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John F. Manning  
*Harvard Law School*

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## WHY DOES CONGRESS VOTE ON SOME TEXTS BUT NOT OTHERS?

John F. Manning\*

ROBERT KATZMANN, *JUDGING STATUTES* (OXFORD UNIVERSITY PRESS 2014). PP. 184. HARDCOVER \$ 26.95.

### INTRODUCTION

A great book—called simply, *Judging Statutes*—grew out of Judge Robert Katzmann’s 2012 Madison Lecture at the New York University School of Law.<sup>1</sup> What makes this particular book about statutory interpretation so engaging is the breadth of perspective that Judge Katzmann brings to it. Before joining the bench, he spent years studying how Congress communicates with the judiciary and advising Members of Congress on how to improve that communication.<sup>2</sup> As a judge, he has confronted the difficulties of effective interbranch communication each and every day. He has looked at laws from both sides and brings a correspondingly informed and measured perspective to his writing.

Judge Katzmann’s basic theme is clear and characteristically thoughtful. Writing squarely within the faithful-agent tradition,<sup>3</sup> he conceives of his task as that of “trying to discern *Congress’s* meaning in the statutes it enacts.”<sup>4</sup> If “the language of the statute is

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\* Bruce Bromley Professor of Law and Deputy Dean, Harvard Law School. I am grateful to Brad Clark, Susan Davies, Brett Kavanaugh, Kenneth Kersch, Linda McClain, and Henry Monaghan for thoughtful comments. My thanks also to the editors of the *Tulsa Law Review* for excellent edits.

1. ROBERT A. KATZMANN, *JUDGING STATUTES* (2014) [hereinafter KATZMANN, *JUDGING*].

2. *See id.* at x (discussing his work with Rep. Robert W. Kastenmeier on improving statutory communication). Among other things, Judge Katzmann’s work culminated in the publication of an important study of the subject. *See* ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997).

3. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (noting that under “the most prominent conception” of statutory interpretation, judges must “discern and apply a judgment made by others, most notably the legislature”).

4. KATZMANN, *JUDGING*, *supra* note 1, at 3 (emphasis added); *see also id.* at 29 (“I start with the premise that the role of the courts is to interpret the law in a way that is faithful to its meaning.”).

plain on its face, pristine, and brimming with clarity,” he says, interpretation is “straight-forward.”<sup>5</sup> But when a statute comes across as “ambiguous, vague, or otherwise imprecise,”<sup>6</sup> Judge Katzmman tells us that “the fundamental task for the judge is to determine what Congress was trying to do in passing the law.”<sup>7</sup> In other words, a court must try “to provide the meaning that the legislature intended.”<sup>8</sup>

Up to this point, Judge Katzmman’s position builds on a fairly standard (though not universally accepted)<sup>9</sup> account of the federal judiciary’s proper role in statutory cases.<sup>10</sup> The book’s added value, then, lies in its development of the idea that judges must focus more self-consciously on the internal nitty-gritty of the legislative process when determining what interpretive fidelity to Congress entails. Starting from the idea that “the Constitution largely vests Congress with authority to determine its own procedure,” Judge Katzmman suggests that “Congress intends that its work should be understood through its established institutional processes and practices.”<sup>11</sup> Federal judges, however, give only “scant consideration” to “how Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws.”<sup>12</sup>

Though the book has many facets, perhaps its central aim is to use this process insight to defend the use of legislative history and to counter what Judge Katzmman calls the “undeniable impact” of textualism.<sup>13</sup> Two supporting arguments break the most new ground. First, because Congress itself treats legislative history “as essential in understanding [statutory] meaning,” a textualist judge’s refusal to consult that resource “may . . . undermine the constitutional understanding that Congress’s statuemaking should be respected as a democratic principle.”<sup>14</sup> Second, because administrative agencies have strong political incentives to honor legislative expectations, courts should take a cue from the fact that agencies “view legislative history as essential reading” when they implement federal statutes.<sup>15</sup>

These arguments cast old-school intentionalism in a sophisticated new light. In so

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5. *Id.* at 4.

6. *Id.*

7. *Id.* at 31.

8. *Id.*

9. A difference of opinion exists about whether federal courts properly function as faithful agents of Congress. Compare William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (making a structural and historical case for reading Article III power to include inherent common law authority in relation to statutes), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (defending the faithful agent theory).

10. I will analyze Judge Katzmman’s book against the backdrop of the Supreme Court’s longstanding acceptance of the faithful agent position. See, e.g., *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); *Ozawa v. United States*, 260 U.S. 178, 194 (1922) (“It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance.”).

11. KATZMANN, *JUDGING*, *supra* note 1, at 9.

12. *Id.* at 8.

13. *Id.* at 45.

14. *Id.* at 52.

15. *Id.* at 28.

doing, Judge Katzmann joins an array of scholars who want judges to craft rules of interpretation that better account for the impact of congressional rules of procedure upon statutory enactments,<sup>16</sup> the way legislative staffers understand drafting practices on the ground,<sup>17</sup> and the role norms of legislative behavior play in shaping statutes.<sup>18</sup> This new line of inquiry might be described as a “Legislative Process school,” which tries to link the meaning constructed by interpreters more tightly to the precise means by which drafters generate that meaning.

Having spent two decades pressing bicameralism and presentment arguments into the service of textualism,<sup>19</sup> I can hardly object to the Legislative Process school’s emphasis on legislative process. To put it somewhat differently, I agree with those who maintain that legislative “intent” is not a fact in the world to be discovered, but rather a construct to be built out from a political or constitutional theory of what *should* count as Congress’s decision.<sup>20</sup>

At the same time, the very process arguments that *Judging Statutes* deems compelling seem to highlight, without fully resolving, an important puzzle about legislative history. Namely, if legislative history is as central to the legislative process as the Legislative Process school suggests—that is, if the most important forms of legislative history (*viz.* committee reports) are generated by key legislators to advise other legislators of a statute’s meaning, if rank-and-file members do base their votes on the legislative history, and if legislative history is more probative of the legislative “deal” than is the statute itself<sup>21</sup>—then why does Congress choose to vote on the dry, technical bill alone, and not on the legislative history or, indeed, on both sets of texts in tandem? Both the bill and the accompanying committee reports are texts; both are generated by the legislative process; both are available before the final vote. So what are we to make of the fact that Congress typi-

16. See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 81 (2012).

17. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, Part I]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and Canons: Part II*, 66 STAN. L. REV. 727, 781 (2014) [hereinafter Bressman & Gluck, Part II]; Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

18. See, e.g., James J. Brudney, *Intentionalism’s Revival*, 44 SAN DIEGO L. REV. 1001 (2007); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1448 (2003).

19. I have argued, as I will again in a different form here, that interpreters should not give authoritative weight to legislative history because doing so permits legislators to make an end run around Article I’s bicameralism and presentment requirements. See, e.g., John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Textualism*].

20. See Nourse, *supra* note 16, at 81 (arguing that legislative intent is a “metaphor”); cf. Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (arguing that any theory of interpretation depends on a theory of “institutional roles”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995) (contending that interpretation entails a theory of legislation and of adjudication).

21. The process contentions of Judge Katzmann and others are elaborated below. See *infra* text accompanying notes 27-47.

cally *chooses* to vote on the bill alone? That question is sharpened, moreover, by Congress's continued failure to put legislative history to a vote three decades into a textualist campaign that has put legislative history on uncertain footing in the Supreme Court.<sup>22</sup> Absent a convincing answer, one might wonder whether pivotal legislators think it unlikely that they could pass the full complement of legislative history—or even high value items such as committee reports—if they put those materials to a vote instead of, or even alongside, the text.

The balance of this essay presses the question whether it should matter, for interpretation purposes, that Congress chooses to vote on some legislative texts but not others. Part I lays out, in greater detail, the key legislative process insights of Judge Katzmman and the Legislative Process school. Part II then considers whether Congress's decision to vote for the text, and not the text and committee reports, should affect a judge's willingness to treat such reports as indicia of legislative intent. Part III examines ways in which agencies and courts might use legislative history, even if one thinks that courts should not treat it as authoritative evidence of legislative intent. Part IV suggests the possibility of treating legislative history as a political, rather than legal, signal.

## I. LEGISLATIVE HISTORY AS CONGRESS SEES IT

Judge Katzmman starts from the widely shared idea that one must construct legislative "intent" from some form of political or constitutional theory.<sup>23</sup> Though scholars of diverse perspectives have questioned the idea that any complex multi-member, lawmaking body can meaningfully share an intention,<sup>24</sup> the analysis here will start from the contrary

22. Perhaps the clearest expression of the Court's newfound skepticism and caution is found in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, in which a majority states:

[L]egislative history . . . is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "looking over a crowd and picking out your friends." . . . Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

545 U.S. 546, 568-69 (2004) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

23. Judge Katzmman rejects the idea that the Constitution prescribes any rules of decision for judges engaged in statutory interpretation. See KATZMANN, JUDGING, *supra* note 1, at 29-31. At the same time, his interpretive approach presupposes that, in a system marked by legislative supremacy, the judge's job is to ascertain as nearly as possible what policy Congress meant to adopt. See *id.*

24. Some form of intent skepticism provides the foundation for a broad spectrum of quite different interpretive approaches. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) (textualism); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 347-48 (1990) (pragmatism); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930) (realism).

premise that one can ascribe a joint intention to an institutional actor—such as a legislature, an army, a corporation, a sports team, or maybe even a faculty.<sup>25</sup> Even if one starts from that assumption, however, Ronald Dworkin famously showed that the question of *how* to construct legislative intent is anything but obvious; one must decide whose intentions count, how to sum them into a collective whole, and at what level of generality even to pose the question of what Congress “intended.”<sup>26</sup>

Judge Katzmann’s preferred method of constructing legislative intent—namely, that of following Congress’s own lead on the question—rests on a theory of the constitutional allocation of lawmaking power: Because the Constitution says little, if anything, about how to read statutes, a court that respects Congress’s “lawmaking prerogatives” should presumably consult the “interpretive materials that the legislative branch thinks important to understanding its work.”<sup>27</sup> This approach would seem, moreover, to enhance the likelihood that the Courts will understand the law the same way Congress does.<sup>28</sup> That focus, moreover, conforms interpretation to the constitutional reality that, within very broad bounds, *Congress* has the power to specify its own “lawmaking processes.”<sup>29</sup>

From that starting point, Judge Katzmann argues that judges should use legislative history to ascertain legislative intent. In particular, they should pay attention to committee reports.<sup>30</sup> Why? The statutory text will not reliably reveal legislative intent because a variety of factors conspire to produce ambiguous, vague, or imprecise texts such as:

the difficulty of foreseeing all problems; the often inherent imprecisions of language itself; the legislature’s decision to identify an issue generally and then to delegate the issue to the executive branch for resolution; and the nature of coalition politics which, in cobbling together the necessary majority, may yield legislation that is deliberately vague and ambiguous.<sup>31</sup>

In addition, increased pressures on legislators’ time “reduce opportunities for reflection and deliberation.”<sup>32</sup> And the often technical language of the bills on which Members of Congress vote may not meaningfully reveal the policies upon which they are voting.<sup>33</sup>

Hence, most Members of Congress must rely on pivotal legislators to inform them what a “yea” vote would mean. In a system in which “congressional committees have

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25. See, e.g., STEPHEN G. BREYER, *ACTIVE LIBERTY* 87 (2005) (noting that one can sensibly speak of “the intentions of an army or a team, even when they differ from those of any, or every, soldier or member”); RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 61-63 (2012) (discussing the group intentions of armies); KATZMANN, *JUDGING*, *supra* note 1, at 34-35 (discussing “local governments, trade associations, and businesses”).

26. See RONALD DWORKIN, *LAW’S EMPIRE* 318, 320-21, 324-27 (1986).

27. KATZMANN, *JUDGING*, *supra* note 1, at 29.

28. See *id.*

29. *Id.* at 13.

30. *Id.* at 19-22.

31. *Id.* at 15.

32. KATZMANN, *JUDGING*, *supra* note 1, at 18.

33. As Judge Katzmann notes, reading the text of a bill may convey little useful information inasmuch as the bill may “contain language amending the United States Code or enacted statutes.” *Id.*

[long] been central to lawmaking,” legislators have come to “accept the trustworthiness of statements made by their colleagues on other committees, especially those charged with managing the bill, about what the proposed legislation means.”<sup>34</sup> Legislators (or, more likely, their staff) “become educated” about the import of a bill “by reading the materials produced by the committees and conference committees.”<sup>35</sup> Indeed, committee reports “have long been important means of informing the whole chamber about proposed legislation; they are often the primary means by which staffs brief their principals before voting on a bill.”<sup>36</sup> These materials serve to convey “a bill’s context, purposes, policy implications, and details.”<sup>37</sup> Accordingly, to put the argument in its boldest terms, “[w]hen Congress passes a law, it can be said to incorporate the materials that it, or at least the law’s principal sponsors (and others who worked to secure enactment), deem useful in interpreting the law.”<sup>38</sup>

Against that backdrop, Judge Katzmman emphasizes that by using legislative history in interpretation, judges “respect what legislators consider their work product.”<sup>39</sup> Judge Katzmman bases his conclusion, in part, on the “bipartisan institutional perspective” he has seen in legislative hearings addressing interbranch relations and, time and again, in judicial confirmation hearings in which senators on both sides of the aisle have voiced disapproval of any exclusionary rule for legislative history.<sup>40</sup> He also relies heavily on recent empirical work by Professors Abbe Gluck and Lisa Schultz Bressman, whose survey of 137 members of the congressional staff found that “‘almost all’” of them view “‘legislative history . . . as the *most important* drafting and interpretive tool apart from the text.’”<sup>41</sup> In fact, as Judge Katzmman adds,<sup>42</sup> the Gluck-Bressman survey further revealed that legislators and the staff who advise them are far more likely to learn about the contents of a bill from the legislative history than from the text itself.<sup>43</sup> Finally, it turns out that the policy staffers who draft the legislative history are more closely tied to the Members of Congress who cut the actual “deals” than are the more independent technical staffers who typically draft the text itself.<sup>44</sup>

In short, if judges seek “to interpret language in light of the statute’s purpose(s) as enacted by the legislators,” those judges should consult legislative materials that reliably reveal “what the legislators were seeking to do.”<sup>45</sup> By consulting the legislative history that legislative drafters themselves regard as central, “the judiciary not only is more likely

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34. *Id.* at 13, 18.

35. *Id.* at 19.

36. *Id.*

37. KATZMANN, JUDGING, *supra* note 1, at 20.

38. *Id.* at 48.

39. *Id.* at 36.

40. *Id.* at 36-37.

41. *Id.* at 37 (emphasis added by Judge Katzmman) (quoting Gluck & Bressman, Part I, *supra* note 17, at 965).

42. KATZMANN, JUDGING, *supra* note 1, at 37.

43. See Gluck & Bressman, Part I, *supra* note 17, at 968.

44. See KATZMANN, JUDGING, *supra* note 1, at 38; see also Gluck & Bressman, Part II, *supra* note 17, at 740-41 (discussing the roles of different staff in the legislative process).

45. See KATZMANN, JUDGING, *supra* note 1, at 31, 33, 35.

to reach the correct result, but also promotes comity within the first branch of government.”<sup>46</sup> In his emphasis on following the legislature’s own valuation of legislative history, Judge Katzmann shares the good company of many distinguished judges, including his predecessors Judge Learned Hand and Judge Henry Friendly.<sup>47</sup>

## II. WHAT CONGRESS PUTS TO A VOTE

There is much to admire about Judge Katzmann’s larger framework for thinking about statutory interpretation. Proponents of legislative supremacy should care about, and strive to understand, what policy Congress means to adopt in the legislation it enacts. I am also prepared to accept, at least for the sake of argument, that legislators and/or the staff who advise them are aware that committee reports, planned colloquies, and the like are used to, and do, convey important signals about the technical meaning, the broader aims, or the strategies of legislation. It is also true that (if one brackets the requirements of bicameralism and presentment)<sup>48</sup> the Constitution says little, if anything, about how Congress is to go about the business of legislating. Indeed, by specifying that “[e]ach House may determine the Rules of its Proceedings,”<sup>49</sup> the document seems to vest discretion over legislative procedure squarely in Congress’s hands.

In an important sense, however, Judge Katzmann’s rationale for crediting legislative history only highlights the following puzzle: If key pieces of legislative history such as committee reports play such a critical role in the legislative process—if the reports are drafted by the most politically accountable staff, if legislators and staffers learn about the content of the legislation primarily from the committee reports, if legislators expect those

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46. *Id.* at 36. In particular, Judge Katzmann would use legislative history, as legislators and their staff presumably do, to flesh out the bare bones of the technical statutory text:

It can aid in the search for meaning when a statute is silent or unclear about a contested issue. Legislative history can be especially valuable when construing a specialized term or phrase in statutes dealing with complex matters beyond the ordinary ken of the judge. In that circumstance, it can aid the judge in understanding how the legislation’s congressional proponents wanted the statute to work, what problems they sought to address, what purposes they sought to achieve, and what methods they employed to secure those purposes.

*Id.* at 35.

47. See *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935) (Learned Hand, J.) (arguing that “while members [of Congress] deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go in any other way”); Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 216 (1967) (contending that members of Congress understood a bill’s general purpose and “relied for the details on members who sat on the committees particularly concerned, and were quite willing to adopt these committees’ will on subordinate points as their own”); see also, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring) (“Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances since most members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.”); 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 (1990) (“[T]o the extent that Congress performs its responsibilities through committees and delegates to the staff the writing of its reports, it is Congress’ evident intention that an explanation of what it has done be obtained from these extrinsic materials.”).

48. See U.S. CONST. art. I, § 7.

49. *Id.* art. I, § 5.



reports to guide the interpretation of legislation—then why does Congress choose not to vote for the legislative history? Indeed, the puzzle is deeper still: If the text of the legislation is not the crucial policy document—if the text is usually impenetrably technical and opaque, if it goes mercifully unread by legislators or staff, if it is prepared by career staffers who do not answer to legislators directly and who often have nothing to do with formulating the underlying policy or striking the deal—then why does Congress vote for the text instead of the legislative history? Or to add to the mystery: If legislators mean for the committee reports and analogously central legislative history to supplement the text any time it really makes a difference—to explain ambiguities, clarify imprecisions, and explicate the policy being pursued or the means of pursuit—then why not vote for both?

The truth is that, in exercising their authority to specify their procedures under Article I, Section 5, the Houses of Congress choose to vote for the boring, dry, technical, opaque, hard-to-read statutory text, drafted by the professional rather than the political staff. Why Congress has made that collective choice we do not know, at least not from the horse's mouth. As of yet, neither Judge Katzmman nor any of the studies on which he relies has a first-hand account from Members of Congress about why they choose to vote for the text rather than the reports and colloquies that more directly inform their votes. One might think that, at some level, it just does not matter, that concerning oneself with the final vote is “spare formalism,” as Gluck and Bressman have said.<sup>50</sup> But that conclusion denies Congress's agency in its *differential choice* of what text(s) to put to a vote and what text(s) not to. It is true that no one has asked Members of Congress if they think that the act of voting on a text is significant. But in the aftermath of *Chadha*'s holding that Congress can make binding law *only* through bicameral passage and presentment to the President,<sup>51</sup> it is not far-fetched to suppose that legislators attach some special significance to the act of voting on a text and sending it down Pennsylvania Avenue for signature or veto. Among the countless pieces of paper Congress generates, those properly called “enrolled bills” seem to stand out from the crowd.

So why doesn't Congress vote on the very pieces of paper that anecdotal and survey evidence tells us count for so much? Why not at least attach the committee reports or specified colloquies as an official appendix to the bill, with the designation that indeterminacies, discontinuities, or even absurdities in the text are to be understood and resolved in light of the “official” explanation on which every principal in the process, including the President, has had a chance to act? Congress has done it before. It has voted on *particular* committee reports.<sup>52</sup> In one famous instance, Congress even stated in the statutory text which passages of the *Congressional Record* were to count as the “official” legislative history for key language in the Civil Rights Act Amendments of 1991.<sup>53</sup> Perhaps in the

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50. Gluck & Bressman, Part I, *supra* note 17, at 969.

51. See *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (invalidating one-House legislative veto).

52. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 92 (1981) (Marshall, J., dissenting) (noting that Congress voted on findings contained in the Senate Report); *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting in part) (indicating that, in the Cable Communications Policy Act of 1984, Congress chose “to speak to the precise issue at hand through a Committee Report that was expressly adopted by both Houses”).

53. Section 105(b) of the Civil Rights Act of 1991 provides:

post-New Deal heyday of legislative history, one might have said (though barely even then) that it did not much matter whether Congress stashed important policy content in the text or in the legislative history. After all, if the Court routinely treated certain forms of legislative history (committee reports and sponsor's statements) as "authoritative" evidence of legislative intent,<sup>54</sup> then why should it matter whether the relevant elaboration ended up in the Statutes-at-Large or the U.S. Code Congressional & Administrative News?<sup>55</sup> But surely after a quarter century of Supreme Court decisions questioning the utility and legitimacy of legislative history,<sup>56</sup> one might think that a prudent legislator who *could* get a desired explanation or elaboration into the statutory text *would* take the trouble to do so.<sup>57</sup>

Judge Katzmann answers that it is unrealistic, in practice, to expect legislators to enact a statutory text with the kind of detail one finds in the legislative history. Often, he says, ambiguity reflects "the simple fact that the issues are difficult and Congress, having identified the general problem, leaves it to an agency or court to determine how best to address the problem in its specifics."<sup>58</sup> Or the complexity of modern legislation makes it "unreasonable to expect Congress to anticipate all interpretive questions that may present themselves in the future."<sup>59</sup> Indeed, sponsors may not be in a position "to craft legislation that [is] both precise and enactable" and may leave a bill "imprecise in order to facilitate

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No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove-Business necessity/cumulation/alternative business practice.

42 U.S.C.A. § 1981 (West 2015).

The "official" legislative history, in turn, states as follows:

INTERPRETIVE MEMORANDUM

The final compromise on S.1745 agreed to by several Senate sponsors, including Senators DANFORTH, KENNEDY, and DOLE, and the Administration states that with respect to Wards Cove-Business necessity/cumulation/alternative business practice—the exclusive legislative history is as follows:

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

137 Cong. Rec. S15276 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth).

54. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); *Steadman v. SEC*, 450 U.S. 91, 101 (1981); *J.W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund*, 434 U.S. 586, 591 (1978).

55. See generally Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000) (arguing that, by dint of interpretive practice, certain forms of legislative history have become functionally equivalent to statutory text and should be understood as such); see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 145-46 (1999).

56. See, e.g., Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205 (1999) ("The Court is less likely to cite legislative history today, and when it does, the citations seem less important to the outcome.").

57. Judge Katzmann himself cites anecdotal evidence that at least some legislators recognize the virtue of shifting detail to the text. KATZMANN, *JUDGING*, *supra* note 1, at 45. He also offers reform proposals that would make incorporating legislative history into legislation more of a standard operating procedure. *Id.* at 102-03.

58. *Id.* at 47.

59. *Id.*

[its] passage.”<sup>60</sup>

Put another way, it is simply not possible to pass statutes as compendious as they would need to be if Congress imported legislative history full stop into the bill. Justice Breyer—now the Supreme Court’s leading proponent of using legislative history—put it well when he wrote:

Congress does not, cannot, and need not write statutes that precisely and exhaustively explain where and how each of the statute’s provisions will apply. For one thing, doing so would require too many words. Who wants statutory encyclopedias that spell out in excruciating detail all potential applications in all potential circumstances? Who could read them?<sup>61</sup>

Along similar lines, almost one-sixth of the respondents to the Gluck-Bressman survey “volunteered . . . that there is a level of important legislation-related detail that is simply inappropriate for statutory text.”<sup>62</sup> These respondents stressed that the omission of statutory details was not driven by a political inability to “agree[] on those details,” but rather reflected “a perception of what modern statutory language ‘should look like’ and, relatedly, how much detail statutory text is supposed to have.”<sup>63</sup>

To me, these observations do not fully answer—and, in some cases, accentuate—the puzzle of why Congress chooses to vote for the dry and formal statutory text, and not some or all of the legislative history that, legislators and staffers say, really tells us where the rubber meets the road. The simple fact is this: a key element of the case for legislative history rests on its availability prior to enactment, when it can instruct legislators, staffers, and other participants in the legislative process of what policy is up for a vote.<sup>64</sup> The committee reports are texts, worked out in advance by legislators or their agents. And unless one imagines a chamber of legislators listening to their leaders’ reassurances about worrying details or explanations of broad statutory objectives, then one must assume that even planned colloquies or sponsors’ statements are reduced to some readily available textual medium prior to any final vote.

From that starting point, the benign (*viz.* nonpolitical) arguments for not voting on the most authoritative forms of legislative history may come up short. Consider Judge Katzmann’s worry that legislation is complex and that the future is unknowable. Fully conceding that fact of life (who wouldn’t?), it is not clear why that consideration helps determine whether to place an anticipated clarification in the statutory text or the legislative history. If a committee or floor manager has foreseen a question well enough to offer a clarifying detail or articulate a useful statement of a bill’s purposes, then neither the complexity of the legislation nor the limits of human imagination have prevented legislators from generating the *text* upon which Judge Katzmann or Justice Breyer would have

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60. *Id.*

61. STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 96 (2010).

62. Gluck & Bressman, Part I, *supra* note 17, at 974.

63. *Id.*

64. See KATZMANN, JUDGING, *supra* note 1, at 19-20.

judges rely. The only question is whether or not Congress *chooses* to vote on that clarifying text, which its Members have generated in the process of creating the bill's legislative history.

The other benign justifications also leave us with big questions. Justice Breyer and some of the Gluck-Bressman respondents suggest that statutory clutter offends accepted norms of code aesthetics or, more worryingly, may cross the lines of reasonable statutory readability. Those concerns are not small ones. As anyone who has tried to read a form contract can attest, excessive textual detail can actually reduce the transparency and comprehensibility of a canonical text.<sup>65</sup> But, again, it is not clear how that helps us sort between voted-on and unvoted-on legislative history. If committee reports and planned colloquies reveal legislative intent, voting on them adds no words to the law library or to the electronic databases in which all legislative materials increasingly reside. Perhaps one would not ask codifiers to wedge the legislative history into the U.S. Code. But that judgment would not preclude an appendix containing the "official" (voted-on) legislative history or the inclusion of statutory provisions that incorporate such legislative history by reference.

Judge Katzmann might reply that insisting that Congress vote on an official legislative history sounds like judicial usurpation of Congress's prerogative to set its own rules of procedure. That is one fair way to understand it. Another way, though, is to think of the exercise in the terms that Judge Katzmann has set forth and to ask what Congress's choice of process implies about its intent. From that standpoint, it is also reasonable to ask why Congress chooses to vote on a technically drafted bill, but not the legislative history, when both sets of texts are available prior to the legislative vote. If the judiciary's job is to suss out legislative intent, then Congress's decision not to vote on (what legislators and their staff say is) the more informative and pivotal text may shed light on what my colleague Einer Elhauge calls Congress's "*enactable* preferences."<sup>66</sup> In other words, if the legislative history addresses points on which pivotal legislators wish to communicate a decisive understanding or intention, perhaps the choice to include those points in *unenacted* texts reveals doubt about whether the expressions could be expected to command a majority if included in texts slated to be put to a vote.<sup>67</sup>

Still, I must acknowledge that, after thinking about this puzzle for as many years as I have, I worry a bit that the line between enacted and unenacted texts may be too thin to be worth fussing about it. For the Supreme Court prior to the advent of the new textualism,

65. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 152 (1995) (worrying about the "mind-numbing complexity" of overly "elaborate" statutory schemes).

66. EINER ELHAUGE, *STATUTORY DEFAULT RULES* 7 (2008) (emphasis added).

67. Of course, pivotal legislators and their staff do create legislative history for all kinds of reasons other than the specifying policy details or guiding purposes for their voting colleagues and for future interpreters. As Judge Katzmann stresses, the Gluck-Bressman study found that legislators use legislative history, *inter alia*, to facilitate internal legislative communication, to create institutional memory for future legislators, and to communicate with interest groups and constituents. See KATZMANN, *JUDGING*, *supra* note 1, at 38 (summarizing survey results set forth in Gluck & Bressman, Part I, *supra* note 17, at 964-89). The fact that legislators generate legislative history for those other purposes does not detract from the fact that pivotal legislators also use such materials to communicate statutory meaning to their chambers, or that rank-and-file legislators treat those communications as reliable expressions of such meaning. See *id.* at 48-49. For Judge Katzmann, legislative history has interpretive significance because legislators use it to communicate and learn statutory policies.

key pieces of legislative history (such as committee reports) served as authoritative expressions of legislative intent.<sup>68</sup> If, for example, the originating committees reported (without contradiction) that a term such as “reasonable attorney’s fees” was to be implemented through a specified twelve-factor test, the Court would not hesitate to equate that expression with the intent of Congress as a whole.<sup>69</sup> In that regime, one might say that the committee report or a floor manager’s colloquy effectively functioned like the extension of the text.<sup>70</sup> In such a regime, I suppose that a legislator who did not like what the legislative history said would have to vote against the bill. In terms of political accountability, moreover, if a vote for the text was functionally a vote for the explanations found in the key legislative history, one would have to wonder whether legislators were any less responsible politically for the contents of that legislative history than for the contents of the text.<sup>71</sup> If all of those assumptions hold, then a further puzzle emerges: How could legislators game the system and gain political advantage by slipping something into the legislative history rather than the text?

That question has always puzzled me and still does after reading Judge Katzmann’s book, the Gluck-Bressman survey, and the other new learning that has emerged in recent years. Still, legislative behavior suggests that there *is* some difference between putting something in a bill and putting it in a committee report. Especially now, if legislators and staffers want judges to treat legislative history as evidence of legislative intent, then why wouldn’t they put it to a vote *if they thought it would pass*? It would presumably be simple enough to devise (though not necessarily to persuade legislators to adopt) a procedure for assembling committee reports or sponsors’ statements or any other “official” legislative history into an “interpretive appendix” to the bill or, indeed, for incorporating any such key legislative history by reference into a bill. The unanswered question of why Congress does not do so casts doubt on claims that legislators regard the bill and the legislative history as equivalent for political purposes.

### III. WHAT IS LEGISLATIVE HISTORY GOOD FOR?

My puzzlement about why Congress votes on bills but not on texts, such as committee reports, does not mean that I would exclude legislative history from a judge’s interpretive toolkit. In fact, I agree with Judge Katzmann that legislative history may be particularly useful in helping a judge figure out the meaning of “a specialized term or phrase” or understand better how a complex statute might work in practice to address the ills at which it apparently is aimed.<sup>72</sup> No one can deny that legislative history may be informative or persuasive—that it can tell us something about the world. A committee report might alert

68. See cases cited *supra* note 54.

69. See *Blanchard v. Bergeron*, 489 U.S. 87, 91 n.5 (1989) (construing 42 U.S.C. § 1988).

70. This is the point of Siegel’s excellent article. See generally Siegel, *supra* note 55.

71. Justice Breyer, in fact, has suggested that a text-based approach makes it easier for legislators “to avoid responsibility for a badly written statute simply by saying that the Court reached results they did not favor.” BREYER, *supra* note 61, at 95. In contrast, an approach that focuses on the purposes, presumably as expressed in the legislative history, will make it easier for the public to assess legislative performance. See *id.* at 95-96.

72. KATZMANN, *JUDGING*, *supra* note 1, at 35.

a judge to investigate whether a seemingly ordinary term or phrase, in fact, has specialized meaning in legal parlance.<sup>73</sup> Or information gleaned from legislative hearings might point the court to the broader social context in which Congress acted or to external policy frameworks Congress may have tapped into for its legislation.<sup>74</sup> Indeed, the legislative history may even contain a convincing analysis of the way the statute should work or of the cluster of problems that provoked the legislation in the first place.<sup>75</sup>

In all of those instances, the Court uses legislative history for the *substance* of what it contains. That is to say, the Court might have found the same material useful in the same way even if it had come from elsewhere—from a lower court opinion, a law review article, a newspaper article, or even an *amicus* brief that conveyed relevant information or persuasive analysis about the statutory context or scheme. The questions I have about Judge Katzmann’s approach lie in the margin in which a judge credits legislative history not because of what it says but rather because of who has generated it. For him, as noted, certain legislative history reflects legislative intent because it comes from pivotal actors whose colleagues will, by dint of legislative practice, treat their utterances as authoritative expositions of the bill on which the chamber is voting. As Judge Katzmann puts it, Congress has set up “rules and procedures” so that certain actors—mainly “committee chairs, floor managers, and party leaders”—can generate legislative history that will “provide reliable signals to the whole chamber.”<sup>76</sup> From that starting point, “[w]hen Congress passes a law, *it can be said to incorporate the materials* that it, or at least the law’s principal sponsors (or others who worked to secure enactment), deem useful in interpreting the law.”<sup>77</sup>

When understood in that way, the interpretive value of legislative history does not come from the fact that it says something true or persuasive about the world. Rather, its legal force derives from the mere fact that legislators accept committee reports or sponsors’ statements as authoritative statements of the policy for which they are voting. When legislative history’s value comes from its status as an authoritative exposition of the text, it is hard to know what to make of the statement that “[l]egislative history is not the law.”<sup>78</sup> The gold standard legislative history may not be “the law” in any formal sense, but it functions as law precisely because legislative practice treats it as an extension of the text. In other words, Judge Katzmann’s particular justification for treating legislative history as

73. See, e.g., Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 852 (1992) (explaining the way a committee report helped identify the word “substantial” as a term of art in administrative law).

74. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 590-91, 596 (2004) (consulting the social context of the enactment of the Age Discrimination in Employment Act and finding that the idea of age discrimination dealt with the problem of favoring younger over older workers rather than the converse); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-03 (1974) (learning from congressional hearings that a standard in the Equal Pay Act derived from established practices and understandings in the human resources community).

75. Even Justice Scalia, at times, used legislative history for that purpose. See, e.g., *United States v. Fausto*, 484 U.S. 439, 448 (1988) (relying on a committee report’s account of the problems flowing from the complexity of civil service statutes prior to the enactment of the Civil Service Reform Act).

76. KATZMANN, *JUDGING*, *supra* note 1, at 48-49.

77. *Id.* at 48 (emphasis added).

78. *Id.* at 38.

evidence of intent turns out to be a double-edged sword.

To sharpen the distinction, consider two hypotheticals suggested by the famous attorney's fees example mentioned above.<sup>79</sup> The statute authorizes the award of "reasonable attorney's fees" in civil rights cases.<sup>80</sup> Imagine that in scenario one, the Court consults the committee report because it contains lots of verifiable data about industry practice—how lawyers customarily calculate fees in such cases. Or suppose that the Court relies on the committee report because it contains references—case citations, treatises, and the like—that enable the Court to find that, by the time Congress imported the language into the statute at hand, the phrase, "reasonable attorney's fees," had ripened into an established term of legal art. In either of those cases, the committee report would matter because it informed a non-expert Court about facts in the world, which a judge would be free after investigation to deem persuasive or not. No one could object to using legislative history in this way, which leaves courts considerable latitude to consult those materials for the value of what they convey.

Now, suppose that, in scenario two, the committee report simply sets forth six factors that the committee deems relevant and intends courts to use in determining a "reasonable" fee. Under Judge Katzmman's approach, the committee's articulation of those criteria should suffice to establish congressional intent because rank-and-file members would, under accepted legislative practice, consult the committee's views in order to understand the bill's meaning. Indeed, under his attributed-intent approach, if the committee report represented that the six factors were relevant because lawyers traditionally used them to determine a reasonable fee in civil rights cases, the Court would have no reason to go out and verify that representation. Rank-and-file legislators would presumably have voted on the basis of the committee report's assertions, whether or not those representations accurately captured some state of play in the world. On that understanding, it is as if the bill itself has, in Judge Katzmman's words, "incorporate[d] the materials" in question.<sup>81</sup> If so, then his theory of interpretation would give similar treatment to two disparate texts, even though Congress has chosen to vote for the bill but not for the legislative history that the bill is said to "incorporate." It is only that use of legislative history that I find troubling.

#### IV. LEGISLATIVE HISTORY AS A POLITICAL SIGNAL

For reasons perhaps somewhat different from those suggested by Judge Katzmman, his book identifies another important way in which interpreters might legitimately make use of legislative history—namely, as a political signal to guide the exercise of delegated discretion. In one of the book's most arresting contributions, Judge Katzmman contrasts the way agencies and courts use legislative history. Judge Katzmman starts from the observation that, in contrast with courts, agencies routinely use legislative history to identify

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79. See *Blanchard v. Bergeron*, 489 U.S. 87, 87 (1989); see also KATZMANN, *supra* note 1, at 91 n.5.

80. 42 U.S.C.A. § 1988 (West 2015).

81. KATZMANN, *JUDGING*, *supra* note 1, at 48.

legislative expectations for purposes of statutory interpretation.<sup>82</sup> “Judges,” he then argues, “would do well to understand the methodology of agency interpretation,” even in cases that do not involve agency-administered statutes.<sup>83</sup>

Why? Judge Katzmann’s central point is that courts should emulate agency practices because agencies have stronger incentives to read legislative expectations accurately—to use techniques that will somehow get it right.<sup>84</sup> In particular, Congress has lots of ways to impress its policy preferences upon agencies, including “confirmation hearings, appropriation hearings, authorization hearings, oversight hearings and investigations, committee reports, floor debates at the time of legislative consideration of a bill, and other non-statutory controls.”<sup>85</sup> Given Congress’s oversight authority and power over agency budgets, any agency that cares about “preserving its autonomy, budget, and responsibilities” will do its level best to fulfill “legislative expectations lest Congress curb the agency’s authority and funding.”<sup>86</sup> In this light, an agency that “ignores a directive in a committee report . . . may suffer the consequences at the next congressional hearing, if not before.”<sup>87</sup>

While I agree with Judge Katzmann that the contrast between agencies and courts is telling, I draw a different conclusion from that starting premise. An agency has good reason to interpret statutes in a way that will fulfill the expectations expressed by originating committees or other pivotal actors, but not necessarily because those expectations reflect legislative intent. An agency might have good *political* reasons to heed the signals of a committee that has jurisdiction over the agency’s regulatory authority, can subject administrators to uncomfortable oversight hearings, or can bottle up agency nominees seeking confirmation. In other words, Judge Katzmann is correct to say that an agency would be foolish to disregard the signals that the originating committee slipped into the legislative history. On that view, agencies may legitimately see legislative history as a political rather than legal constraint on their exercise of delegated power.

82. *See id.* at 24-26.

83. *Id.* at 27.

84. I bracket institutional competence arguments, which I find inconclusive. Judge Katzmann argues that agencies are simply better than courts at reading the legislative process. *See id.* In particular, the doctrine that courts must “defer to an agency’s interpretation of an ambiguous statute that it administers” rests in part on the agency’s superior “institutional competence”—the felt sense that “an agency is deeply familiar with the legislation it is charged with implementing.” *Id.* (discussing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). This point mirrors the commonly held view that because agencies participate in the drafting of legislation and live with a statute on a daily basis, they are more likely to understand and capture its true gist. *See, e.g.,* Peter L. Strauss, *When the Judge Is Not the Primary Official With Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI. KENT L. REV. 321, 346-47 (1990).

The institutional competence argument, however, cuts both ways. One could say that since agencies are better at reading legislative intent, courts should follow their lead and consult the same materials that agencies do. But one might also conclude that superior agency competence in reading the legislative history counsels against, rather than in favor of, a generalist judge’s attempting to perform the same feat of political reconstruction. *See* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 209-10 (2006). In other words, agencies might be better than courts at reading and understanding legislative history precisely because the former’s participation in the process gives them the wherewithal to evaluate the legislative history critically and to separate the wheat from the chaff.

85. KATZMANN, *JUDGING*, *supra* note 1, at 24.

86. *Id.* at 26-27.

87. *Id.* at 27.



This approach has two conceptual benefits and one functional one. The first conceptual benefit lies, again, in crediting the differential signal that Congress sends by voting on the statutory text but not the key legislative history. In the Gluck-Bressman survey, no fewer than 94% of the respondents reported that they create legislative history “to shape the way that agencies interpret statutes.”<sup>88</sup> If that is the aim of generating legislative history, then the “enactable” preferences problem becomes glaring. Congress effects a basic delegation in the bill on which legislators choose to vote. Detailed instructions for fleshing out that delegation, however, come in the legislative history on which legislators choose not to vote. Treating that legislative history as an instantiation of legislative intent ignores Congress’s disparate treatment of the bill and the legislative history. Conversely, the legislative choice to treat the two texts differently is preserved by treating the legislative history as merely a political signal that any sensible agency will follow but that does not bind that agency legally, as would a clear statutory command.

The second conceptual virtue is this: Treating legislative history as a political signal makes sense of another congressional choice—namely, the decision whether to vest primary interpretive authority in an agency rather than a court. Article III of the Constitution establishes federal courts to be largely independent of Congress.<sup>89</sup> By constitutional design, Congress has difficulty exerting control over judicial decisionmaking.<sup>90</sup> In contrast, the levers of congressional influence described by Judge Katzmman make agencies more directly answerable to Congress in their implementation of federal statutes.<sup>91</sup> If Congress chooses the judiciary rather than an agency as the primary implementer of a federal statute, then it is buying independent judgment at the cost of political control, or at least influence, over implementation. If one understands legislative history as a political rather than a legal signal, then Congress retains considerable power to determine how much of a role legislative history will play simply by choosing a court or an agency as the law’s primary implementer.

If a vague or ambiguous statute leaves a court with interpretive discretion, a court may opt, for any number of good reasons, to consult legislative history in the exercise of that discretion.<sup>92</sup> By virtue of its constitutionally prescribed independence, however, a federal court can be expected to feel less compulsion than would an agency to follow a political signal contained in a committee report. If Congress wishes to issue (but not vote for) effective instructions about how to fill in the inevitable gaps or ambiguities in its laws, it can achieve that goal more reliably by opting for an agency rather than the judiciary as the law’s primary implementer. Suggesting, as Judge Katzmman does, that courts and agen-

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88. Gluck & Bressman, Part I, *supra* note 17, at 972.

89. See U.S. CONST. art. III, § 1 (assuring life tenure and salary protection).

90. Of course, Congress has authority to exert control over the federal courts by stripping their jurisdiction. But for a variety of political, structural, and cultural reasons, it has rarely done so. See generally Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011).

91. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879, 887-88 (1975).

92. See *supra* text accompanying notes 73-75.

cies should approach legislative history the same way elides that important structural difference between the two implementing branches. It also minimizes the reality that Congress necessarily makes trade-offs when it chooses between an agency and a court as the primary implementer of its statutes.

Understanding legislative history as a political rather than a legal signal has one important practical virtue as well. Judge Katzmann writes that an appreciation of legislative purpose “allows judges to apply the laws in situations not necessarily anticipated by the enacting Congress.”<sup>93</sup> He worries, moreover, that textualism may introduce rigidity into the law since no legislature has enough foresight and skill to anticipate and provide for all the eventualities that will arise in the life of a statute.<sup>94</sup> But it is not clear if legislative history makes statutes more or less adaptable—at least not if it is treated as legally binding evidence of Congress’s intentions rather than as a source of information or as a political signal. As Professor Jerry Mashaw has written:

[T]he exclusion of legislative history is more likely to increase the flexibility of statutes than to render them static or rigid. After all, inquiry is directed necessarily away from pre-statutory history and toward later text including administrative decisions, judicial decisions, and later statutes. Suppressing the working documents, or *travaux préparatoires*, of codes or constitutions is a common technique for ensuring that texts have a long, useful life. Thus were the records of our own Constitutional Convention suppressed, as were the working documents respecting most Western civil codes.<sup>95</sup>

If I am correct in suspecting that legislative history is politically less costly to produce than the statutory text, then treating legislative history as legally binding evidence of legislative intent should impose more, rather than less, constraint upon interpreters trying to adapt statutes to novel circumstances.

Treating legislative history as a political rather than a legal signal strikes a workable balance between legislative guidance and flexibility over time. As Judge Katzmann notes, agencies have good reason to heed the signals that their oversight committees and other pivotal legislators place in the legislative history.<sup>96</sup> In contrast with a theory that treats legislative history as binding evidence of statutory intent, a theory that treats legislative history as a political signal would leave an agency room to reinterpret its mandate when circumstances change. Substantive circumstances might change; the political composition of Congress might evolve; an administration might come to think it worth bearing the political cost of exercising statutory discretion in a way that the oversight committee disfavors. In this scenario, legislative history still counts for something important; it signals a pivotal legislative actor’s policy preferences to executive entities that typically have good

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93. KATZMANN, *JUDGING*, *supra* note 1, at 34.

94. *See id.* at 47 (“[I]t is unreasonable to expect Congress to anticipate all interpretive questions that may present themselves in the future.”).

95. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 836 (1991).

96. *See* KATZMANN, *JUDGING*, *supra* note 1, at 27.

reason to care about those preferences. It does not, however, bind the agency indefinitely to instructions or preferences that legislators chose to place in texts that Congress did not put to a vote rather than in the ones it did.

Certainly, treating legislative history as largely a political signal raises rule of law concerns—an issue that my former colleague Professor Peter Strauss has pressed with insight.<sup>97</sup> Denying the legal force of legislative history denies administrators a tool to resist political pressure applied by future legislative committees or, even perhaps, by the administration itself. But that concern is mitigated if one accepts, as the Court properly does, that the Constitution gives Congress room to delegate broad law implementation authority to administrative agencies.<sup>98</sup> If Congress can delegate broad law elaboration authority to agencies, then it should be no affront to the rule of law for agencies to change their minds, provided that they remain within the scope of the delegation conferred by law.<sup>99</sup> Conversely, if Congress can muster votes for an open-ended statutory text but not for the details placed in a committee report, then it may also offend rule-of-law values to treat these differently situated texts alike as binding legal documents.

I am not sure myself whether treating legislative history as a political but not legal document is a fully satisfying solution. As a middle ground, it may duck the hard questions about whether or not to equate legislative history with legislative intent. What I will say, however, is that this intriguing distinction could not have emerged without Judge Katzmann's wonderful book. Whether and to what extent I may disagree with the book's bottom line, it will, and should, provoke a fresh examination of the premises of the statutory interpretation debate for many years to come.

### CONCLUSION

The debate over statutory interpretation is an eternal one. Often, those of us in the thick of it wonder if there is anything new to be said, whether by ourselves or others. Judge Katzmann's book *Judging Statutes* offers a fresh and important perspective on statutory interpretation, in general, and on legislative history, in particular. He tells us that, in a world in which specified legislative procedures are few, interpreters should take their cues from Congress about how the legislative process generates meaning. Similarly, he says, because agencies are much closer to Congress than are the courts, we should take our cues from agencies about how to read statutes. Both arguments, he contends, counsel in favor of judicial reliance upon legislative history.

Judge Katzmann's thoughtful arguments open new and productive avenues of debate. For me, his contentions leave open some nagging questions and unsolved puzzles. The most important one is the one to which I have returned again and again here and elsewhere: If, as Judge Katzmann says, Congress uses legislative history to communicate and to understand the detailed content of statutes—if committee reports, for example, are

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97. See Strauss, *supra* note 84, at 322 (discussing the “rule of law culture” fostered by agency use of legislative history).

98. See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474-75 (2001).

99. Hence, the Court's position has been that when Congress delegates lawmaking authority to an agency pursuant to a vague or open-ended statute, the agency may validly reconsider a prior interpretation. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

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really where the rubber meets the road—then why doesn't Congress vote for the legislative history as well as the text? Until we can answer that question, I think that respect for Congress's procedural choices counsels against treating the legislative history as a binding source of legislative intent—as if it were incorporated into the text.