent Regarding the Statute Shared by a Majority of Legislators

New textualists argue that a majority of legislators will rarely share a subjective intent regarding a statute's meaning. They rely on two cogent arguments.[201] First, most legislators give little thought to any particular statute, and certainly do not formulate a position on the numerous specific issues that will confront courts and agencies in applying the statute.[202] Often members focus on the general principles embodied in the bill. Moreover, members vote based on the recommendations or votes of others. Many members of Congress vote on the basis of "cues" or "referents"[203]—such as the position of the relevant committee chair, party leaders,

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200 Subsumed in the new textualist view that legislators vote only on the text of the statute is a view that Congress's lawmaking power includes only the power to create text that others will interpret, *see supra* note 162; Congress may not set forth principles of guidance that interpreters must consider, except by enacting legally-binding statutory text. This also suggests that in enacting legislation Congress simply has the responsibility to issue commands, not explain them. The following advice regarding statutory preambles exemplifies such an approach: "For a law should be brief, in order that the uninitiated may grasp it all more easily . . . Warn me, tell me what you wish me to do! I am not learning but obeying." 6 SENECA, AD LUCILIUM EPSITULAE MORALES 36 (Richard M. Gummere trans., 1917).

Some recognize that such interpretive guidance is appropriate, but only as "political" instructions backed up by political sanctions Congress can use against agencies, and that such "political" instructions should have no "legal" effect, *i.e.*, should not be considered legally binding, and thus should not constrain the courts in interpreting the statute. *See* International Bhd. of Elec. Workers v. NLRB, 814 F.2d 697, 716–17 (D.C. Cir. 1987) (Buckley, J., concurring); POPKIN, *supra* note 127, at 419–21; *see also Congressional Control of the Administration of Government*, *supra* note 197, at 615 (citing a statement by Davidson); Zwirn, *supra* note 195, at 320–21.

201 They also rely on the public choice analysis noted earlier. *See supra* text accompanying notes 131–38.

202 *See* Karkkainen, *supra* note 172, at 416.

203 *See* MAASS, *supra* note 195, at 40, 42; Brudney, *supra* note 75, at 27 & n.102; Correia, *supra* note 6, at 1157; Donald R. Matthews & James A. Stimson, *Cue-Taking by Congressmen: A Model and a Computer Simulation*, *in* THE HISTORY OF PARLIAMENTARY BEHAVIOR 247–73 (William O. Aydelotte ed., 1977); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983). For a practical account of the manner in which legislators decide to vote, see BERNARD ASBELL, THE SENATE NOBODY KNOWS 35–36, 267–68 (1975).

or the Administration.[204] Members who vote on the basis of such cues or referents will ordinarily constitute a majority of the chamber.

In addition, many members vote on bills for reasons that have little or no relationship to their view of the bills' merits.[205] A member might vote for a statute in exchange for a colleague's vote on another measure. The member might vote for the statute to gain favor with his party's leadership.[206] The member might also vote for the statute because the electorate favors it, while secretly hoping either that the statute will not be enacted or will prove ineffective.[207] Thus, with respect to virtually any issue that arises under a statute, it is highly unlikely that a majority of the enacting legislative body thought about the issue, voted based on the merits of the bill, and agreed on the resolution of the issue.

However, precisely these same arguments can be made with respect to legislators' consideration of the statutory text.[208] Few, if any, legislators read all of a statute before they vote on it; indeed, often they do not read any of it.[209] Members will more likely rely on descriptions of the bill's provisions, provided in the committee report or by members of their staff, than read the text of the bill and form their own judgments about the text's meaning.[210] In addition, many members may give little thought to the text of the bill because they will vote based on the positions of others—those colleagues or others they use as cues or referents.[211] Moreover, even if members read the text, they would probably understand the terms of the statute differently.[212]

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[204] *See* Diver, *supra* note 52, at 557; Larry Evans et al., *Congressional Procedure and Statutory Interpretation*, 45 ADM. L. REV. 239, 247–57 (1993).

[205] *See* Edwards v. Aguillard, 482 U.S. 578, 636–38 (1987) (Scalia, J., dissenting); Breyer, *supra* note 73, at 864–66; Diver, *supra* note 52, at 558; Mayton, *supra* note 75, at 144–45 & n.99; Shepsle, *supra* note 134, at 244, 248–50.

[206] *See, e.g.*, *Edwards*, 482 U.S. at 637 (Scalia, J., dissenting).

[207] *See, e.g.*, DWORKIN, *supra* note 121, at 322–24. *See generally* ARTHUR, *supra* note 122, at 35.

[208] *See* Wald, *supra* note 110, at 307; *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 60 (citing a question by Chairman Kastenmeier to Judge James Buckley).

[209] *See Interbranch Relation*, *supra* note 73, at 90, 91 (citing testimony of former Congressman Robert Kastenmeier and Eleanor Holmes Norton); MAASS, *supra* note 195, at 115–16 (reciting an instance in which a Senate Committee misled the Senate by adding appropriate language to the report but not putting the language in the bill itself); *Congressional Control of the Administration of Government*, *supra* note 197, at 614–15; *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 33, 111 (citing statements of then-Circuit Judge Stephen Breyer and Stephen F. Ross).

[210] *See supra* note 195.

[211] *See supra* notes 203–04.

[212] For instance, to use the Founders' Park example, a member of the legislative body might

The new textualists do not appear to address these problems in great detail, but their response can be surmised. Legislators' failure to form an understanding of the text (either because they do not read the statute or because they follow others' cues) and their potentially divergent interpretation of words are unimportant because each legislator has a duty to become aware of the text of the statute and ascertain the meaning of that text to a reasonable person. Legislators have a duty to the populace subject to the law, not just their own constituents, to enact determinate and easily understandable statutes.[213] If a legislator wants a statute to reflect his subjective intent, and the text of the statute, as interpreted by a reasonable person, does not reflect that intent, he must attempt to change the statute so that the statute conveys his intent to the reasonable reader. No legislator who votes for a statute (even one who casts the decisive vote) could reasonably expect the courts to give the statute the meaning he subjectively ascribes to it if that subjective understanding departs dramatically from the customary meaning of the words used in the statute.[214] Because of the duties outlined above, the new textualists conclusively presume[215] that all of the legislators knew the meaning the reasonable person would attach to the statutory text and voted for or against the statute on that basis.[216] With such a

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interpret the term "motor vehicle" to mean any one of the following: (1) all motorized vehicles, (2) all motorized vehicles that operate on the surface of the earth (land or water), (3) all motorized vehicles that operate on land (but not those that operate on water), (4) all motorized vehicles that operate on land except trains, (5) all motorized wheeled vehicles, and (6) all motorized wheeled vehicles that are used primarily for transportation (excluding, for instance, riding lawnmowers).

[213] *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939); USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 51–52; Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 124–25 (1948); HURST, *supra* note 125, at 39, 54–55; SUNSTEIN, *supra* note 74, at 102–03. *See generally* 1A SINGER, *supra* note 156, § 21.16, at 138–70; 2A SINGER, *supra* note 156, § 45.08, at 33–42.

[214] *See* Charles B. Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 516–17 (1940). Thus, virtually all courts refuse to consider affidavits from legislators regarding the meaning they intended statutes to have. *See* Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1439 (7th Cir. 1988); 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, 109 n.17 (1996). There are other reasons for refusing to accept such statements, such as their unreliability. *See, e.g.*, Bread Political Action Comm. v. Federal Election Comm., 455 U.S. 577, 582 n.3 (1982).

[215] Perhaps it would be more accurate to say new textualists "virtually conclusively presume" because when faced with absurd results (and perhaps obvious typographical errors), new textualists may be willing to give a statute something other than its ordinary meaning. *See, e.g.*, Green v. Bock Laundry Mach., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring).

[216] Indeed, Judge Buckley made the sort of argument outlined above when confronted with the assertion that the criticisms the new textualist lodge against the use of legislative history can also be lodged against reliance on statutory text.

> Mr. Kastenmeier: Let us assume that in a decade we have a new series of judicial

conclusive presumption based on duties arising out of the responsibilities of legislators, legislators' failure to read the statute or recognize the ordinary meaning of the statutory text become failures to acquit their responsibilities rather than a problem that undermines new textualist theory.[217]

This is a cogent response. However, as I will argue in Part IV, a similar argument supports the recognition of the parts of legislative history that constitute the legislature's explanation of the statute. In particular, because the public justification of statutes is important, courts should view individual legislators as having a duty to contribute to that public justification and thus presume that they

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> activists . . . that . . . have not only little respect for legislative history, they have little respect for the legislative language itself, for the same reasons.
>
> Judge Buckley: Well, one begins with the assumption that printed law is the law of the land. And one has to work from there backwards. One has to assume, if we are to have an orderly society, that one can impute the meaning of the language to the majorities in the House and the Senate that vote for it. And this is a pure, textual approach to the interpretation of laws.

Statutory Interpretation and the Uses of Legislative History, *supra* note 160, at 60 (colloquy between Chairman Kastenmeier and Judge James Buckley). Similarly, in *United States v. Taylor*, 487 U.S. 326 (1988), Justice Scalia asserted:

> The text is so unambiguous on these points that it must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.

Id. at 345 (Scalia, J., concurring). Scalia argued that such an assumption fosters the democratic process.

[217] *See* Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("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).

Indeed, the new textualists (and the Supreme Court in general) place on Congress the responsibility for becoming aware of certain judicial doctrines, such as judicially-created clear statement rules. *See supra* notes 90–91 and accompanying text. In following such clear statement rules, courts interpret statutes as if Congress were aware of the need to expressly override the clear statement rule. Any evidence that Congress was unaware of the clear statement rule when drafting legislation is simply irrelevant. Congress's failure to consider such a canon can simply be dismissed as a dereliction of duty.

Moreover, syntax canons (and other interpretive canons) also constitute presumptions about legislative behavior that do not appear to have an empirical basis and perhaps reflect judicial judgments about how Congress should legislate, *i.e.*, the obligations of members in considering and voting upon legislation. *See* Friedrich v. City of Chicago, 888 F.2d 511, 516 (7th Cir. 1989); Edwards v. United States, 814 F.2d 486, 489 (7th Cir. 1987) (Posner, J.). *See generally* Bell, *supra* note 214, at 156 n.261.

vote on the basis of the text and the public justification.

2. *New Textualist Methodology*

The new textualist's methodology is simple.[218] Courts should interpret statutes based on the ordinary meaning of the words used in the statute and various rules of grammar[219] and syntax, such as the interpretive canon that a court must interpret a statute so as to give every word some effect.[220] If the ordinary meaning of the words and the syntax and grammatical devices do not yield an interpretation, the court should fit the statute into the corpus of the law.[221] Ordinarily, a court should not refer to legislative history when interpreting a statute.[222]

Stated alternatively, the new textualists place no reliance on legislators' subjective understanding of a statute at the time they vote on it, but rely only on the objective meaning of the text of the statute, *i.e.*, the understanding of the statute that the reasonable person would adopt.[223] The only relevant text to be construed in this objective manner is the text of the statute—the text of various elements of the legislative history lack relevance because according such documents any legal effect is illegitimate.[224]

New textualism has undergone a fearsome counterattack.[225] However, this counterattack rarely contests the validity of the three premises underlying new textualism outlined above. Rather, critics argue that new textualism cannot yield

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218 The approach outlined above is that of Justice Antonin Scalia, the leading new textualist. *See Green*, 490 U.S. at 527–30 (Scalia, J., concurring). *See generally Why Learned Hand*, *supra* note 68, at 1005–06. Many pursue a similar approach. However, Judge Frank Easterbrook, who shares with new textualists a belief in public choice theory and a skepticism about legislative intent, does use legislative history. In part this appears to stem from his view that the text of statutes is ordinarily indeterminate. *See* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 89, 91 (1984).

219 *See* Crandon v. United States, 494 U.S. 152, 169–70 (1990) (Scalia, J., dissenting).

220 *See* Mertens v. Hewitt Assocs., 508 U.S. 248, 257–58 (1993) (Scalia, J.); Church of Scientology v. IRS, 792 F.2d 153, 156–57 (D.C. Cir. 1986) (Scalia, J.), *aff'd*, 484 U.S. 9 (1987). For a general statement of the rule, see POPKIN, *supra* note 127, at 276; 2A SINGER, *supra* note 155, § 46.06, at 119–26.

221 *See* POPKIN, *supra* note 127, at 276; *see also* Karkkainen, *supra* note 172, at 408–11.

222 *See, e.g.*, *Conroy*, 507 U.S. at 519 (Scalia, J., concurring); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621–23 (1991) (Scalia, J., concurring); *Green*, 490 U.S. at 527–30 (Scalia, J., concurring).

223 *See* Correia, *supra* note 6, at 1156 & n.94.

224 *See Conroy*, 507 U.S. at 519 ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

225 *See Statutory Interpretation and the Uses of Legislative History*, *supra* note 160; *infra* notes 226, 229–40 and accompanying text.

results in difficult cases, regardless of its basis in constitutional or political theory, and unduly increases the power of interpreters relative to lawmakers.

First, critics argue, because words lack any precise inherent meaning outside the context in which they are used, heavy reliance on text to interpret statutes will produce unreasonable, stilted, and erroneous interpretations of statutes. Words have meaning only within the context in which they are used, and thus context must be considered in interpreting statutory text. Legislative history forms a crucial part of that statutory context. In attempting to construe words without considering context, new textualists misconstrue those words.[226]

Indeed, the most elementary reason for rejecting new textualism, and perhaps the one that most motivates the courts, is that more information is better than less.[227] When faced with difficult questions of statutory interpretation, courts naturally seek as much guidance as possible, and legislative history can provide such guidance.[228] At least legislative history is produced by the body that enacted the statute.

Second, new textualism allegedly increases the power of interpreters, namely courts and administrative agencies, at the expense of lawmakers, such as Congress and the President,[229] by increasing the likelihood that the relevant interpreter will find a statute ambiguous.[230] A court must decide a case even when confronting an

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[226] *See* Eskridge, *supra* note 3, at 669; Karkkainen, *supra* note 172, at 421–22. *See generally* Alienikoff, *supra* note 9, at 23; Breyer, *supra* note 73, at 848–61; McNollgast, *supra* note 161, at 718, 738; Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93, 107–08, 125, 127 (1995); Sunstein, *supra* note 135, at 416–17, 423–24, 431 n.96.

[227] *See Wisconsin Pub. Intervenor*, 501 U.S. at 611 n.4 (White, J.) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."); William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 533 & n.86 (1992); *see also Colloquies: What They Are and What They Do*, 33 TAX NOTES 128, 128 (1986) (reporting the statement of a former Internal Revenue Service Commissioner that "[i]f the statute is not clear, you look for anything you can find"); *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 67 (citing the testimony of Judge Patricia Wald: "And somehow to suggest that I should not look at legislative history, not just the reports, but even the whole length and breadth of it, makes me feel like somebody is tying one hand behind my back in getting at congressional intent.").

[228] This point can also be stated negatively: courts rely on legislative history to avoid the difficult intellectual work. *See* DICKERSON, *supra* note 4, at 138 & n.4, 164; Slawson, *supra* note 171, at 399.

[229] The President has a dual role: he participates in lawmaking through the exercise of the veto and in interpreting law through his supervision of administrative agencies. *See* Bell, *supra* note 214, at 117 n.66.

[230] *See* Sunstein, *supra* note 135, at 430 & n.91; Eskridge, *supra* note 3, at 675–76; Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663, 1682 (1991); Karkkainen, *supra* note 172, at 475; Plass, *supra* note 226, at 125. *See generally* Bell, *supra* note 214, at 106–07, 121, 126–27, 135–45. *But see* Orrin S. Kerr, *Shedding*

ambiguous statutory text.[231] Under new textualism, if a court finds a statute ambiguous after it has considered the ordinary meaning of words and various grammar and syntax rules, it must essentially make policy judgments to resolve the interpretive question,[232] or, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[233] allow agencies to do so.[234] New textualism rejects sources produced by electorally responsible institutions explicating the policies underlying the statute, namely congressionally-produced legislative history, that could help courts and agencies resolve ambiguities before having to make their own policy judgments. Such an expansion of judicial and agency discretion has implications for the relative powers of governmental institutions. If most judges could resolve most issues based on text, as Justice Scalia asserts that he can,[235] new textualism might well reduce judicial discretion and return power to elected legislators and chief executives.[236] If, as is more likely, most judges view text as largely indeterminate,[237] new textualism will instead more often require judges and

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Light on Chevron: *An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. REG. 1, 2 (1998). At the very least, Scalia's approach is no more determinate than conventional interpretive techniques. *See* Karkkainen, *supra* note 172, at 423–24; Schacter, *supra* note 116, at 593, 644.

[231] *See* Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 382; Sunstein, *supra* note 135, at 430.

[232] *See* Karkkainen, *supra* note 172, at 407, 411–14; *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 67.

[233] 467 U.S. 837 (1984).

[234] In *Chevron*, the Court suggested that administrative agencies, in resolving such unresolved questions, rely on their own policy preferences or those of the political branches of government, *see id.* at 865, without attempting either to determine how the enacting legislature would have resolved the issue or to discern the enacting legislature's policy preferences. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 502, 525 (1989); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

[235] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521. Many observers question Justice Scalia's conclusions that the statutes at issue in recent cases are unambiguous. *See, e.g.*, Karkkainen, *supra* note 172, 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).

[236] Even the "dictionary" meaning of a word is not determinate, and it may provide a court with substantial discretion. The Supreme Court has used a variety of dictionaries—27 between 1988 and 1994—in determining the "plain meaning" of statutory terms. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437–39 (1994). *See generally* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998).

[237] *See* National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 418 (1992); Easterbrook, *supra* note 218, at 98; Farina, *supra* note 234, at 460–61.

administrative agencies to resolve cases by relying upon their own policy views without any guidance from Congress. Such a preference for unguided judicial and agency policymaking (albeit, in the case of administrative agencies, influenced by the *current* President and Congress)[238] over expressions of policy by the legislature that enacted the statute seems inconsistent with the principle that the courts and agencies should act as agents of Congress.[239]

Notice, however, that neither of these attacks contests the three premises of new textualism analyzed above.[240] Rather, they suggest that new textualism will lead to erroneous interpretations based on the indeterminate nature of language and will increase the discretion and thus the power of courts and agencies at the expense of Congress.

B. *Intentionalism*

Intentionalism requires the interpreter to construe a statute according to the "intent" of the enacting legislature; the interpreter must determine which interpretations the enacting legislature wanted it to adopt, or would have wanted it to adopt had the relevant issue been brought to the legislature's attention. Ascertaining this "legislative intent" requires not only an examination of the text of the statute, but, in addition, the statute's "legislative history," because sometimes legislatures, like individuals, use words that do not reflect their intentions.

Two intentionalist approaches, simple intentionalism and imaginative reconstruction, should be distinguished. Simple intentionalism requires the interpreter to determine the intent the members of the legislature actually possessed when enacting the statute. Thus, simple intentionalism will aid the interpreter only if the members of the legislature had a particular situation in mind, *e.g.*, if the

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[238] Of course, the preferences of the *current* Congress and President may conflict with the preferences of the enacting Congress. *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 608 (1993); Diver, *supra* note 52, at 579–81, 584; Pierce, *supra* note 235, at 765.

[239] *See* DICKERSON, *supra* note 4, at 7–9; HURST, *supra* note 125, at 33, 40; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 408 (1991); Eskridge & Frickey, *supra* note 9, at 325–26; Gonzalez, *supra* note 9, at 636–46.

[240] There is yet a third argument for rejecting textualism. Legislative history makes cases somewhat easier to decide. *See* Slawson, *supra* note 171, at 399. Frederick Schauer makes this sort of argument with respect to focus on text. *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 253–56 (1990). Schauer also argues that this is an advantage of rules, *see* SCHAUER, *supra* note 157, at 145–49, 229–33. Instead of having to determine the relevance of the corpus of the law and fit the statute within it, one can narrow the issues by examining legislative history. *See generally* SUNSTEIN, *supra* note 74, at 42 (discussing the importance of lack of time for judicial decisionmaking and noting that precedent is liberating by allowing courts not to constantly revisit first principles).

councilpersons that enacted the Founders' Park ordinance actually had the inoperable jeep in mind when enacting the ordinance. If the legislators did not have the relevant specific situation in mind, they could not have formed any intent regarding that situation. "Imaginative reconstruction" adapts intentionalism to this situation. A legislature can have an "intent" even on unforeseen issues—the interpreter determines this intent by intuiting the response legislators would have provided had the issue been brought to their attention.[241] Thus, based on the text and legislative history of a statute (as well as the general circumstances leading to the statute's enactment and the values and attitudes common during that period in which the legislation was enacted),[242] the interpreter seeks to draw conclusions about how the legislature would have voted on the issue if it had arisen.[243]

In general, the courts seem to have adopted intentionalism—at least simple

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[241] *See* Burnet v. Guggenheim, 288 U.S. 280, 285 (1933) (Cardozo, J.); Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989); Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 171 (1947) ("[The task] is no less than to decide how those who have passed the 'enactment' would have dealt with the 'particulars' before [the judge], about which they have said nothing whatever."); Win-Chiat Lee, *Statutory Interpretation and the Counterfactual Test for Legislative Intention*, 8 LAW & PHIL. 383, 393–94 (1989); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

[242] *See* Posner, *supra* note 241, at 818.

[243] The primary proponent of this approach is Judge Richard Posner. *See, e.g., id.* at 817; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 103–05, 273–76 (1990). The approach is subject to powerful critiques. *See* WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 101 (Supp. 1992); *see also* Easterbrook, *supra* note 188, at 537–39; Lee, *supra* note 241, at 397–401.

Because of the difficulty of truly applying "imaginative construction," in practice it is little different from the Hart and Sacks "Legal Process" approach, *see* William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 392–95 (1990); Sunstein, *supra* note 135, at 434–36; *supra* note 137. The Legal Process approach focuses more on what a *reasonable* Congress with the enacting Congress's overall statutory goals would have wanted. Some argue that because of the difficulty in discerning such a hypothetical intent, those who engage in imaginative reconstruction really base their conclusion on their views of what the legislature should have intended, not what it would have intended. *See* 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, 63–64; *see also* Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 59 n.1 (1988); USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 43.

Furthermore, "imaginative reconstruction" as advocated by Judge Richard Posner ignores institutional issues. Before an issue is addressed by a legislature, it must go through many steps in which some legislators wield more power than others. For instance, the House Rules Committee may have prevented the particular issue from coming up before the House of Representatives. Surmising the outcome of a hypothetical vote on the issue, assuming both that the issue would have come before the chamber and that the legislators would have cast their votes based on their views of the merits of the issue, ignores the institutional realities of the legislative process.

intentionalism.[244] Unfortunately, intentionalism has not been rigorously defined by scholars who find it convincing. Instead, the approach has, in large measure, been defined by those who find it deficient. I will discuss the assumptions underlying intentionalism and the unfortunate methodological consequences intentionalism has produced.

1. *Intentionalist Premises*

Three premises that underlie intentionalism and correspond to the three previously discussed premises underlying new textualism merit discussion. First, at least as seen by its critics, intentionalism is individualistic and non-institutional; it ignores the role of legislative institutions. Second, intentionalists do not view the vote on a statute as the approval of statutory text; they view such a vote as an enactment of the subjective intent shared by a majority of the legislature. Third, the intentionalist approach implicitly incorporates the belief that a majority of legislators will often share an intent regarding many of the issues that arise (or at least would have had the issues been broached). These assumptions are problematic, and lead to unfortunate methodological consequences.

a. *The Significant Action in the Legislative Process Is the Vote of Each Chamber on Legislation*

In the view of its critics, intentionalism, like new textualism, focuses on legislatures as collections of individuals rather than as institutions. Intentionalists aggregate the intentions of individual legislators—in particular, the intentions of a majority of the individual legislators form the foundation of statutory law. The subjective intent that a majority of legislators either shared, or would have shared had a particular issue been raised, constitutes the legislative intent that governs interpretation of the statute.[245] Dean Paul Brest's description of the intentionalist

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[244] *See* DICKERSON, *supra* note 4, at 137; FARBER & FRICKEY, *supra* note 66, at 89; Balkin, *supra* note 158, at 772–73 & n.87; *infra* note 259. The courts characteristically assert that the interpretive task requires determining legislative intent, and then canvass both the text and legislative history to ascertain that intent. *See id.* The Supreme Court has not explicitly approved "imaginative reconstruction" as an interpretive approach, and has sometimes explicitly rejected it, *see* West Va. Univ. Hosp. v. Casey, 499 U.S. 83, 100–01 (1991) (Scalia, J.); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 185 (1978) (Burger, C.J.).

[245] *See* DICKERSON, *supra* note 4, at 87–88; DWORKIN, *supra* note 121, at 320–21; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–13 (1980); Eskridge, *supra* note 243, at 380; Eskridge & Frickey, *supra* note 9, at 326; Heidi M. Hurd, *Interpreting Authorities*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 405, 422 (Andrei Marmor ed., 1995); Moore, *supra* note 162, at 348.

approach highlights this aspect of intentionalism.[246] He observes that intentionalists not only examine the text of a statute, but also accord each legislator an "intention-vote."[247] By counting these intention-votes, one can determine the legislative intent regarding a particular issue.[248]

A focus on individual legislators rather than the legislature as an institution, in conjunction with the democratic requirement of equality among legislators, would seem to demand that no one legislator's intent be considered more important than that of any other.[249] However, such an approach ignores institutional obligations and institutional actions.[250] Indeed, the more cogent intentionalists build a theory based upon the special institutional position of committees. As an institution, Congress delegates to committees the responsibility of determining legislative policies, subject to the review and consent of the chamber as a whole.[251] Accordingly, the views of the committee and its representative in floor debates, *i.e.*, the floor manager,[252] which are in effect ratified by approval of the committee's recommended statutory text, should receive special weight. However, judicial practices go far beyond the approaches that this delegation-assent theory would

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[246] *See* Brest, *supra* note 245, at 212–13. Brest discusses the intentionalist approach in preparing to attack the "original intent" approach to Constitutional interpretation. *See id.*

[247] *See id.* at 212.

[248] *See id.* at 212–13. Brest applies this intention-vote technique to the question of whether the Hart-Fuller "no vehicles in the park" ordinance prohibits operation of mopeds within a park. *See id.* at 213. The "intentionalists" must determine the intent of each member of the city council on this "moped" issue when the council voted on the ordinance. *See id.* If a majority of members did not intend to ban mopeds, the statute would not prohibit mopeds from the park. Brest acknowledges the abstract nature of the discussion and acknowledges that those who focus on legislative intent do not use the intention-vote methodology, but he properly notes that the "different, and much cruder ways of determining adopters' intentions" used in the real world "assume[ ] the existence of an attainable ideal which is fairly described by" the intention-vote metaphor. *See id.*

[249] *See supra* text accompanying notes 179–84. If the members were secretly polled and a majority agreed on the meaning of a statute with regard to a particular issue, that majority interpretation would constitute the intent of the legislature. Each intent, whether expressed publicly in legislative documents viewed as authoritative, expressed privately, unexpressed, or unformed at the time of the vote, counts equally.

[250] *See* Breyer, *supra* note 73, at 866.

[251] *See* SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (Hand, J.); Correia, *supra* note 6, at 1157–58; Hurd, *supra* note 245, at 423; Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 778–81, 783 (1966); James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 312 (1995); Zeppos, *supra* note 185, at 1345–47; *see also* Breyer, *supra* note 73, at 858–60, 863–64 (delegating work to staff).

[252] The floor manager is a delegate of the committee. *See* United States v. Wrightwood Dairy Co., 315 U.S. 110, 125 (1942); SMITH & DEERING, *supra* note 144, at 129.

permit—courts, with the blessing of many scholars, use elements of legislative history that do not merit recognition under a delegation-assent theory.[253] Moreover, delegation-assent theorists rarely offer a theoretical justification[254] for imposing on legislators the obligation to either voice disagreement with committee reports or consider themselves bound by them.[255]

As we shall see, intentionalism's focus on Congress as merely the sum of individual legislators creates insurmountable methodological problems. Viewing legislatures as institutions avoids those methodological problems. More particularly, one can ground the justification for the use of legislative history upon the belief that legislatures, as institutions, have a duty to explain statutes and that individual legislators have a corresponding duty to address those explanations.

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[253] For instance, courts give weight to: (1) statements of sponsors of legislation (who surely have not been delegated any power), *see* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 221 & nn.74–75 (1988); Giles, *supra* note 171, at 367, (2) testimony of witnesses at congressional hearings, *see id.* at 366 nn.46–55, 385–88 (illustrating in an appendix the use of nonlegislator contributions in U.S. Supreme Court cases), and even (3) preliminary reports prepared by executive branch officials or private groups before submitting proposed legislation, *see generally* Kosak v. United States, 465 U.S. 848, 856–57 & n.13 (1984) (relying on report drafted by a Department of Justice official fifteen years before the enactment of the relevant statute); Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 221–22 & nn.30, 32 (1979) (relying on the report of National Association of Insurance Commissioners). Sometimes the Court provides no evidence that Congress endorsed the nonlegislator statements on which they rely. *See* Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 204–12 (1980); Giles, *supra* note 171, at 360, 375–76. Surely a delegation-assent theory does not justify such practices.

[254] Ronald Dworkin does explore the theoretical justifications of considering legislative history in *Law's Empire*. He argues that statutes regarding moral issues must embody consistent principles. *See* DWORKIN, *supra* note 121, at 178–84. Courts must generally render decisions on the basis of principles consistent with either precedent or statutes. *See id.* at 225–28. Certain aspects of legislative history, such as committee reports, provide a basis for courts to use in interpreting statutes consistently with their underlying principles. *See id.* at 343.

[255] *See* DICKERSON, *supra* note 4, at 159; POPKIN, *supra* note 127, at 482; MacCallum, *supra* note 251, at 780. Delegation-assent theorists might suggest that legislators have an obligation to either respond to or consider themselves bound by the official explanation of a bill because the members know that courts (and agencies) use legislative history. Because every legislator has notice of the judicial use of legislative history and an opportunity to participate in creating that legislative history, each should be bound by his failure to avail himself of the opportunity to set forth his views in the legislative history. *See* DICKERSON, *supra* note 4, at 159; Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena For Your Thoughts?*, 63 N.C. L. REV. 879, 977–78 (1985). However, such an argument is circular: judicial use of legislative history is legitimate because legislators know courts use legislative history.

b. *A Vote on the Statute Is a Vote to Make the Subjective Intent of the Majority the Law*

In contrast to the new textualists, who believe that a vote on the statute represents merely an expression of approval or disapproval of the statutory text, intentionalists believe that the vote on the statute is a vote to convert the subjective intent of the majority into law. The vote on a statute acts as a toggle switch. If a majority of legislators share an intent, but the legislature does not enact a statutory provision memorializing that shared intent, the shared intent can have no legal effect.[256] However, if the legislature enacts a statute purporting to memorialize that intent, then that intent becomes binding law, even if the ordinary meaning of the terms chosen to memorialize that intent do not reflect that shared intent.[257] When the interpreter concludes that the statute's "text cannot possibly reflect the actual intent of Congress," because of a typographical error, for instance, legislative intent rather than the text governs.[258] Thus, once the statute passes, intent, not text, is authoritative.[259]

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[256] *See generally* Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501–04 (1988) (Scalia, J.) (stating that in the absence of statutory language to interpret, legislative history is without legal effect even if the intent it evidences is clear); IBEW v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987) ("A cardinal principle of the judicial function of statutory interpretation is that courts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point."). On this, they agree with new textualists. *See supra* note 188 and accompanying text.

[257] As Justice Oliver Wendell Holmes once wrote: "We are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908); *accord* Rosebud Sioux Tribe v. Kniep, 430 U.S. 584, 597 (1977); *see also* Sullivan v. Eberhart, 494 U.S. 83, 106 (1990) (Stevens, J., dissenting) ("[W]e . . . do not sit to insist that Congress express its intent as precisely as would be possible. Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily."); West Va. Univ. Hosp. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting).

[258] *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (Rehnquist, J.) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."); United States v. Locke, 471 U.S. 84, 120–25 (1985) (Stevens, J., dissenting); POSNER, *supra* note 243, at 267–69; Breyer, *supra* note 73, at 850–51. *See generally* 2A SINGER, *supra* note 155, § 47.37, at 283–90.

[259] *See* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Marcus v. Hess, 317 U.S. 537, 542 (1943); United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 53–54 (1942); Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). *See generally* 2 SINGER, *supra* note 155, § 45.05, at 22; HURST, *supra* note 125, at 32 ("The standard criterion for proper interpretation of a statute is to find the 'intention of the legislature.'").

c. *It Is Likely That There Will Be One Subjective Intent Regarding the Statute Shared by a Majority of Legislators.*

Intentionalism presumes that a majority of legislators will often share one subjective intent, or would have, had a particular issue been raised. Intentionalist courts could not use legislative intent to resolve many cases if they did not believe that legislative majorities often share a purpose. The argument over the importance of "intent" to interpretation would hold little significance if intent existed as seldom as new textualists claim it does.[260]

Intentionalists do not address the claims that few members think intently about bills and that legislators' votes may bear little relation to their views of a statute's merits.[261] To the extent that they address such claims,[262] they rely on the delegation-assent theory described earlier.[263] Indeed, the methodological problems faced by intentionalism result from intentionalists' pursuit of legislative intent despite cogent arguments that a majority will rarely share a common intent.

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[260] Of course, "imaginative reconstruction" partially addresses this problem, by allowing courts to find intent even when a majority of legislators did not form an intent regarding a particular issue. Nevertheless, imaginative reconstruction assumes that a majority of legislators would have agreed on the resolution of a particular issue, making it vulnerable to the same critique leveled against the simple intentionalist view that legislative majorities frequently share an actual intent. *See supra* notes 201–07 and accompanying text.

[261] The intentionalist could argue, in response, that we should honor the wishes of those legislators who possess the greatest expertise and knowledge. *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); FRIENDLY, *supra* note 195, at 216.

However, such a rationale conflicts with democratic theory. In an election, we do not give greater weight to the votes cast by more knowledgeable citizens. *See* Reynolds v. Sims, 377 U.S. 533, 562–63, 567–68 (1964) (establishing the one-person-one-vote principle); *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting) ("Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized."); MAYO, *supra* note 179, at 108–13. Similarly, agencies possessing expertise remain subject to the control of democratic institutions. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865–66 (1984); Sierra Club v. Costle, 657 F.2d 298, 404–10 (1981); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 99, 100, 105 (1993); Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1, 46–47 (1996). *See generally* J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 585 (1972); MAYO, *supra* note 179, at 94, 275–76.

[262] Intentionalists do not directly address the claims of cycling and nontransitive choices made by public choice theory.

[263] *See supra* note 251 and accompanying text.

2. *The Intentionalists' Methodology*

a. *Using Legislative History to Find Intent*

Intentionalists need a method for determining legislative intent—either legislators' actual intent or the underlying attitudes that would have led legislators to agree upon a particular answer if a particular issue had arisen. Traditionally, courts have relied upon both the ordinary meaning of the statutory text and "legislative history" to discern legislative intent. Legislative history consisted of a limited set of legislatively-produced documents—primarily, committee reports and floor debates. That approach has evolved. Currently, courts use anything that can help them discern legislative intent, including, in some jurisdictions, the testimony of legislators. This evolution results from intentionalists' efforts to find legislative intent where none exists.[264]

Describing intentionalist methodology in terms that allow comparison with new textualist methodology, intentionalist methodology's goal is subjective rather than objective. The intentionalist seeks the subjective understanding of the members of the legislative majority rather than the understanding of a reasonable person reading the statutory text.

b. *The Problems*

Unfortunately, using legislative history to determine the subjective intent of a majority of legislators presents serious problems. First, the use of legislative history to determine legislative intent conflicts with the democratic principle that all representatives are equal.

The documents that comprise traditional legislative history contain the statements and views of few members of Congress—for any particular bill, most legislators do not participate in committee proceedings and remain silent during floor debate. Thus, using legislative history to discern intent introduces a bias toward the views of representatives who express their views in a certain narrow range of documents. The views of the many legislators who expressed their views either in other public fora (such as in political campaigns or on the Sunday talk shows[265]) or privately (to other legislators or staff members), or who never expressed them, do not appear in the legislative history.[266] The legislative history

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[264] *See* Slawson, *supra* note 171, at 397–403 (citing four factors contributing to the increased use of legislative history).

[265] For example, "Face the Nation," "This Week," and "Meet the Press."

[266] Even if the views of every legislator were fully known, intentionalists would then face the additional problem of aggregating the intentions of individual legislators so as to determine an intent of the legislature. In general, such "aggregation" problems are insurmountable. *See* Pildes

also will not reflect the "intent" of members who did not formulate specific views before the vote on the statute.

Accordingly, if the views of all legislators, those who expressed their views in other public fora, those who expressed their views privately, those who did not express their views, and those who did not form views, as well as those who expressed their views in the legislative history, are to be given one intention-vote–the legislative history will surely provide unreliable evidence of the intent of the majority of legislators. Rather, the intent set forth in the legislative history will be biased toward the views of those who expressed their intent.[267]

Second, as noted earlier, a majority of legislators will rarely share any intent. Most legislators will not have given sufficient attention to the statute to form an intent on difficult interpretive issues. Moreover, the legislators' votes may not reflect their intent, if, as often happens, they vote for reasons largely unrelated to their view of the statute's merits.

Third, we do not have and will likely never have sufficient information to determine the subjective intent of legislative majorities. At best, legislative history provides indirect and inaccurate information regarding the views of the two types of legislators that intentionalists should most wish to learn about: (1) the typical majority voter, *i.e.*, the legislators who made up the bulk of the legislative majority; and (2) the swing voters, *i.e.*, the legislators who cast the deciding votes. Worse yet, the legislative that history may not provide *any* explanation of some legislative compromises.

Intentionalists should arguably focus on the views of the typical majority voter or the swing voters.[268] The focus on the typical majority voter reflects majoritarian concerns—the views of such a legislator likely resemble the views of the majority of legislators who comprise the victorious legislative majority.[269] The focus upon swing voters rests on a causation argument: the swing voters were the legislators most likely to have voted against the bill, and if they had done so, it would have

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& Anderson, *supra* note 121, at 2206 (rejecting notion that courts' role in interpreting statutes is to ascertain the aggregation of the individual legislators' personal preferences); DWORKIN, *supra* note 121, at 320–21; Karkkainen, *supra* note 172, at 416; Moore, *supra* note 162, at 348–49, 351; Eskridge & Frickey, *supra* note 9, at 326.

267 Historians face the same problem. *See* DANIEL J. BOORSTIN, HIDDEN HISTORY 7–9 (1987) (discussing the biases introduced into historical works as a result of the greater durability of written rather than oral communications); LOUIS GOTTSCHALK, UNDERSTANDING HISTORY: A PRIMER OF HISTORICAL METHOD 45–46 (1950); *see also* RALPH ELLISON, THE INVISIBLE MAN 439 (2d ed. 1995) (1952).

268 *See* Easterbrook, *supra* note 243, at 63; Costello, *supra* note 243, at 40 & n.2, 61–62; Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 436–37, 449 n.96 (1988); Starr, *supra* note 171, at 375–76 (questioning use of legislative history as indicative of congressional intent).

269 *See* DWORKIN, *supra* note 121, at 320.

been defeated—thus, in some ways, their votes determined the outcome.[270] However, discerning the intent of either the typical majority legislator or the swing legislators is a daunting task because we have little information about their views.[271] Such members generally remain silent during legislative deliberations and often either do not give great thought to the proposed legislation or do not vote solely on the legislation's merits.

The statements by the sponsors and leading proponents of the bill may provide indirect evidence held by the bulk of the members of the majority or the swing voters. However, those who speak or prepare committee reports probably hold more extreme views than either the ordinary member of the majority or the swing legislator.[272]

Moreover, the legislative history frequently does not even provide an accurate picture of the intent of those most involved in drafting and agreeing to a particular compromise. Much that is crucial, perhaps the most crucial parts of the legislative process, is not documented in any record, either official or unofficial.[273]

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[270] *See* McNollgast, *supra* note 161, at 739–40.

[271] Farber and Frickey suggest that judges can rely upon their "intuitive sense of the legislative center of gravity" to reach conclusions about the views of the "median" or "'typical' centrist" legislator. *See* FARBER & FRICKEY, *supra* note 66, at 54.

[272] *See* Eskridge, *supra* note 243, at 383–84; Mayton, *supra* note 75, at 144–45 & n.101; McNollgast, *supra* note 161, at 711–12. To the extent that committees do not reflect the views of the chamber as a whole, committees and their representatives on the floor, *i.e.*, floor managers, will probably hold views that diverge from those of most legislators. *See* Bell, *supra* note 214, at 147 n.223.

[273] Most political maneuvering, legislative negotiation, and compromise takes place in circumstances where no official records are kept—at caucuses, leadership meetings, meetings with the President, and private conferences. *See* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131 & n.30, 1141 (1983); Diver, *supra* note 52, at 556–57; Macey, *supra* note 64, at 228, 239; Rodriguez, *supra* note 6, at 220–21; Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 575 (1992); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 200, 202 (1983); *see also* Baade, *supra* note 86, at 1094; Garth L. Mangum, *Legislative History in the Interpretation of Law: An Illustrative Case Study*, 1983 B.Y.U. L. REV. 281, 281, 298–99, 300 (noting that the public history of the Job Partnership Training Act of 1982 did not reflect the realities of the political process surrounding the bill's enactment and that "[t]he Committee reports may be more accurately described as justifications to the various supporters than as explanations of congressional intent"). *But see* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 880–82, 903–04 (1987) (suggesting that legislative history can be accurate even when critical events take place privately).

c. *The Attempted Solutions*

The courts and "intentionalist" scholars have pursued two basic approaches in addressing the inadequacy of traditional legislative history as a tool for determining the subjective intent of legislative majorities. One approach expands the legislative record or, more radically, transforms statutory interpretation from an exercise in interpreting text into a fact-finding exercise. A second approach involves acknowledging the inaccuracy of traditional legislative history but refusing to consider additional information because of countervailing values. The first approach will fail; the second is arbitrary.

The first approach seeks to increase the judiciary's sophistication in discerning legislative intent. On a practical level, courts have, over time, expanded "the record" of legislative action, considering an increasingly wider range of materials.[274] Initially, courts referred primarily to statements in floor debates and committee reports.[275] While these remain the preferred sources,[276] courts now refer to a wider range of documents, including transcripts of mark-up sessions,[277] testimony at congressional hearings,[278] and documents prepared by nonlegislators.[279] Some have

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[274] *See* Skeer v. EMK Motors, Inc., 455 A.2d 508, 512–13 (N.J. Super. Ct. App. Div. 1982) (relying upon governor's press releases as aid to statutory interpretation); Raybestos-Manhattan, Inc. v. Glaser, 365 A.2d 1, 9–10 (N.J. Super. Ct. Ch. Div. 1976) (noting that courts may properly consider "legislative history materials which may never have met the legislative eye," including newspaper articles, letters written by nonlegislators, and outside speeches by legislators); USING AND MISUSING LEGISLATIVE HISTORY, *supra* note 162, at 121–23 ("Almost every conceivable variety of legislative history has been accepted as bearing upon the proper interpretation of a statute. . . .").

[275] *See* CURTIS, *supra* note 2, at 52; *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 140 (testimony of William N. Eskridge); Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 tbl.2 (1982) (inference from data).

[276] *See* Carro & Brann, *supra* note 275, at 304 (inference from data); Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 291 tbl.2 (1982) (inference from data).

[277] *See* Borrell v. United States Int'l Communications Agency, 682 F.2d 981, 988 (D.C. Cir. 1982); Ross, *supra* note 273, at 575 (recommending that transcripts of mark-up sessions be published); Wald, *supra* note 273, at 202 & n.56.

[278] *See* Giles, *supra* note 171, at 385–88; *see also* Lowe v. SEC, 472 U.S. 181, 190–201, 200 nn.44–46 (1985); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 176, 177 n.23, 179–85 (1978).

The expansion of the legislative "record" can also be seen in the Court's attitude toward reliance upon testimony given in congressional hearings. In 1931, a unanimous Court held that statements made to committees of Congress and by Senators who were not in charge of the bill were entitled to no weight "[f]or reasons which need not be restated." McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493–94 (1931). Currently, the Court regularly refers to testimony provided at committee hearings. *See* Giles, *supra* note 171, at 385–88 (showing regular use of

recommended further expansion of the legislative record, calling for the publication of documents that currently remained unpublished.[280] More significantly, some courts have begun to accept sworn statements regarding legislative intent from legislators.[281]

Consistent with these developments, but on a more theoretical level, Nicholas Zeppos offers a rigorous and well-developed theoretical argument that legislative intent resembles the intent of individuals or organizations, to which courts frequently attach legal consequences.[282] Zeppos argues that the methodology used in determining legislative intent should resemble that used in determining intent in other contexts.[283]

This first approach of expanding the legislative record and reformulating statutory interpretation as fact-finding will fail. While it may reduce the bias toward the views of those who spoke as opposed to those who did not, such an approach will surely not eliminate that bias. Nor will it solve the problems caused by legislators' failure to give detailed thought to statutes and their frequent decisions to vote for reasons unrelated to their understanding of a statute. Such an approach

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congressional hearing testimony in the Court's opinions from the mid-1940s until 1989). Admittedly, the Court has cited *McCaughn* with approval as recently as 1986, in *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

[279] *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 743–47 (1989); Kosak v. United States, 465 U.S. 848, 856–57 & n.13 (1984); Giles, *supra* note 171, at 385–89.

[280] *See, e.g.*, Robert M. Rhodes et al., *The Search for Intent: Aids to Statutory Construction in Florida*, 6 FLA. ST. U. L. REV. 383, 405–07 (1978) (recommending filing of all "reports, memoranda, fact sheets, and other such material which seeks to analyze, explain, 'sell,' or defend legislation"); Ross, *supra* note 273, at 575 (recommending that transcripts of mark-up sessions be published).

Some have urged a more sophisticated and critical review of existing materials. *See, e.g.*, FARBER & FRICKEY, *supra* note 66, at 99–100; Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL'Y 43 (1988); McNollgast, *supra* note 161, at 741; *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 67 (testimony of Judge Patricia M. Wald).

[281] The California courts have held that sworn statements of legislators should be accepted in attempting to determine legislative intent. *See, e.g.*, Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049, 1055–56 (Cal. 1972).

[282] Zeppos draws his noncontroversial examples from cases involving the intent of individuals or hierarchical organizations in which there is a clear delegation of authority. *See* Zeppos, *supra* note 185, at 1341–42.

[283] *See id.* at 1343; *cf. Hearings Before the Comm. on the Nomination of David H. Souter* 131 (1990) (statement of Judge David H. Souter) (analogizing determining legislative intent to trial-type factfinding); *Interbranch Relations*, supra note 73, at 81 (testimony of the Honorable Patricia Wald) (arguing that critics should not be concerned that judges will give undue weight to the wrong information because "[j]udges spend their whole lives deciding what information is relevant in other contexts").

does not even solve the lack of information problem. Though courts have expanded the sources recognized as legislative history,[284] they ultimately, like Alice and the Red Queen,[285] running harder and harder yet making no progress toward their goal, seem no closer to discerning actual legislative intent.

A second approach involves acknowledging the inadequacy of legislative history. Even if traditional legislative history does not reflect the subjective intent of the majority, countervailing concerns require courts and agencies to limit their attempts to discern true subjective intent. For instance, a desire to enhance citizens' ability to ascertain the law can justify limiting the inquiry into legislative intent.[286] The more sophisticated the judicial search for subjective legislative intent, the more citizens will have to consult numerous documents, some of which may even be unavailable.[287] Concerns about the reliability of the evidence of intent could also justify limiting the inquiry into legislators' subjective intents—the unofficial sources of information regarding legislative intent, particularly legislator testimony, may be too unreliable.[288]

Ultimately, this second approach, limiting the inquiry into subjective intent based upon competing values, seems arbitrary.[289] The approach requires the judiciary to view subjective intent as the law, but to adopt a technique that clearly will not uncover that subjective intent. In addition, the approach will invariably require the courts to make questionable distinctions between documents that can be considered and those that cannot. Moreover, the dangers posed by the use of various categories of documents probably varies greatly depending upon the circumstances

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[284] *See supra* notes 274–81 and accompanying text.

[285] *See* LEWIS CARROLL, *Through the Looking Glass and What Alice Found There*, *in* THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROLL 103–04 (Edward Guiliano ed., 1982).

[286] *See* DICKERSON, *supra* note 4, at 195–96.

[287] Some argue against judicial use of legislative history precisely because the practice makes ascertaining the law much more difficult and expensive. *See* United States v. Public Util. Comm'n, 345 U.S. 295, 319–20 (1953) (Jackson, J., concurring); *In re* Sinclair, 870 F.2d 1340, 1342–43 (7th Cir. 1989); Dickerson, *supra* note 273, at 1139–41, 1146; Bell, *supra* note 214, at 112 n.31 (citing *In re Sinclair*, 870 F.2d at 1342–43).

[288] *See* DICKERSON, *supra* note 4, at 195.

[289] Such a flaw need not be fatal. Sometimes courts cannot avoid drawing arbitrary lines, lines that embody no coherent theory distinguishing cases on one or the other side of the line. For instance, Professor Richard Pearson criticizes contemporary tort law because in discarding traditional "arbitrary" distinctions, courts have found themselves forced into a detrimental overexpansion of tort liability. *See* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477 (1982); *cf.* SUNSTEIN, *supra* note 74, at 83 (arguing that the *Miranda* rule need not be abandoned merely because it is not congruent with a philosophically adequate theory and thus may on occasion be overprotective or underprotective). Nevertheless, courts should, if possible, avoid seemingly arbitrary line-drawing. *See id.* at 54–56.

surrounding the adoption of the particular statute being interpreted.[290]

In short, because intentionalism focuses on legislators as individuals, and thus requires the interpreter to ascertain an intent shared by a majority of legislators, intentionalism faces serious methodological problems. The result has largely been an expansion of the materials courts consider in interpreting statutes. Ultimately, however, the courts have not demonstrated an ability to convincingly identify any actual intent of a majority of legislators. Rather, the conclusions about legislators' intentions tend to reflect judges' policy views more than any credible factual determination of legislators' subjective policy views.

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[290] Making the ascertainment of law simple is a worthy goal. In some areas of the law we sacrifice accuracy in fact-finding to more important values. Examples of rules reflecting the subordination of accurate fact-finding to more important values include evidentiary privileges, evidentiary rules making offers of settlement inadmissible, and rape-shield laws. *See* 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 268–72 (John William Strong ed., 4th ed. 1992) (discussing the rationales underlying various evidentiary privileges); FED R. EVID. 408 (settlement offers); *id.* at 410 (plea agreements); *id.* at 412 (admissibility in sex-offense cases); 124 CONG. REC. 34, 912–13 (1978) (statement of Representative Mann) (discussing rape-shield law); *id.* at 913 (1978) (statement of Representative Holtzman) (discussing rape-shield law).

Even by these standards, the severely truncated legislative intent inquiry, which limits judicial inquiry to "official" documents prepared with an eye toward their examination by courts, seems rather extreme. Such an absolute refusal to look beyond official statements (and a limited range of official statements at that) conflicts somewhat with the courts' willingness to look beyond official statements in reviewing administrative actions. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419–20 (1971) (noting that a court could require the agency to file an affidavit explaining its decision, or in some rare cases, require an agency official to appear and give oral testimony); KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 8.5, 8.6, at 395–96 (3d ed. 1994).

Concerns about the reliability of documents and testimony are also valid. However, we often trust judges to sort through potentially unreliable evidence when they act as fact-finders. Many evidentiary doctrines limit evidence in order to prevent juries from hearing evidence we cannot expect them to process correctly, yet judges sitting as fact-finders can hear the evidence and consider it for its worth. *See* McClelland v. Williamson, 627 S.W.2d 94, 99 (Mo. Ct. App. 1982); Peck v. Jacquemin, 491 A.2d 1043, 1054 (Conn. 1985); *In re* E.H., 276 S.E.2d 557, 565 (W. Va. 1981); 1 MCCORMICK, *supra*, § 60, at 238; Kenneth Culp Davis, *Hearsay in Nonjury Cases*, 83 HARV. L. REV. 1362, 1362 (1970); Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407, 412–14 (1965).

Moreover, unofficial records and legislator testimony are not much more unreliable than the records on which courts currently rely. The records courts currently rely upon have been produced with a conscious view toward persuading other lawmakers and citizens of the wisdom of the legislation and influencing administrative agencies and the courts in interpreting the statute. Moreover, the drafters of such documents know that they will never be subject to cross-examination (except perhaps in extremely rare circumstances). *See* U.S. CONST. art. I, § 6; Raveson, *supra* note 255, at 911–14. Accordingly, any sharp distinction between official and unofficial records is exaggerated. *See* Zeppos, *supra* note 185, at 1347–49.

IV. THE PUBLIC JUSTIFICATION APPROACH

The public justification approach rests upon three premises. First, legislatures are institutions, not merely aggregations of individual legislators. As an institution, the legislature has obligations apart from those of its individual members and can act without a vote of the full membership. Second, the vote on a statute is a vote on both its text and its justification as presented by the institution. Third, even though a majority will not likely share subjective intentions, legislators have an obligation to both understand the ordinary meaning of the statutory text and learn the institutional explanation of the statute. The public justification approach seeks the reasonable meaning of words rather than subjective intentions of those who approved the words. It is an "objective" rather than a "subjective" approach, but expands the text that must be interpreted to include the institutional justifications for statutes as well as their text.

A. *Premises of the Public Justification Approach*

1. *Congress Has Duties and Can Act as an Institution*

Congress is an institution rather than merely a collection of individuals. As an institution, Congress has obligations in addition to the duties of each of its individual members. A duty to provide an institutional explanation of a statute is one such obligation, and that obligation makes some legislative history legally significant. Moreover, Congress can act as an institution in ways that do not involve formal votes of the full membership of the legislative chamber. Thus, other aspects of the legislative process besides floor votes should be afforded legal significance. In particular, committee actions deserve recognition.

a. *Institutional Duties*

The public choice and intentionalist approaches suggest a focus on individual legislators that ignores the duties of the legislature as an institution. The individual legislator may have obligations, such as the obligation to represent the preferences of his or her constituents or to oppose unconstitutional legislation, but Congress does not. For instance, we might believe that voters have a duty to vote against a repressive or unconstitutional referendum measure, yet not view "the electorate" as having a collective duty to reject such referenda. Only with difficulty can one view the electorate as an institution with such collective obligations.

Congress should be viewed as an institution with obligations separate from those of individual legislators. For instance, Congress also has a duty to enact comprehensible laws. Congress also has a duty to oversee the operations of the

executive branch and to inform the public of executive branch misconduct.[291]

The difference between institutional and individual obligations can be illustrated by the early Nineteenth Century controversy regarding whether the Supreme Court should issue opinions seriatim.[292] Thomas Jefferson asserted that the Justices should render opinions seriatim, arguing that each Justice was a representative and had an obligation to offer an explanation for his vote on a case.[293] Chief Justice John Marshall believed that the Court should produce one opinion.[294] In Marshall's view, the Justices had no obligation, as individuals, to justify their votes. Rather, only the Court as an institution had an obligation to explain its decision, and thus only an opinion for the court was necessary.[295] Ultimately, of course, Supreme Court practice has evolved into a hybrid of the two positions— the Court has an obligation to explain its decision, and each Justice may note any disagreement with the opinion of the Court.[296]

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[291] *See supra* note 46; *infra* note 299 and accompanying text.

[292] *See* DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 88, 88–89 (1966) [hereinafter CONGRESS AND THE CONSTITUTION] (discussing seriatim and unanimous opinion controversy during the Court's early years); DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 168–69, 173, 175–76, 181–84 (1954) (same); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990) (discussing seriatim opinions).

[293] *See* Michael Mello, *Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment*, 22 FLA. ST. U. L. REV. 591, 600–07 (1995); Ginsburg, *supra* note 292, at 138. Justice Story believed that it was his "duty" in constitutional cases "to give a public expression of [his] opinions, when they differed from that of the Court," because "the public [has] a right to know the opinion of every judge who dissents from the opinions of the Court, and the reasons of his dissent." Birscoe v. Bank of the Commonwealth of Kentucky, 36 U.S. (11 Peters) 257, 329, 350 (1837) (Story, J., dissenting).

[294] John Marshall is credited with forging this tradition in the Supreme Court. *See* 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919); Herbert A. Johnson, *Part Two* of *Foundations of Power: John Marshall, 1801–15*, *in* 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 373, 380–81 (Paul A. Freund ed., 1981); Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITT. L. REV. 785, 796–97 (1975).

[295] *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 13 (1993) ("The move from the original English practice to the American practice . . . involves a commitment to, and a demand for, collegial deliberation, and supports an ideal of a multi-judge court acting as an entity, not merely an aggregation of individual judges.").

[296] *See* Ginsburg, *supra* note 292, at 134; Marshall, *supra* note 18, at xvi–xx. A similar difference in perspectives, individual versus institutional, can be seen with respect to congressional consideration of constitutional concerns in enacting statutes. *See* CONGRESS AND THE CONSTITUTION, *supra* note 292, at 155–56. Each individual member of Congress undoubtedly has an obligation to consider the constitutionality of pending statutes. *See id.* at 155, 348–49. Indeed, in taking the oath of office, each member of Congress swears to uphold the Constitution. *See* 5

We can now apply these observations to the legislative context. By focusing upon individual legislators, one could conclude that the only obligation to explain statutes is that of each individual legislator to discuss his actions with his constituents. Of course such an obligation exists. But while such explanations might aid the legislator's constituents in deciding whether to re-elect him, they may be useful for little else. If every member of the legislature presents his own reasons for voting for the measure, or even if we look at varied statements of many legislators, we still may lack a sense of the legislature's rationale for adopting the statute.[297]

A rationale that can fairly be ascribed to the legislature as a collective entity would be far more useful. We will have one relatively coherent rationale rather than numerous varying rationales.[298] Moreover, collective rationales are at least likely to have a continuing influence on further legislative efforts that go beyond the present membership of the legislative body.

b. *Institutional Actions*

Congress undoubtedly acts as an institution when it enacts statutes. However,

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U.S.C. § 16 (1994). *See generally* Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 449, 497 (1971). However, viewing the obligation to comply with the Constitution as an institutional obligation of Congress is also helpful. One can suggest that the House and the Senate, as institutions, should ensure that constitutional issues are identified, analyzed, and presented to members. *See* CONGRESS AND THE CONSTITUTION, *supra* note 292, at 155, 349–60.

[297] A less severe instance of this problem is the plurality judicial opinion. When Supreme Court Justices focus on individual statements and attempt to gain votes at the expense of clarity, opinions for the Court become unclear. *See* GOLDSTEIN, *supra* note 18, at 35, 40–41. Goldstein argues that:

> Opinion-writing must become a process of informing for a vote. It must be a process of clarification characterized by candor. It must not be a process of obfuscation characterized by disingenuousness. The votes that [J]ustices get or are denied, should be based on a shared understanding of what an opinion means, not just on the bottom line, not just on the result. To vote otherwise can only lead the [J]ustices, individually and collectively, to forget We the People for whom and to whom they are expounding the Constitution.

Id. at 40–41.

[298] The likelihood of legislatures producing coherent institutional rationales depends on one's view of the potential for agreements among a wide range of legislators. Those who see legislators' preferences as exogenous and immutable will doubt that a legislature can ever adopt a coherent rationale for a statute. Civic republicans, on the other hand, believe that there is great potential for agreements between legislators on the underlying policies that statutes are to implement, and that dialogue allows people to take a broader and more common perspective with respect to the appropriate course of action. Congress appears able to formulate relatively coherent explanations for policies underlying statutes.

Congress can act even when its full membership is not voting on the floor of the relevant legislative chamber. Legislatures often delegate work to committees. For instance, legislative oversight, an institutional function, is conducted by committees rather than by floor vote.[299] More importantly for our purposes, legislatures often establish committees to analyze and develop legislative proposals, including justifications for those proposals, and provide information regarding those proposals to the legislative body. Thus the members of Congress have established a system in which standing committees develop information regarding prospective bills in certain subject areas, craft particular legislation, and then provide a rationale for the committee proposals.[300] Accordingly, Congress, as an institution, produces explanations of statutes[301] even though the text of those explanations arguably never become subject to a formal vote.[302]

However, while some actions taken by small groups of legislators or individual legislators count as institutional actions, others should not.[303] An action should qualify as "institutional" only if it satisfies three criteria. First, the action must be made known to all members of the legislature. Second, the action must be subject to reversal by the full membership.[304] Third, members must view the action as authoritative—something other than the expression of an individual or a group.

In short, legislatures have institutional obligations. Legislatures owe the populace not merely clear statutory commands, but a public justification of those commands. As we shall see, this public justification obligation, and the fulfillment of this obligation through committee reports or other documents, legitimates legislative history without reliance upon the flawed concept of legislative intent.

2. *A Vote on a Statute Is a Vote on the Text and the Explanatory Materials*

The concept of public justification offers an alternative view of the duties of the individual legislator as well as the duties of the legislature as a whole. Collective actions and responsibilities, such as those of a legislature, have meaning only if individual members of the collective have duties. Thus, the responsibility of the legislature structures the responsibilities of individual legislators. I will first discuss

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[299] *See* OLESZEK, *supra* note 133, at 301–02.

[300] *See* Correia, *supra* note 6, at 1156–58.

[301] *See* DWORKIN, *supra* note 121, at 343 (noting potential usefulness of formal committee reports or unchallenged statements by a bill's manager).

[302] *See* Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J., concurring) (noting that legislative history cannot be amended or modified on the floor); 128 CONG. REC. 16918 (1982) (statement of Senator Armstrong); CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 182 (1989); Zwirn, *supra* note 195, at 326.

[303] *See* DWORKIN, *supra* note 121, at 343.

[304] *See* Correia, *supra* note 6, at 1157; MacCallum, *supra* note 251, at 785.

the impact that the legislature's duty to provide understandable commands has upon individual legislators' responsibilities in voting on a bill. I will then discuss the implications that the duty of public justification outlined above has for the responsibilities of individual legislators when they participate in debate and voting.

A legislature can satisfy its duty to provide understandable commands to citizens only if each legislator has a corresponding obligation in casting his vote. That corresponding obligation consists of expressing assent or dissent, in the form of his vote, to the meaning of the proposed statute (*i.e.*, the command) in customary English usage. An example will illustrate the point. Assume a ten member legislative body, in which each of the ten legislators use the term "motor vehicle" to communicate different concepts, none of which relate to the customary meaning of the term "motor vehicle." A statute passed by such a legislature prohibiting motor vehicles from entering a park would mean nothing if the legislators' only obligation were voting based on their own subjective use of the term motor vehicles. In effect there would be no "meeting of the minds"—each legislator could insist that the courts interpret the language as she understood it because she had no duty to consider the ordinary meaning of the statutory text.[305] The statute could have meaning, regardless of the legislators' differing understandings of the term "motor vehicle," if legislators had a duty to assent or dissent, in the form of their votes, to the statute's customary meaning. Even if no legislator understood the term "motor vehicles" to mean motorized means of transport, the term "motor vehicle," as used in the statute, could be given that meaning. Such an interpretation would be justified because the legislators *should* have based their vote on the customary meaning of the statutory text, even if they did not. In short, the legislators constructively assented to banning "motorized means of transport," and only such objects, from the park. Such constructive assent makes legislators' actual intent in assenting irrelevant. The legislator who objects to a court honoring the customary meaning of the statutory language rather than that legislator's subjective use of that language can be told that he should have either sought to amend the statute or voted against it. His decision to vote for the statute based on his own subjective belief was irresponsible.

Now the implications of the legislature's duty to provide public justification can be explored. Because under the public justification approach the duty of the legislature is broader, the duties of each individual legislator are broader. The legislature has an obligation to provide a public justification. Each legislator has an obligation to participate in the creation of both the statutory text and the public justification. The legislature can provide a public justification only if individual

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[305] For instance, when such a multilateral misunderstanding occurs in the formation of a contract, the contract is declared void because there was no meeting of the minds. *See* 2 RESTATEMENT (SECOND) OF CONTRACTS § 201 illus. d (1981); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.9, at 248 (1990).

members vote on the basis of that public justification. Thus, 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 legislature, she is not entitled to have a court honor her subjective view of the statute's rationale any more than she would be entitled to have a court honor her subjective use of the terms in the text of the statute. Rather, the legislator who asserts that her own subjective view of the rationale should govern the statute's interpretation can be told that she should have expressed her objection to the rationale provided by the legislature. Her duty as a legislator makes her act of voting for the statute without expressing her disagreement with the publicly-offered rationale irresponsible—the statute need not be interpreted under the assumption that legislators act so irresponsibly.

The duty of the legislator to express assent or dissent regarding each statute's public justification now provides the missing element to the argument of the intentionalists who pursue a delegation-assent approach.[306] Under the delegation-assent argument, legislators assent, by voting for a statute, to the explanation of the statute provided by the committee that reported the proposal. The argument rests on a kind of constructive assent—a member's vote constitutes assent to the legislative history, whether or not the member actually intended to assent to that legislative history. If the individual legislator has no responsibility for the legislative history, and the legislature has no duty to provide public justification, it is difficult to construe the legislator's vote as constructive assent to anything other than the ordinary meaning of the words of the statute. The member should have felt no obligation to disavow the legislative history.[307]

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[306] *See supra* text accompanying notes 251, 254–55.

[307] *See* Tiersma, *supra* note 97, at 17, 20–22. Silence can assume significance only if one presumes that the silent person is interacting with another. *See id.* If such an interaction does not exist, the silence of the recipient of a message can either indicate consent or a refusal to engage in conversation. Thus the recipient's silence in response to a statement means nothing if the person who made the statement had no right to expect or demand a response. *See id.* at 22. In other words, for silence to constitute consent, the silent person must have a duty to engage in the interchange. Because there is no such requirement if the only significant part of the legislative process is voting, silence cannot be viewed as significant. If the development of public justification by means of a committee proposal and full-chamber review is a part of the legislative process in which legislators have an obligation to participate, a legislator's silence can be accorded significance. *See id.* at 321 ("[D]rawing inferences from conduct and particularly silence often depends on social norms reflecting how people ought to behave."); *see also id.* at 33–34 (stating "behavioral norms" are needed to allow one to draw from silence the inference of consent rather than other competing plausible inferences). Interestingly, while civic republicans assume that governing largely involves engaging in dialogue, *see* Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on*

The public justification concept provides the basis for constructive assent—each legislator has a responsibility to express assent or dissent to both the customary English usage of the words in the statute and the explanation of the statute. Given such a duty, one could say that the legislator should have responded to the public justification provided and that his failure to do so, whether because of agreement, indifference, or inattention, constitutes constructive assent to that explanation.

A modified version of the Founders' Park hypothetical can illustrate the argument above. In this modified hypothetical, the ordinance's history prior to city council debate and its text remain unchanged. But now assume that the debate on the ordinance had been different, that it focused on concerns about road safety and whether the preceding road accidents justified the limitations on road traffic. Thus, under the modified hypothetical, during the council debate no one mentioned limiting traffic in off-road areas, removing the immobilized jeep, or limiting boating. A legislator who believes that the term "motor vehicles" covers all motorized modes of transport, including motorboats and immobilized jeeps, has a duty to object to the limited nature of the "statutory" justification offered by the legislative committee and its chairperson. If the legislator assents to the statute based upon the customary meaning of the term "motor vehicle" and does not dissent from the institutional rationale, he should be viewed as having constructively assented to that rationale. He should not be heard to complain if a court concludes that the text is indeterminate and relies on the public justification, which the legislator did not contest, as an aid in construing the ambiguous language. The legislature (*i.e.*, the city council) had a duty to, and did, justify the legislation, and the individual legislator thus had a duty to address that justification.

3. *It Is Unlikely That There Will Be One Subjective Intent Shared by All Legislators—But So What?*

The strength of the new textualist attack on the concept of "legislative intent" rests upon the cogency of the new textualist assertion that a subjective intent shared by a majority of legislators rarely exits. Under the public justification approach, the likelihood that there will be no such shared intent can be acknowledged but ignored.

With respect to most statutes, as noted earlier, it is unlikely that a majority of legislators were aware of the text of the statute and shared a common understanding of its language. The new textualists could disregard this problem, we presumed, because of their conception of legislators' duties—legislators have a duty to read the words of the statute and understand their customary English usage. Thus,

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Civic Republicanism, 97 YALE L.J. 1651, 1651–52, 1654–55 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503, 1528 (1988); Sunstein, *supra* note 51, at 1575, public choice theorists assume that governing is an individualistic expression of preferences. *See, e.g.*, FARBER & FRICKEY, *supra* note 66, at 45.

legislators' votes signify their assent to the text in the customary English usage, regardless of whether they had actually read the statute and actually understood the customary English usage of the words employed.

Under the public justification approach, 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. A public justification is available to each legislator, as is the text of the statute. Just as each legislator has a duty to make herself aware of the statutory text and its meaning in ordinary English usage, under the public justification approach each individual legislator also has a duty to make herself aware of the public justification offered for the statute, and to vote on the basis of that public justification. Accordingly, if the legislator votes for the statute without dissenting from the public justification, she should be viewed as constructively assenting to that public justification. The legislator who fails to familiarize herself with the public justification for a statute, or fails to challenge a public justification that she privately considers inaccurate, has not acquitted her duty as a legislator. Her actual views of the statute's rationale are irrelevant because she failed to meet her obligation to address the statute's public justification.[308]

B. *Public Justification Methodology*

The public justification approach requires the interpreter to examine both the statute's text and public justification. Commentary outside the public justification should not be considered binding.[309] The text of the statute must be interpreted in light of the public justification provided. Thus, although the public justification should be honored by the court, it should be accorded less weight than the statutory text.

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[308] Indeed, this differs little from legislators' duty to learn judicially-created clear statement rules, which courts and new textualists use in construing statutes. *See supra* note 217.

[309] The court may want to consider such documents in arriving at the most efficacious interpretation of the statute once it determines, after examining the text and public justification, that the statute is ambiguous. If interpretation is viewed as a two-step process—the first involving law discovery (determining what the statute means) and the second involving law creation (deciding cases where the statute does not provide answers), *see* DICKERSON, *supra* note 4, at 13–32; Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 328–31 (1996)—a court should be restricted to the public justification in the law discovery process, but should be free to use all aspects of legislative history, as well as matters outside the legislative history, in the law creation process. *See* DICKERSON, *supra* note 4, at 169. (One need not distinguish the elements of the interpretive process as sharply as suggested to believe that different sources can be consulted depending on which of the following two questions a court seeks to answer: (1) how should a court best conduct itself as an agent of legislative will, or (2) how should a court construe the statute if it cannot or will not act as an agent of the legislative will.)

The court must identify the materials that constitute the statute's public justification. Because this public justification reflects an institutional approach, the materials that comprise the public justification must be attributable to the legislature as an institution. As suggested above, three criteria should be employed to determine whether particular material is attributable to Congress. First, only material available to all legislators may be considered a part of the public justification. Each legislator has a right to participate in the development of the public justification, so each must have access to that justification.[310] If some members lack such access, the justification is not that of the institution, but of the limited group that has access. Moreover, a member can have no duty to respond to statements regarding a statute if he lacks access to those statements. Reports of congressional committees and statements made on the House and Senate floor satisfy this requirement. Committee reports must be available to all members of Congress,[311] and all members may attend floor proceedings or obtain a copy of the *Congressional Record*.[312] On the other hand, documents not readily available prior to floor vote, such as party caucus documents,[313] transcripts of committee mark-up sessions,[314] transcripts of committee hearings,[315] and public speeches outside Congress,[316] should not be considered part of the public justification. Treating such

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[310] *See supra* text accompanying note 304.

[311] *See* Brudney, *supra* note 75, at 27 & n.104; Correia, *supra* note 6, at 1157; OLESZEK, *supra* note 133, at 205.

[312] *See Senate Manual* § 906 [Senate Doc. 102-1]. The *Congressional Record* includes all speeches made during floor proceedings and is distributed daily. *See* THOMAS B. CURTIS & DONALD L. WESTERFIELD, CONGRESSIONAL INTENT 20, 55 (1992).

[313] It would also exclude other communications that members sometimes use in determining how to vote, such as whip advisory notices, "Dear Colleague" letters, and circulars from specialized caucuses, *see* TIEFER, *supra* note 302, at 180 n.98.

[314] *See* Davidson, *supra* note 197, at 107; Wald, *supra* note 273, at 202. Though the rules of the Senate require "'a complete transcript or electronic recording adequate to fully record'" all committee proceedings, a majority of the committee may waive the requirement. *See* Davidson, *supra* 197, at 107 (quoting and discussing Senate Rule XXVI, cl. (5)(e)).

[315] *See* Brudney, *supra* note 75, at 27 & n.103. *But see* CURTIS & WESTERFIELD, *supra* note 312, at 20.

[316] Members of Congress increasingly attempt to mobilize public attention to influence legislative consideration of legislation. *See* Organization of the Congress: Final Report of the Joint Comm. on the Organization of Congress, H.R. REP. NO. 103-618, at 187 (1993); TIMOTHY E. COOK, MAKING LAWS AND MAKING NEWS: MEDIA STRATEGIES IN THE U.S. HOUSE OF REPRESENTATIVES 167 (1989); OLESZEK, *supra* note 133, at 47, 325. Statements made to the public outside the legislative chamber and committee proceedings should not be considered part of the public justification used to interpret statutes. The locus of deliberation should be congressional proceedings, which are intended to enhance deliberation and produce coherent policy. Thus, the courts' interpretive technique should encourage legislators to assert, in the legislative process, the arguments they make to the public generally, so as to ensure full legislative

documents as expressions of Congress, rather than as expressions of individuals or groups, would be inappropriate.

Second, material may become a part of a statute's public justification only if members can respond to the material before casting their votes. Documents that members can amend during floor proceedings would obviously satisfy this requirement. Presumably, however, in most legislatures members can amend only statutes during floor proceedings. For instance, reports filed by congressional committees cannot be amended.[317] However, a document should qualify as an institutional document even if members cannot amend it during floor debate, so long as members can disavow the document, in whole or in part, before voting. Though members cannot formally amend a committee report, a legislative majority can disavow committee reports in several ways.[318] Members may certainly express disagreement with the committee report on the floor of the legislature.[319] 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.

Third, only material considered authoritative by the legislators themselves

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deliberation.

Indeed, the Supreme Court has similarly distinguished legislators' "legislative" activities from their "political" activities in addressing legislators' immunity under the Constitution's Speech and Debate Clause, U.S. CONST. art. I, § 6, cl. 2. Legislators are immune from liability for statements made when conducting legislative business—acts that are a part of the deliberative process by which members participate in committee or congressional proceedings. *See* Doe v. McMillan, 412 U.S. 306, 313–19 (1973) (distinguishing Congress's members' legislative duties, namely those responsibilities that are a part of the deliberative process by which members participate in committee or congressional proceedings, from their political duties); Gravel v. United States, 408 U.S. 606, 625–26 (1972); TRIBE, *supra* note 13, § 5-18, at 291–93; Raveson, *supra* note 255, at 892. Legislators are not immune from liability for statements made in connection with their role as members of Congress that are not a part of their participation in committee or congressional proceedings, such as statements made in press releases and public speeches. *See* Hutchinson v. Proxmire, 443 U.S. 111, 123–33 (1979) (press release); Dickey v. CBS, Inc., 387 F. Supp. 1332 (1975) (public speech); TRIBE, *supra* note 13, § 5-18, at 291–93.

[317] *See supra* note 302.

[318] *See* Zwirn, *supra* note 195, at 326.

[319] In the House of Representatives, however, special rules often severely limit debate. Though these rules are adopted by majority vote, *see* OLESZEK, *supra* note 133, at 138, 150–51, 165, an individual may lose any realistic opportunity to comment on a bill's public justification or anything else. This should be a concern with respect to reliance on public justification, but there is a similar problem with respect to the ability to amend bills, which may be lost by majority vote for a special rule. *See id.* at 142–51 (discussing closed rules that prohibit floor amendments and special rules governing debate in general). The size of the House and the difficulty in managing it requires compromising individual legislator's ability to amend statutes and comment on public justification, but the statutory text and public justification merit respect nevertheless.

should gain recognition as a part of a statute's public justification. Material that legislators themselves customarily rely upon as an exposition of statutory meaning (particularly when casting their votes) meet this standard; material that members regard as an expression of the views of one particular legislator or group of legislators do not. Committee reports and floor manager statements have attained such authoritative status. Senators and Representatives, for example, rely upon committee reports and floor manager statements as authoritative expositions of statutory meaning. If a member wants an authoritative explanation of a statute, he (or his staff) consults the committee report or questions the floor manager during the debate on the bill.[320] Congress delegates to committees the task 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. Thus, a committee report is required by the rules of the House[321] and customarily provided in the Senate.[322] Conference reports must be published in the *Congressional Record* and made available to each Senator or Representative before they vote on the corresponding bill.[323] Indeed, members have come to rely on committee reports so heavily that they often do not consult the text of the statute.[324] Moreover, members of Congress surely realize that courts, members of the public, and agencies find such documents authoritative.[325] On the other hand, statements made at hearings, made outside Congress, or set forth in party caucus documents do not appear to have gained the same respect. They are seen as expressing only the views of individual members, not that of Congress as an institution. 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.[326] However, even assuming that 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.[327] So while the courts may have provided

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[320] *See* Thomas F. Broden, Jr., *Congressional Committee Reports: Their Role and History*, 33 NOTRE DAME LAW. 209, 210, 212 (1958) (discussing the important roles that committee reports play in the legislative process).

[321] *See* H.R. Res. 5, *supra* note 48 (House Rule XI, cl.2(e)(1)(A)).

[322] *See* Broden, *supra* note 320, at 215–16; OLESZEK, *supra* note 133, at 206; Zwirn, *supra* note 195, at 322.

[323] *See* OLESZEK, *supra* note 133, at 289.

[324] *See supra* notes 195, 209 and accompanying text.

[325] *See supra* note 73.

[326] *See supra* note 255.

[327] *See, e.g.*, Civil Rights Act of 1991, 105 Stat. 1071, 1075 (1991) (setting forth portions of legislative history that courts may refer to in deciding whether the statute was retroactive); 5

the initial impetus for reliance upon committee reports and floor manager statements, the continued reliance upon such documents may be attributed to, at a minimum, Congress's acquiescence.

Ultimately, the categories of material considered part of the institutional justification of statutes must be limited somewhat so that legislators' duty to respond to that justification does not become overwhelming. In other words, we should not require members of Congress to review and publicly comment upon numerous documents on pain of being found to have assented to all the statements therein, because acquitting such a duty would deprive members of needed time to engage in other legislative activities.[328] However, if the legislative process is to be a discussion of policy rather than a registration of preferences, legislators should have a duty to review the limited number of documents discussing statutory rationales produced by authorities within the institution.

With respect to the United States Congress, the "public justification" of statutes consists of: (1) committee reports (of both conference and standing committees), (2) statements of the floor manager—who shepherds the bill during floor debate (and who is often the chair of a relevant committee or subcommittee),[329] and (3) the statement of a sponsor of an amendment, when that amendment has not been the subject of committee consideration. The final category takes into account situations in which the Senate or the House adopts an amendment proposed by a member that changes the bill recommended by the relevant committee.[330] Proposal and adoption of such amendments typically occur during floor debate.

Thus, members of Congress have a duty to familiarize themselves with the explanations contained in these three types of documents. They also have a duty to object to the explanations with which they disagree. However, 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 need to express his disagreement with the public justification as well. Such a requirement would

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U.S.C. § 801(g) (West Supp. 1998) (providing that courts may not draw any inference from Congress's refusal to exercise its power to "disapprove" a regulation under the new statute governing congressional review of agency rulemaking); Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 213–17 (1994) (discussing statutory provisions that direct courts in their interpretation of statutes).

[328] *See* Davidson, *supra* note 197, at 98–100 (describing the time constraints members of Congress face).

[329] *See* SMITH & DEERING, *supra* note 144, at 130 tbl.4-2. *See generally id.* at 129–31.

[330] For examples of such cases, see Church of Scientology v. IRS, 484 U.S. 9, 16–17 (1987); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 524–27 (1982). Some argue that such floor amendments greatly increase the probability that statutes will become meaningless gibberish. *See, e.g.*, *Statutory Interpretation and the Uses of Legislative History*, *supra* note 160, at 54, 65; Breyer, *supra* note 73, at 873–74.

needlessly extend debate. Thus, if several legislators argue that the statute's rationale is broader, narrower, or simply different than that identified in the public justification, other members need not add their voices in support.[331]

However, such an expression of disagreement will probably provoke a discussion and clearer resolution of the issue. The floor manager may provide a more complete explanation of the statute. That explanation may convincingly demonstrate that 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 Founders' Park example again can serve as an illustration. If several members argued that the "motor vehicles" ordinance addresses the problems caused by road and off-road vehicles, the court should question the validity of any statement, whether included in the committee report or uttered by the committee chairperson during floor debate, indicating that the ordinance covers only road vehicles.

In short, a court interpreting a federal statute should interpret the text in light of committee reports, floor manager statements, and sponsor statements, but abandon reliance on apparently relevant aspects of those documents if floor debate reveals a substantial controversy regarding those aspects of the documents. A court should not consider itself bound by other aspects of legislative history (although these other aspects of legislative history may be used as persuasive authority if a court, after examining the text in light of the public justification, concludes that the statute is ambiguous).

This approach is objective, relying on the customary meaning of text. In this respect, it resembles the new textualist approach and differs from the intentionalists' subjective approach. However, under the public justification approach, the relevant text is expanded to include not just the text of the statute, but also the text of certain additional documents. A recognition of the duty of the legislature to explain statutes and of the individual legislators to react to the public justifications justifies this expansion of the relevant text.

V. APPLICATION OF THE PUBLIC JUSTIFICATION APPROACH

Examination of two ongoing interpretive debates further illustrates the usefulness of the public justification approach. The first debate involves judicial

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

interpretation of unexplained statutory provisions that appear to address controversial issues. The second involves application of general statutory language to situations that the enacting legislature did not contemplate.

A. *The Dog That Did Not Bark*

Supreme Court Justices have debated whether congressional silence regarding a questionable application of an ambiguous statute justifies limiting the reach of the statute. The text of a statute, read literally, may appear to require a questionable treatment of an issue even though nothing in the applicable legislative history addresses the issue.

An amendment of the Voting Rights Act of 1965[332] presented the Court with such a situation in *Chisom v. Roemer*.[333] Initially, the statute prohibited any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that resulted in a denial of the right to vote on account of race or color.[334] Based on this initial language, the Supreme Court held that plaintiffs must prove intentional discrimination to establish a Voting Rights Act violation.[335] Congress then amended the Voting Rights Act, adding section 2(b), to allow plaintiffs to establish a Voting Rights Act violation merely by showing the discriminatory effect of a statute, without showing discriminatory intent.[336] Specifically, section 2(b) provided that plaintiffs could establish a violation of the Voting Rights Act by proving that members of a minority group "have less opportunity than other members of the electorate . . . to elect *representatives* of their choice."[337]

The *Chisom* Court had to determine whether the word "representatives" included candidates for elective judicial offices, and thus whether litigants could rely upon the section 2(b) "effects" test (which required no proof of discriminatory intent) to challenge rules governing judicial elections. Justice Stevens, writing for the majority, argued that the word "representative" encompassed all elected officials, even judges.[338] He offered several reasons for his conclusion, but only one

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[332] 79 Stat. 437, 445, 446 (1965) (codified at 42 U.S.C. §§ 1971, 1973–1973p (1994)).

[333] 501 U.S. 380 (1991).

[334] 79 Stat. at 437; *Chisom*, 501 U.S. at 391.

[335] *See Chisom*, 501 U.S. at 393 (discussing Mobile v. Bolden, 446 U.S. 55 (1980)).

[336] *See id.* at 393–95; Pub. L. No. 97-205, 96 Stat. 134 (1982).

[337] *Chisom*, 501 U.S. at 398 (quoting White v. Register, 412 U.S. 755 (1973)) (emphasis added).

[338] The use of the term "representative" to encompass judges may seem odd. The term could be used to refer only to people elected to multi-member bodies. However, even the dissent did not argue for so limited a definition. *See Chisom*, 501 U.S. at 404–07 (Scalia, J., dissenting). Such a definition would exclude elected executive branch officials, and it is unlikely that a majority of the legislators who voted for section 2(b) intended the term "representative" to exclude executive

merits discussion here. Justice Stevens argued that Congress would not have differentiated judicial elections from all other elections without noting that intent or without many members of Congress expressing opposition.[339] In particular, before the amendment of the Voting Rights Act, identical standards governed judicial and nonjudicial elections; the ambiguous term "representative" should not be viewed as requiring the standards for judicial and nonjudicial elections to diverge.[340] In setting forth his reasoning, Justice Stevens referred to a Sir Arthur Conan Doyle story in which Doyle's famous detective, Sherlock Holmes, determined the murderer's identity by noting that the victim's dog did not bark on the night of the murder.[341] In that story, Holmes relied upon the dog's silence to infer that the murderer was someone with whom the dog was familiar. Congress's silence regarding the divergence of the standards for judicial and nonjudicial elections, when amending the Voting Rights Act, had significance, just as the silence of the "dog that did not bark" had significance in the Holmes story.[342]

Justice Scalia objected to Justice Stevens's reasoning. First, he argued, Justice Stevens's argument relied on 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."[343] The word "representative" clearly did not include judges, and Congress did not have to "call its shot,"[344] that is, explain the significance of the textual change it was making. To Justice Scalia, the text of the statute clearly provided different standards for non-judicial elections, in which "representatives" are chosen,

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branch officials. (Indeed, Congress borrowed the language of section 2(b) from a court opinion that discussed the right to elect legislators, and Congress substituted the word "representative" for "legislator." *See id.* at 398.) Justice Stevens interpreted the term representative to mean any official who served in an elective office, including executive branch officials and judges.

[339] *See id.* at 396.

[340] *See id.* at 395–96.

[341] *See id.* at 396 n.23 (noting the incident occurred in *The Silver Blaze*).

[342] Stated differently, one who asserts that an ambiguous statute has changed "settled law" has the burden of establishing Congress's intent to make such a change. Thus, in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989), the Court rejected the plaintiffs' literal interpretation of a statute because plaintiff had not carried its burden of showing that Congress intended the change suggested by the statutory text. *See id.* The Court offered no basis for imposing such a burden. Perhaps the approach is based on a preference for the status quo. Alternatively, it could rest upon the Court's perception of congressional practice. Perhaps the Court believes that legislative majorities rarely take significant action without announcing that they are doing so or sparking considerable legislative controversy.

[343] *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting).

[344] This is a reference to the rule in some pocket billiards games that shooting a ball into a pocket does not count unless the shooter has first indicated both the ball that he will "sink" in a pocket and the pocket into which the ball will go.

and judicial elections, in which officials who do not "represent" constituents are chosen. Second, Justice Scalia argued that he could not assume that everything of significance will be noted in legislative history or spark legislative debate.[345]

In several cases, the Justices have debated the propriety of interpreting statutes based on the absence of an express announcement of an intent to change the law and a lack of controversy over a provision. Often the Court affirms the legitimacy of the argument,[346] but on at least one occasion it has not.[347] Indeed, the Supreme Court's most recent use of this technique, in *Department of Commerce v. United States House of Representatives*,[348] produced dissention among the Justices.

When using this "dog that did not bark" approach, the Court implicitly envisions legislative intent as a fact awaiting discovery. Thus, the Court derives its most prominent analogy for such reasoning from the technique used by detectives in attempting to determine a fact—the identity of a murderer.[349] For the Court, legislators' apparent belief that they need not explain a particular statutory change and the absence of controversy about the statute's meaning provide two "clues" to legislators' subjective understanding of the statute. Any inferences from legislative silence rest on certain assumptions about legislative behavior, namely that when the legislature takes significant action it will explain the significance of its actions, or at least individual legislators will contest the controversial action during legislative consideration of the relevant bill.[350] Of course, even assuming that this is invariably true, the Court would nevertheless need to determine whether the issue before it is one that members of Congress believed significant.

Viewing arguments based on Congress's silence as factual is problematic; the Supreme Court rarely cites any facts in support of its conclusion that a particular change would either have been explained in the legislative history or provoked controversy. Clearly, not every change that a statute makes requires explanation or provokes discussion; members of Congress have limited time to debate issues.

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[345] *See Chisom*, 501 U.S. at 406 (Scalia, J., dissenting).

[346] *See, e.g., id.* at 396 (Stevens, J.); United Sav. Ass'n v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 380 (1988) (Scalia, J.); Church of Scientology v. IRS, 484 U.S. 9, 17–18 (1987) (Rehnquist, C.J.) (referencing *Silver Blaze*); Harrison v. PPG Indus., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting); *see also* Trailmobile Co. v. Whirls, 331 U.S. 40, 61 (1947) (noting that mute legislative actions should be viewed skeptically).

[347] *See Harrison*, 446 U.S. at 592 (Stewart, J.); *Chisom*, 501 U.S. at 406 (Scalia, J., dissenting).

[348] 119 S. Ct. 765 (1999).

[349] *See Harrison*, 446 U.S. at 595–96 (Rehnquist, J., dissenting) (commenting that an effort to determine intent is better entrusted to a detective than a judge); *cf.* LEIF H. CARTER, REASON IN LAW 66 (4th ed. 1994) (describing the quest for legislative intent as "detective work," requiring "sleuthing techniques" to gather "hard evidence").

[350] *See Chisom*, 501 U.S. at 392; Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266–67 (1979).

Thus, to draw inferences from Congress's failure to explain or the lack of legislative controversy, the Court must conclude that the particular change in the law, allegedly made merely by the enactment of certain statutory text, was sufficiently salient to members of Congress that it would have led them to explain their actions or provoked discussion. However, probative evidence of Senators' and Representatives' views of the significance of a particular change rarely exists. Thus, the Court most often merely asserts, without citing any evidence, that if Congress had envisioned a particular interpretation of the statutory language there would have been some indication of such an intent in the legislative history, or at least some debate.[351] It is almost as if Sherlock Holmes had inferred the identity of the murderer from the victim's dog's silence knowing only that ordinarily the dog's master familiarized the dog with important people in his life, surmising that one of the suspects was probably someone the master considered important, and reasoning that therefore the dog knew that particular suspect. This is hardly the sort of inference Holmes was likely to draw, at least without obtaining more specific evidence.[352]

Justice Scalia's challenge to such reasoning is reminiscent of his challenge to the use of legislative history in general.[353] He argues that changing the text of a statute should suffice to change the law. Interpretation based on silence is flawed, argues Justice Scalia, because due process does not require that "legislation . . . be supported by committee reports, floor debates, or even consideration, but only by a vote."[354]

Justice Stevens's and Justice Scalia's opposing positions correspond to the

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[351] *Chisom* is a perfect example. The Court cites no evidence showing that if Congress had intended to exclude judicial elections from the "results" test of the amended § 2, it would have said so explicitly, or, at least, some members would have objected vocally. *See Chisom*, 501 U.S. at 396. The Court merely notes the "unusually extensive legislative history of the 1982 amendment." *Id.*

This lack of factual inquiry is also evident in other cases. *See* American Hosp. Ass'n v. NLRB, 499 U.S. 606, 613 (1991); Crandon v. United States, 494 U.S. 152, 162 (1990); *Church of Scientology*, 484 U.S. at 17–18; *United Sav. Ass'n*, 484 U.S. at 380; Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 791 (2d Cir. 1946).

[352] Indeed, most legislators may fail to envision a particular application of the statute, even though the language of the statute clearly suggests such an application, because they have given little thought to the statute and its potential applications (both obvious and non-obvious). Thus (at the risk of extending the analogy to the Doyle story too far), because most members do not give detailed thought to all applications of a statute, drawing an inference from the lack of controversy over a statute may be likened to inferring the identity of the murderer from a dog's silence without knowing whether the dog was muzzled, drugged, or somewhere far from the scene of the murder.

[353] *See* notes 187–92 and accompanying text. However, Justice Scalia has himself at least once used this form of argument. *See United Sav. Ass'n*, 484 U.S. at 380.

[354] Sable Communications v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring).

general views of intentionalists and new textualists outlined earlier in this Article. The approach I suggest rests on the principle that legislatures should justify statutes and that courts should interpret unexplained legislative actions cautiously. The Scalia approach is deficient because it does not acknowledge the role of public justification. Even though the Due Process Clause does not create a judicially enforceable requirement that legislatures provide a justification for statutes, legislatures should (and do) explain statutes, and courts should interpret statutes in light of this unenforced legislative obligation. Thus, courts should accord significance to the absence of any assertion that a statute covers a controversial situation when interpreting ambiguous statutory language.

However, the Stevens approach is deficient in characterizing interpretive questions as factual issues involving "legislative intent." The deficiencies of the "legislative intent" concept have been discussed earlier.[355] Instead of attempting to determine whether members of Congress would have viewed a potential application of the statute as sufficiently controversial to warrant vocal opposition or explanation in the legislative history, the Court should determine whether a particular application of the statute is questionable given its own view of the public justification offered for a statute and the corpus of the law. If the proposed application of the statute is questionable[356] and no mention is made of such an application of the statute in the "public justification" (committee reports, statements of floor managers, and statements of sponsors), then the Court may appropriately construe the statute to exclude that situation.

Thus, in *Chisom*, the Court properly considered Congress's failure to suggest that voting rights standards should diverge for judicial and non-judicial elections. However, the Court erred in relying upon some unsupported (and ultimately probably insupportable) inference about legislative intent. The Court should have considered whether the more general purposes of the Voting Rights Act would have been served by such a distinction, and whether other federal voting rights laws distinguished judicial and non-judicial elections. The Court may have concluded, after pursuing such an analysis, that distinguishing judicial and non-judicial elections would not have furthered the elimination of discrimination in voting and that any countervailing principles (such as the principle of preserving local governments' freedom to establish the voting rules) apply no differently in judicial and non-judicial elections. The Court could then have concluded that judicial and non-judicial elections should not be distinguished, based on ambiguous statutory

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[355] *See* notes 265–73 and accompanying text.

[356] A statute cannot be limited in its effect just to those matters specifically contemplated by the legislature at the time the statute was enacted. *See* DICKERSON, *supra* note 4, at 22, 80; DWORKIN, *supra* note 121, at 19. The use of general words in the statute suggest that the statute's application should extend beyond the precise situations specifically contemplated and discussed by members of the legislature.

language, unless Congress at least sets forth such a policy in its justification of the statute.

In any event, legislative justification of statutes is important, and courts ordinarily should not conclude that Congress has commanded a significant change in the law without explanation. The requirement of justification supports the requirement that Congress "call its shot" when statutory language is ambiguous.

B. Holy Trinity: *General Words with Unexpected Applications*

The approach presented in this Article may also change our view of the interpretive enterprise in situations where a statute uses general words that extend beyond any justification offered for the statute. Professor William D. Popkin refers to the problem created by such statutes as the problem of "generality"—"generality refers to language which appears to cover a range of facts even though some applications may seem strange."[357] *Holy Trinity Church v. United States*[358] provides a classic example of this type of problem.[359]

The statute at issue prohibited anyone from assisting or encouraging the immigration of any foreigner who had, before immigrating, entered into a contract to "perform labor or services of any kind."[360] The United States sued Holy Trinity Church, which had hired an English cleric as it rector and pastor. The central issue was whether such employment constituted the "performance of labor or services of any kind" under the immigration statute. As the Court noted, the text of the provision seemed to apply to such employment.[361] However, the Court focused on congressional intent, asserting that it did not "think Congress intended to denounce with penalties a transaction like that" between a church and a rector.[362] 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*."[363] The Court held that the statutory phrase "labor or services of any kind" meant only manual labor, relying on its general knowledge of the circumstances surrounding the statute's enactment, the problems that prompted

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[357] POPKIN, *supra* note 126, at 401; *see also* DICKERSON, *supra* note 4, at 51–53.

[358] 143 U.S. 457 (1892).

[359] The *Holy Trinity* Court itself noted that the interpretive problem it faced resulted from congressional attempts to address a particular problem by using general language that encompassed situations Congress did not envision. *See id.* at 459, 472.

[360] *Id.* at 458.

[361] *See id.* at 457–58. The plain meaning argument was strengthened by the statute's explicit exemption of some professionals, including actors, artists, lecturers, singers, and domestic servants. *See id.*

[362] *See id.* at 459.

[363] *Id.* at 459 (emphasis added).

Congress to act,[364] and the statute's legislative history, which focused on immigrants who engaged in physical labor.[365] The Court noted that the relevant Senate committee realized that the text of the statute could be read to include even those immigrants who did not engage in manual labor and refused to amend the statute to limit its reach to manual laborers.[366] The Committee had explained that it did not wish to delay the bill's enactment by redrafting it and expressed its confidence that the courts would interpret the bill to bar only manual laborers.[367] The Court also expressed concern about the statute's impact on religious freedom were the statute interpreted literally, and said it did not believe Congress meant to inhibit the practice of religion.[368]

Though no Justice dissented in *Holy Trinity*, Justice Anthony Kennedy criticized the *Holy Trinity* Court's approach in his opinion in *Public Citizen v. United States Department of Justice*.[369] Justice Kennedy argued that legislative materials possess no authority. He also asserted that the judicial practice of "rummag[ing] through" legislative history does not further "democratic exegesis."[370] Finally, he argued that determinations of legislative intent are generally so deficient and based on so little evidence that a court's conclusion as to legislative intent really reflects the views of the judges rather than those of the enacting legislature.[371] Justice Kennedy even analogized the attempt to determine legislative intent to a seance.[372]

How are we to approach this dispute between those who believe in limiting

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[364] *See id.* at 463–64. The Court explained that the statute could be interpreted in light of the "evil" it was designed to remedy. *See id.* In identifying that "evil," the Court could properly consider "contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body." *Id.* at 463 (citing United States v. Union Pacific R.R., 91 U.S. 72, 79 (1875)). In the Court's view, the problem Congress sought to remedy was big business's use of imported labor to reduce the wages of native American laborers. *See id.*

[365] *See id.* at 464–65.

[366] *See id.* at 464.

[367] *See id.* at 464–65.

[368] *See id.* at 472. This portion of the Court's argument resembles the types of arguments based on legislative silence discussed in the previous section. In support of its view that Congress would not have enacted a statute making contracts between churches and foreign clerics illegal, the Court did not discuss any statement made in Congress, but rather generally canvassed the role of religion within the United States from the settlement of North America until 1892. *Cf.* SUNSTEIN, *supra* note 74, at 87, 89 (suggesting a similar approach).

[369] 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).

[370] *Id.* at 473.

[371] *See id.* at 473.

[372] *See id.* at 473 (After noting the focus, supported by *Holy Trinity*, on the spirit of the law, Kennedy notes that "[t]he 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.").

general words by the legislative history and those who do not? Justice Kennedy offers telling criticisms of the use of legislative history to the extent that it is used to determine the actual subjective intent of a majority of the enacting legislature. The factual basis for a conclusion that most representatives in the Congress that enacted the immigration bill intended the statute to apply only to manual laborers does not seem fully convincing and may reflect the views of the judges more than any serious factual inquiry.[373] Certainly, historians, journalists, archaeologists, or others concerned with history, would find unpersuasive the factual inquiry conducted by the *Holy Trinity* Court.[374]

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, Kennedy's view is too restrictive. The public justification for the statute is an appropriate source to use in determining the scope of the statute. Judges must acknowledge that they are not conducting a factual inquiry into "intent" when attempting to construe a statute. 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. Although, 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.[375] Thus judges will have to acknowledge discretion; they will have to admit that their interpretation is not merely the one they are forced to accept by some "legislative intent," but rather one that is chosen based on the court's interpretation of the text of the statute and the public justification provided.

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[373] *See* MacCallum, *supra* note 251, at 778 ("While judges and administrators obviously utilize evidence of the intentions of various individual legislators, they make no serious attempt to discover the actual intentions of the voting majorities. . . .").

[374] Perhaps, however, historians and lawyers study the past for different reasons. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 168–71, 180–90 (1996); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987). Kalman notes the differences between historians' and lawyers' view of history: While historians focus on nuance and complexity, and emphasize the differences between the present and the past, lawyers focus on simplicity and clarity, and on the similarities between the past and the present. *See* KALMAN, *supra*. To illustrate her point, Kalman notes historians' unfavorable reaction to civic republicans' claims that their approach embodies the views of the Framers of the Constitution. *See id.* at 174–76; *see also* S. Martin Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

[375] *See* Lee, *supra* note 241, at 389–90, 403–04.

VI. CONCLUSION

In many ways the conventional approach to interpreting statutes, reading text in the context of limited portions of legislative history, is a sound approach in need of a supporting theory. As we have seen, justifying the use of legislative history based on the concept of legislative intent has produced two consequences. First, when scholars, from Max Radin to the new textualists, began to argue that the legislature could only be treated as the sum of individual legislators, the notion of legislative intent became untenable. Even when scholars who found legislative intent useful argued that a legislature should be viewed as an institution in which authority is delegated to certain institutional actors subject to expressions of assent by the entire chamber, they did not provide a convincing normative reason for viewing the vote on the statute as an endorsement of the explanatory statements provided by the institutional actors. Second, the concept of "legislative intent," in conjunction with both the argument that the legislature is merely the sum of individuals and the documentation of more of the legislative process, has produced serious methodological consequences. Interpretation of statutes has almost become a factual inquiry into subjective intent in which courts either lack the most probative evidence or seem to arbitrarily refuse to pursue all the relevant evidence.

The public justification approach addresses these problems. It provides a basis for asserting that legislatures have a duty not merely to enact statutes, but to explain them as well, and that accordingly legislators have a duty to respond to the institutional explanations of those statutes. The public justification approach allows courts to examine legislative history without conceiving of the interpretive task as a factual inquiry into subjective intent and provides something of a guide to distinguishing documents that should be given weight in the interpretive process from those documents that should not.