

# TEXTUALISM, THE AUTHORITATIVENESS OF CONGRESSIONAL COMMITTEE REPORTS, AND STANLEY SURREY

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## I

### INTRODUCTION

When Stanley Surrey—possibly the most prominent tax academic of the twentieth century—died in 1984, the school of thought sometimes known as the “new textualism” that has gained such influence in the United States over the last three decades had not yet emerged.<sup>1</sup> To be sure, there had been scholarship and debate on statutory interpretation including an important article by Professor Max Radin, a colleague of Surrey’s during his brief time at Berkeley Law, whose positions—such as the undiscoverable nature and potential irrelevance of congressional intent—have since been repeated by some new textualists.<sup>2</sup> But the more pointed assertions of Justice Scalia, including his almost complete disdain

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1. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) [hereinafter Eskridge, *Textualism*] (coining the term and attributing its origin to events taking place after Surrey’s death).

2. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870–71 (1930). Radin subsequently backed away from his position. See Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 410 (1942) (referring to his previous statements on legislative intent as “undoubtedly somewhat too sweeping”); William S. Blatt, *A History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 827–31 (1985). According to Surrey, Radin’s liberalism and inexperience caused his appointment to the California Supreme Court to be rejected. The governor substituted Roger Traynor, another Berkeley law professor and someone with whom Surrey had closely worked, and Traynor would become what many view as one of the greatest justices of a state supreme court. Surrey wrote that Traynor’s liberalism was deep but not well known at the time of his appointment. See STANLEY S. SURREY, *A HALF-CENTURY WITH THE INTERNAL REVENUE CODE: THE MEMOIRS OF STANLEY S. SURREY* 24–25, 82 (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) [hereinafter SURREY MEMOIRS].

for legislative history as an interpretive aid, had not yet widely entered the public arena.

Surrey would have been very interested in this development. He had spent almost his entire professional career working with statutes and thinking about issues such as statutory interpretation. Early in his career, he identified himself as being what would now probably be termed a “purposivist,” someone who thinks legislation is a purposive act and statutes should be construed to carry out that purpose.<sup>3</sup>

Aside from philosophical differences with the new textualists, Surrey would have been surprised by some of their assumptions about the legislative process as well as recent empirical findings reported by scholars about that process. As revealed in his recently published memoirs, Surrey had extensive first-hand experience with the tax legislative process, first working about nine years in Treasury’s legislation office and then eight years as Treasury’s top tax policy official during the Kennedy and Johnson Administrations. Between and after these lengthy stints in government, during his academic years at Berkeley and Harvard, he continued to be actively involved in the tax legislative process.<sup>4</sup> Recognizing early on the connection between statutory interpretation and the legislative process, he would surely have jumped into the new textualism debate to share his knowledge and insights about the real-world legislative operation.<sup>5</sup>

This article aims to fill in some of Surrey’s missed engagement. Drawing on his memoirs and other sources, the article describes aspects of the tax legislative process—the preparation of tax statutes and legislative history—that are of significance to statutory interpretation and the positions of the new textualists.<sup>6</sup> Importantly, the description is at the granular level at which Surrey experienced it, material not generally included in standard political science or legal scholarship on the topic. After considering the on-the-ground special features of the tax legislative process, this article contends that in interpreting tax statutes, courts should rely upon both textual canons and other common tools of judicial interpretation (questioned by recent scholar–empiricists) and legislative history (questioned by textualists).<sup>7</sup> The article also explains why, contrary to the claims

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3. See ROBERT A. KATZMANN, *JUDGING STATUTES* 31 (2014) (defining purposivism); Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779, 803–13 (1941). Some forty years later, Surrey believed this article had been one of his best. See SURREY MEMOIRS, *supra* note 2, at 46.

4. See SURREY MEMOIRS, *supra* note 2, at 27–68, 71–80, 187–200, 307–46.

5. See *id.* at 47.

6. See KATZMANN, *supra* note 3, at 8–9 (“[T]here has been scant consideration given to what I think is critical for courts discharging their interpretive task—an appreciation of how Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws. . . . Congress intends that its work should be understood through its established institutional processes and practices.”).

7. See Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 832–38 (1991) (describing special aspects of tax legislative process); Bradford L. Ferguson, Frederick W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES

of textualists, pre-enactment committee reports of all federal legislation, not just tax legislation, are authoritative evidence of statutory meaning.

Part II uses the words of Justice Scalia (and sometimes those of his co-author, Bryan Garner) to briefly summarize the main positions of the new textualists. Part III describes several areas where the textualist assumptions or empirical findings about the legislative process deviate from the operation of that process in the tax area. Part IV explains why congressional committee reports are authoritative evidence of statutory meaning and Part V concludes.

## II

### JUSTICE SCALIA AND THE NEW TEXTUALISM

“Textualism, in its purest form, begins and ends with what the text says and fairly implies.”<sup>8</sup> The “text” Justice Scalia referred to is the statute, the “text that must be observed.”<sup>9</sup> The judicial task is to “look for meaning in the governing text, ascribe to that text the meaning it has borne from its inception, and reject . . . speculation about both the drafters’ extratextually derived purposes and the desirability of the fair reading’s anticipated consequences.”<sup>10</sup> Justice Scalia subscribed to an interpretation method based on “how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.”<sup>11</sup>

In construing text, “words . . . have a limited range of meaning, and no interpretation that goes beyond that range is permissible.”<sup>12</sup> But words must be understood in their context, which helps to reveal the intended, objective purpose of the text.<sup>13</sup> This is to be distinguished from the subjective purpose of the drafters of the text, which is irrelevant.<sup>14</sup> Justice Scalia approved the “whole-text canon” that requires text to be construed as a whole. A “judicial interpreter [must] . . . consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”<sup>15</sup> He also endorsed using dictionaries and a number

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804, 806–07 (1989) (same); Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 196–203 (2017) (same); cf. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 797–98 (2014) (suggesting different statutory interpretation approaches may be appropriate for different types of legislation); Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1170–71 (2021) (same); Ganesh Sitaraman, *The Origins of the Legislation*, 91 NOTRE DAME L. REV. 79, 117–18 (2015) (same).

8. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) [hereinafter *READING LAW*].

9. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22 (Amy Gutmann ed., 1997) [hereinafter *INTERPRETATION*]. This article does not address interpretation of the Constitution.

10. *READING LAW*, *supra* note 8, at xxvii.

11. *Id.* at 33.

12. *INTERPRETATION*, *supra* note 9, at 24.

13. See *READING LAW*, *supra* note 8, at 20, 33, 36–38, 56.

14. See *id.* at 30.

15. *Id.* at 167.

of interpretive canons as aids to help resolve statutory ambiguity.<sup>16</sup> “The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.”<sup>17</sup>

For both theoretical and practical reasons, Justice Scalia opposed relying on legislative history, including committee reports, in interpreting statutes. He declared it to be a “false notion” that such material is a “worthwhile aid[] in statutory construction.”<sup>18</sup> His principal theoretical objection was that “it assumes that what we are looking for is the intent of the legislature rather than the meaning of the statutory text.”<sup>19</sup> Rather, he agreed with Justice Holmes: “We do not inquire what the legislature meant; we ask only what the statute means.”<sup>20</sup> As Justice Scalia explained, “[w]e are a Government of laws, not of committee reports.”<sup>21</sup>

Even if it were relevant, congressional intent, as a practical matter, cannot be discerned from the legislative history. For one thing, Justice Scalia claimed it is “pure fantasy” to think the legislature even had a view on a particular matter at issue.<sup>22</sup> The few members of Congress who may have thought about it likely had varying views; there is no evidence of a collective intent on the part of Congress.<sup>23</sup> Legislative history is drafted by staff, rarely even read by the members of Congress, and not voted on by the members.<sup>24</sup> And the staff are not trustworthy agents of their principals:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the [material in the reports is] . . . inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of [the material] . . . was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.<sup>25</sup>

Committee reports do not supply history “in the sense that it was part of the *development* of the bill, part of the attempt to inform and persuade those who voted.”<sup>26</sup> Rather, they simply express a “phony purpose” to influence judicial interpretations of the law.<sup>27</sup> According to Justice Scalia, “[i]t is less that the courts

16. *See id.* at 69–239.

17. *Id.* at 61; *see also* Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (identifying “background canons of interpretation of which Congress is presumptively aware”).

18. READING LAW, *supra* note 8, at 369; *see also* INTERPRETATION, *supra* note 9, at 29–30 (“[L]egislative history should not be used as an authoritative indication of a statute’s meaning.”).

19. READING LAW, *supra* note 8, at 375.

20. *Id.* at 29 n.96 (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899)).

21. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 621 (1991) (Scalia, J., concurring).

22. READING LAW, *supra* note 8, at 376; *see also* INTERPRETATION, *supra* note 9, at 32.

23. *See* READING LAW, *supra* note 8, at 376, 392.

24. *See id.* at 376; INTERPRETATION, *supra* note 9, at 32–34.

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

26. INTERPRETATION, *supra* note 9, at 34 (emphasis in original).

27. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) [hereinafter *Scalia Interview*].

refer to legislative history because it exists than that legislative history exists because the courts refer to it.”<sup>28</sup>

In contrast, Justice Scalia asserted that so long as it is approved through the Constitutional requirements of bicameralism and presentment, a statute is the law regardless of whether the authors of the statute have any understanding of what is in it.<sup>29</sup> Everything else is “legal fiction.”<sup>30</sup> Reliance on legislative history enables willful judges to justify almost any result—in Judge Leventhal’s words, “to look over a crowd and pick out your friends.”<sup>31</sup> “It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”<sup>32</sup>

### III

#### THE DRAFTING OF TAX STATUTES AND LEGISLATIVE HISTORY IN CONGRESS

##### A. The Lead Drafters of Tax Statutes

Justice Scalia did not state explicitly his assumption regarding the drafters of statutes, but by emphasizing and criticizing the staff role in preparing legislative history, he at least suggested that legislators were involved in drafting statutory text.<sup>33</sup> If that was his assumption, it is almost certainly incorrect for virtually the entire 110-year history of the modern income tax, encompassing enactment of over 1,000 public laws.<sup>34</sup>

At the start of the twentieth century, federal legislators drafted most of their bills and other legislative materials.<sup>35</sup> As a result, when the House Ways and

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28. INTERPRETATION, *supra* note 9, at 34; *see also* READING LAW, *supra* note 8, at 377.

29. *See* U.S. CONST., art. I, § 7, cl. 2; INTERPRETATION, *supra* note 9, at 35.

30. READING LAW, *supra* note 8, at 376.

31. *See* INTERPRETATION, *supra* note 9, at 17–18, 35–36; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Leventhal).

32. INTERPRETATION, *supra* note 9, at 22.

33. This appears to be a common assumption of the judiciary. DANIEL M. BERMAN & VICTORIA J. HANEMAN, *MAKING TAX LAW* 40 (2014) (“The Supreme Court frequently refers to legislators as the drafters of federal law.”).

34. This figure is based partially on the number of public laws amending Title 26 of the U.S. Code between 1939 (when that Title first incorporated the text of the positive-law Internal Revenue Code) and January 3, 2022, calculated from Off. of the Legal Revision Couns., *Table III – Statutes at Large*, U.S. CODE, <https://uscode.house.gov/table3/table3years.htm> [<https://perma.cc/HE28-TC5X>] (last visited Sept. 6, 2022). The breakdown was 199, 486, and 363 enactments amending the Internal Revenue Codes of 1939, 1954, and 1986, respectively. In addition, there were at least sixteen major federal income tax enactments between the 1913 Act and enactment of the 1939 Code. *See* ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 71–382, 401–53 (1940). Thus, the total number of public laws for the entire period between the 1913 Act and January 3, 2022 was at least 1,064. *See also Public Laws Amending the Internal Revenue Code*, in INTERNAL REVENUE CODE (Wolters Kluwer through Pub. L. No. 117-167) (legal publisher’s compilation of tax enactments between 1954 and August 9, 2022 listing about twenty percent fewer laws (395 and 303 enactments amending the Internal Revenue Codes of 1954 and 1986, respectively) but excluding laws making only minor amendments to the tax code).

35. *See* HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 718 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)

Means Committee, following ratification of the Sixteenth Amendment, decided to draft a bill that would become the 1913 Act—the first Act of the modern income tax—it asked Representative Cordell Hull (D.–Tn.), later Secretary of State under President Franklin Roosevelt, to prepare the income tax provisions.<sup>36</sup> Readers familiar with that statute know that it is not a model of clarity; it is perhaps the least comprehensible of a very long line of complicated tax statutes.<sup>37</sup>

Change was afoot, however. In 1912, Congress began considering proposals to hire professionals to help with statute drafting. Some states, such as Wisconsin, had instituted that practice and Columbia University had started a program, with Middleton Beaman (a librarian at the Library of Congress) as one of its co-directors, to study and improve the drafting of statutes.<sup>38</sup> But Congress rejected the initial proposals. In opposing a bill to create a professional drafting service in Congress, Senator Augustus Bacon (D.–Ga.) asserted:

I think it is the most astonishing piece of legislation I have ever heard proposed in this body. If the time has come . . . when Senators are going to need a schoolmaster to teach them how to draft a bill, I think it is about time that the Senators who are in such need should retire to their homes, resume their seats on their school benches, and let somebody else come here who is capable of doing such work.<sup>39</sup>

As Bacon's words suggest, some members viewed the use of such assistance as an "implied slur" upon their abilities as legislators.<sup>40</sup>

In 1916, Columbia persuaded Congress to accept a practical demonstration of the utility of professional drafters by allowing Beaman and one other lawyer to serve as unpaid volunteers.<sup>41</sup> Hull, already hard at work on a bill redrafting the 1913 income tax and adding a new estate tax, quickly enlisted the assistance of the two volunteers. There remained, however, resistance to their help within Congress. Representative Claude Kitchin (D.–N.C.), the powerful House majority leader and chair of the Ways and Means Committee, had no interest in consulting "university professors."<sup>42</sup> Only after Hull strongly prevailed upon him did the committee allow the volunteers to attend the discussions of the bill that would become the 1916 Act—a much more clearly drafted statute.<sup>43</sup>

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(stating that up until then, "the employment of expert technical help was not even debated.").

36. See 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 70 (1948) [hereinafter HULL MEMOIRS]. See generally LAWRENCE ZELENAK, *FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX* 6–25 (2018) (providing excellent background on Hull and his efforts to get an income tax enacted).

37. *Tariff Act of 1913*, Pub. L. No. 63-16, 38 Stat. 114; Charlotte Crane, *Pollock, Macomber, and the Role of the Federal Courts in the Development of the Income Tax in the United States*, 73 *LAW & CONTEMP. PROBS.*, no. 1, 2010, at 1, 17 (describing 1913 Act as a "poorly drafted hodgepodge").

38. Frederic P. Lee, *The Office of the Legislative Counsel*, 29 *COLUM. L. REV.* 381, 381 (1929).

39. 50 *CONG. REC.* 2376 (1913).

40. George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 *NOTRE DAME L. REV.* 2287, 2294 (2013) [hereinafter Yin, *Gridlock*].

41. Lee, *supra* note 38, at 385.

42. *Id.*

43. See Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756; Lee, *supra* note 38, at 385–86; HULL MEMOIRS, *supra* note 36, at 80–81; *Organization of Congress: Hearings Before the Joint Committee on the Organization of Congress Pursuant to H. Con. Res. 18: Part 2*, 79th Cong. 429 (1945) (statement of

During the next two years, Beaman helped prepare two 1917 tax bills adding a complicated new excess profits tax as well as a large and very challenging bill—to be enacted as the Revenue Act of 1918 but not passed until February 1919, three months after the Armistice—that extensively revised both the income and excess profits taxes.<sup>44</sup> Beaman had originally hoped to demonstrate his skills to a number of House committees but he ended up working almost exclusively for the tax committee. Beaman’s talented assistance made Kitchin a fan of professional drafters and he helped include in the 1918 tax bill the creation of a separate House and Senate “legislative drafting service” (now the House and Senate Offices of the Legislative Counsel (“HLC” and “SLC” or, together, “Leg Counsel”)).<sup>45</sup> As explained by Representative Allen Treadway (R.–Mass.), a Ways and Means Committee member:

[Beaman’s drafting] assistance . . . was of the utmost value, not alone in improving the phraseology of the bill but in preventing serious discrepancies from appearing in the text. . . . The Committee on Ways and Means felt that Congress should not be a mendicant on Columbia University nor receive favors at its hand, however gladly offered.<sup>46</sup>

The Republicans agreed to establish the offices on condition that Beaman head the House office and all staff hiring be on an apolitical, nonpartisan basis.<sup>47</sup> Beaman led the HLC from 1919 until his retirement in 1949, was the office’s principal tax drafter throughout that time, and as we shall see, introduced Surrey to the drafting process during his first stint at Treasury beginning in 1938. Surrey described Beaman as “a remarkable person . . . with a superb analytical mind and a way with words that no one has since matched. . . . [He] did not suffer fools or foolish talk, and he made this very evident.”<sup>48</sup>

Legislators, of course, initiate and modify the ideas that are expressed in bills and can change the text of a bill prior to enactment. But ever since Representative Hull’s work on the bills that became the 1913 and 1916 Acts, there is no indication of any significant involvement of legislators drafting the text of tax bills. Instead, virtually all tax legislation of any significance has been drafted under the direction of attorneys from either the HLC or SLC.<sup>49</sup> Though

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Middleton Beaman, House Legislative Counsel) [hereinafter Beaman 1945 Testimony] (explaining how Kitchin had told Hull “in no uncertain terms . . . that he would not have some kind of a professor telling him what to do”).

44. See Revenue Act of March 3, 1917, Pub. L. No. 64-377, 39 Stat. 1000; War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300; Revenue Act of 1918, Pub. L. No. 65-254, 40 Stat. 1057; Lee, *supra* note 38, at 386; Yin, *Gridlock*, *supra* note 40, at 2295.

45. See 56 CONG. REC. app. 701–02 (1918) (statement of Rep. Claude Kitchin); Revenue Act of 1918, Pub. L. No. 65-254, § 1303(a), 40 Stat. 1057, 1141; Revenue Act of 1924, Pub. L. No. 68-176, § 1101, 43 Stat. 253, 353 (revising and renaming drafting service).

46. 59 CONG. REC. app. 8829 (1920).

47. Lee, *supra* note 38, at 386.

48. SURREY MEMOIRS, *supra* note 2, at 27.

49. See *The Role of Tax Policy in the Development of Tax Legislation: Larry Woodworth’s Era and Now*, 32 OHIO N. U. L. REV. 1, 6 (2005) [hereinafter *Woodworth’s Era*] (statement of Bob Shapiro, former chief of staff, Joint Committee on Taxation) (“The Legislative Counsel’s Office played a very important role, as they do today, in drafting all [tax] legislation.”).

the service of those offices is optional, it has been heavily used in the tax area because of the complexity of tax bills, the expertise and experience of the Leg Counsel drafters in that area, and the very longstanding reliance upon the offices by the congressional tax committees. The committees quickly discovered that professionally drafted statutes were “less subject to the appearance of unanticipated and alarming loopholes. In tax legislation that was a particular concern.”<sup>50</sup> Because of the Origination Clause of the Constitution,<sup>51</sup> the bulk of tax statutes have originated from the HLC.

Three years before Beaman retired, Ward Hussey joined the HLC and began drafting tax bills under Beaman’s supervision. As Hussey later explained, Beaman “had a very brilliant mind. That’s why I tried to follow in his footsteps . . . .”<sup>52</sup> Hussey assumed principal responsibility for tax drafting in 1952 and continued it for thirty-seven years until his retirement in 1989.<sup>53</sup> He headed the HLC in his final sixteen years and developed a drafting manual, still used by the office, describing appropriate drafting style of statutes.<sup>54</sup> Attorneys in the office who follow the manual are thus drafting statutes in the “revenue” (or “tax”) style started by Beaman and continued by Hussey.<sup>55</sup>

Hussey has a legendary reputation among tax professionals. His long tenure working in tax, encompassing enactment of both the 1954 and 1986 Codes, means that a significant amount of the Internal Revenue Code was drafted under his direction. And his knowledge of the law was simply extraordinary.<sup>56</sup> Combining

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50. M. Douglass Bellis, *Drafting in the U.S. Congress*, 22 STAT. L. REV. (U.K.) 38, 41 (2001). Bellis at the time was Deputy Legislative Counsel of the HLC. See also 67 CONG. REC. 4499 (1926) (statement of Rep. William Green (R.-Ia.), chair, House Ways and Means Committee) (praising Beaman’s efforts and the HLC and SLC).

51. U.S. CONST. art. I, § 7, cl. 1.

52. Jasper L. Cummings, Jr. & Alan J.J. Swirski, *Interview: Ward M. Hussey*, ABA SECTION TAX’N NEWSQUARTERLY, Spring 2013, at 5 [hereinafter *Hussey 2000*]. This interview was originally published in 2000. Hussey died in 2009.

53. See Ellin Rosenthal, *After 42 Years, Behind-the-Scene Taxwriter Departs*, 43 TAX NOTES 249, 249 (1989) [hereinafter *Hussey 1989*]. Ed Craft, who headed the HLC from 1963 to 1973, began tax drafting around 1950 and worked with Hussey in preparing the bill that became the 1954 Code. See *Office of House Legislative Council*, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES, <https://history.house.gov/People/Appointed-Officials/Legislative-Counsel/> [https://perma.cc/7BMY-MAHX] (last visited Feb. 28, 2023); Interview by Terry Anderson with Edward O. Craft, former legisl. couns., U.S. House of Representatives 30–33 (Mar. 25, 1978), <http://fedora.dlib.indiana.edu/fedora/get/iudl:2601603/OVERVIEW> [https://perma.cc/JXK4-LZKS].

54. OFF. OF THE LEGIS. COUNS., HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE III, 2 (2022 ed.), [https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/ManualDraftStyle\\_2022.pdf](https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/ManualDraftStyle_2022.pdf) [https://perma.cc/B3RH-8ZUS] (last visited Feb. 28, 2023) [hereinafter HLC DRAFTING MANUAL].

55. In the House, there is no mandatory style that must be followed in drafting legislative documents such as bills. See CHARLES W. JOHNSON, JOHN V. SULLIVAN & THOMAS J. WICKHAM, JR., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE* 167 (2017). For revenue or tax style, see HLC DRAFTING MANUAL, *supra* note 54, at 11; TOBIAS A. DORSEY, *LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE* 238 (2006). Dorsey was an HLC attorney when the book was published.

56. See *Woodworth’s Era*, *supra* note 49, at 6 (statement of Bob Shapiro); Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104



his time in government with Beaman's, virtually every tax statute in seventy of the first seventy-six years of the modern income tax was drafted by or under the supervision of one of these two highly experienced and extremely talented public servants. "Long tenure of service is of great importance in legislative drafting work, where it takes years to 'learn the ropes.'"<sup>57</sup>

Following Hussey's retirement, the principal responsibility for tax drafting in the HLC was passed to John Buckley, a brilliant lawyer and draftsman who had worked in that office since 1973 and in the tax area since 1974. For many years, he was Hussey's top assistant in tax drafting. Buckley left his position in 1994 when he was appointed chief of staff of the nonpartisan Joint Committee on Taxation (JCT).<sup>58</sup> From 1996 to the present, tax drafting has been one of the responsibilities of Wade Ballou, who has headed the HLC since 2016. Ballou, a 1983 graduate of the University of Virginia School of Law, is now approaching his fortieth year of service in that office.<sup>59</sup> In summary, there has been an extraordinary continuity of statutory drafting assistance in the tax area, with a small number of talented and experienced lawyers performing and directing the work and providing invaluable institutional memory for almost the entire existence of the modern income tax.

## B. The Utility of Canons and Dictionaries as Interpretive Tools and the Process of Drafting Tax Statutes

Justice Scalia's assumption about congressional knowledge and use of canons and dictionaries in preparing statutory text has been called into question by two recent empirical studies surveying persons involved in legislative drafting. In one study, Professors Gluck and Bressman interviewed 137 congressional counsels with responsibility for drafting legislation. Most worked for one of twenty-six committees, but twenty-eight of the interviewees were employed by either the HLC or SLC.<sup>60</sup> According to the authors, their survey respondents showed only

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IOWA L. REV. 1291, 1329 (2019) (reporting views of Hussey as an "experienced and brilliant figure").

57. Harry W. Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441, 446 (1952).

58. Jasper L. Cummings & Alan J.J. Swirski, *Interview with John Buckley, Democratic Chief Tax Counsel, Committee on Ways and Means*, ABA SECTION TAX'N NEWSQUARTERLY, Winter 2004, at 18 [hereinafter *Buckley Interview*].

59. See *House Officers FY2021 Budget Hearing Before the H. Subcomm. on Legislative Branch Appropriations*, 116th Cong. 11 (2020) (statement of E. Wade Ballou, Jr., House Legislative Counsel), <https://docs.house.gov/meetings/AP/AP24/20200303/110533/HHRG-116-AP24-Wstate-BallouE-20200303.pdf> [<https://perma.cc/DS6B-DUCR>] (last visited Oct. 31, 2022) [hereinafter *Ballou Testimony*]. Since Buckley's time, tax drafting has evolved into more of a "team" approach with increased collaboration between HLC and SLC drafters. On the House side, in addition to Ballou, Stan Grimm (now retired), Henry Christrup, and Scott Probst have been active tax drafters with Christrup, an HLC senior counsel with the office since 2000, presently the lead tax drafter. The SLC's lead tax drafter for many years was James Fransen, another superb attorney, who served in that office for thirty-nine years, the last fifteen as its head, and continues to work on a contract basis. See 160 CONG. REC. 17,657-58 (2014) (statement of Sen. Harry Reid (D.-Nv.)). Other Senate tax drafters include Mark Mathiesen, Mark McGunagle, and Allison Otto. I thank Wade Ballou for this information.

60. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical*

moderate familiarity with six common textual canons and reported limited use of them in preparing statutory drafts. For example, only sixty-two percent of the respondents were familiar with the rule against superfluities (specifying that statutes should be construed to avoid redundancy) and almost an equal percentage thought the rule is rarely or only sometimes observed in drafting.<sup>61</sup> Similarly, over half of the respondents said that dictionaries were never or rarely used in drafting and only fifteen percent reported they are always or often used.<sup>62</sup> One interviewee reported: “Scalia is a bright guy, but no one uses a freaking dictionary.”<sup>63</sup> According to Gluck and Bressman, “[t]he canons most commonly employed by courts . . . appear to be used least often by our drafters.”<sup>64</sup> More generally, their respondents “viewed Congress’s primary interpretive relationship as one with agencies, not with courts.”<sup>65</sup>

In a separate study conducted in a similar manner, Professors Oei and Osofsky interviewed twenty-six staffers involved in the drafting of tax bills, including persons from the tax committees, Treasury, IRS, SLC, and individual member staffs.<sup>66</sup> The authors reported that courts were generally not the principal intended audience of their respondents and that “potential future interpretations of statutory language and judicial doctrines appeared not to be at the forefront of [their] minds.”<sup>67</sup> Indeed, the respondents indicated “indifference” to particular textual choices in the statute, believing that such choices did not matter much.<sup>68</sup> The authors characterized this finding as perhaps their “most surprising”<sup>69</sup> and believed it presented a deep challenge for textualism.<sup>70</sup> Regarding the use of canons, Oei and Osofsky generally concurred with Gluck and Bressman: “there is often a disconnect between judicial reliance on such canons and legislative drafting realities.”<sup>71</sup>

Unfortunately, for the reasons explained below, quantitative results of surveys of a heterogeneous group of staffers involved in legislative drafting—without consideration for the specific tasks performed by the staffers—may well produce erroneous conclusions about how tax bills are drafted and should be interpreted. The Oei and Osofsky study had an additional flaw in that they did

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*Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 919–21 (2013). An earlier, more limited study surveyed the views of sixteen counsel for the Senate Judiciary Committee who participated in statute drafting and two lawyers from the SLC who worked on Judiciary Committee bills. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 578–79 (2002).

61. Gluck & Bressman, *supra* note 60, at 934.

62. *Id.* at 938 & n.111.

63. *Id.* at 938.

64. *Id.* at 930.

65. Bressman & Gluck, *supra* note 7, at 765 (emphasis omitted).

66. Oei & Osofsky, *supra* note 56, at 1295, 1314.

67. *Id.* at 1318 (emphasis omitted).

68. *Id.* at 1336–38.

69. *Id.* at 1316.

70. *Id.* at 1336–38.

71. *Id.* at 1338.

not interview anyone from the HLC.<sup>72</sup> This was a very serious omission since most tax bills originate from that office and (as we shall see) tax drafting choices are to a very important extent determined by the attorneys in that office. Contrary to the findings of the two studies, the manner in which tax statutes are drafted supports Justice Scalia's position that textual canons and dictionaries are valid aids to interpret them.

When time permitted, the drafting of important House tax bills was generally carried out through a collaborative process directed by the HLC's lead tax drafter. Surrey described his drafting experiences between 1939 and 1947 as participation in an intense, intellectually challenging seminar led by Beaman and attended by his HLC assistant, attorneys from the Treasury and IRS, and occasionally Colin Stam, chief of staff of the JCT<sup>73</sup>:

The seminar proceeded by Beaman's asking question after question, probing the points of analysis, immersing himself in the subject, holding up words or phrases to the light and exposing their defects, exploring alternative methods of organizing the material. The intellectual rigor of these discussions was high. Day after day, we sat in his office, as he indefatigably pursued his inquiries. Obviously, we became impatient—when would he actually begin to draft! All of a sudden he would reach for pencil and paper and start to put down some phrases. We then could relax for we knew the actual drafting had commenced. Soon he would call in his male secretary and dictate an initial draft. But the process was not yet ended. As the typed pages came back, sometimes with a sentence or two, sometimes a subsection or paragraph, they were passed around to the group to be pored over as with a microscope. Finally Beaman would be satisfied and the material sent to the printer to be part of the draft bill to be presented to the Committee. . . .

The entire process was as rigorous an intellectual task as any I have observed in my teaching career. I learned how words should be used in a statutory draft—words held up to as intense an examination as would a jeweler searching a precious stone. I saw how a section could be structured, how technical phrases could be formed, how various sections of the law could be tied together by those phrases. It was an elegant process producing a finely tuned structure. But it did have one weakness. For this approach always to be successful everyone else construing the statute would have to play the game by the rules Beaman and his successors devised, would have to recognize the function he had decided a word or phrase should perform.<sup>74</sup>

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72. See *id.* at 1316 (noting that the HLC declined interview requests due to confidentiality restrictions).

73. Stam's participation in these sessions was apparently erratic due to his differences with Beaman. SURREY MEMOIRS, *supra* note 2, at 42–43. For differences Surrey had with Stam, see George K. Yin, "Who Speaks for Tax Equity and Tax Fairness?": Stanley Surrey and the Tax Legislative Process, 39 VA. TAX REV. 39, 54–64 (2019). Treasury participants were generally all apolitical career staff. Livingston, *supra* note 7, at 837 n.75. Surrey described an occasion when an Assistant Secretary of the Treasury surprisingly showed up for a drafting session. The official's lack of preparation, tax expertise, and familiarity with the drafting process made his presence somewhat awkward and Beaman found a graceful way to excuse him. According to Surrey, it was the only time he had seen an official higher than Treasury's Tax Legislative Counsel attend a drafting session. SURREY MEMOIRS, *supra* note 2, at 39.

74. *Id.* at 38–40. See also James M. Landis, *Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 36–38 (1959) (describing Beaman's use of same rigorous approach to assist Harvard Law School Professor (and future Dean) Landis and New Deal brain trusters Benjamin Cohen and Tommy Corcoran in drafting the bill that became the Securities Act of 1933).

When I participated in House drafting during the mid–1980s, the process was virtually identical to Surrey’s description.<sup>75</sup> There were changes in the participants—the JCT staff had assumed a much greater role and were often the principal attorneys supporting the HLC drafters, staff from the House and Senate tax committees sometimes took part, and executive branch staff (principally the IRS but also occasionally the Treasury) were not always present.<sup>76</sup> Further, because of the large volume of tax legislation during that period and changes in the legislative process, I believe there were generally tighter deadlines than during Surrey’s time, thus curtailing the amount of time that could be devoted to drafting.

But the rigor, intensity, and intellectual challenge of the seminars when they occurred were as Surrey described them. The lead HLC tax drafter—in my case, Hussey—asked question after question of the group. After much discussion, Hussey would invite the group’s scrutiny of very tentative rules, first written on the chalkboard and then in typed form following his dictation. These steps were sometimes repeated many times and, time permitting, there were circulated drafts and follow-up sessions before drafting was complete. Like Beaman, Hussey ran a tight and efficient operation; he did not suffer fools in a kindly manner.<sup>77</sup> I fully share Surrey’s fond recollection of the sessions; for many, I believe they were one of the clear highlights of service on Capitol Hill.

Leg Counsel attorneys, including Beaman, Hussey, and Buckley, have described their perspective of what transpired in the drafting sessions.<sup>78</sup> In general, they sought to learn in a crash course the nature and reason for the proposed policy change, the context of the change within existing law, the scope of who or what would be affected by the change, and its desired ramifications and possible collateral consequences. As Beaman explained in 1945 testimony:

[W]e need knowledge. The more we know the better we are equipped to do the proper job. That means, of course, research and the asking of questions. A lot of it comes from

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75. Though I served on the Senate Finance Committee staff at the time, the JCT staff sometimes invited a broad group of people to House drafting sessions, including bipartisan Senate staff. The ultimate objective, of course, was to obtain approval of tax proposals from both sides of Capitol Hill and the more and sooner the Senate, through its staff, could begin to understand the legislation being developed and identify possible problems or objections, the more likely there would be a successful outcome. This practice was especially used when large tax bills were being developed under tight deadlines and independent drafting on the Senate side was not assured. I also participated in many Senate drafting sessions led by James Fransen that were generally conducted in the same manner as in the House.

76. Treasury, for some reason, sometimes preferred to exclude IRS staff. See *Hussey 2000*, *supra* note 52, at 6. Treasury was itself occasionally excluded during the 1980s when Congress sought to raise revenue to address the deficit and the Reagan Administration was opposed. *Woodworth’s Era*, *supra* note 49, at 12 (statement of Bob Shapiro). In recent years, the executive branch has sometimes again been excluded from drafting, perhaps because the larger and stronger Hill staffs have made their involvement less necessary. See *Oei & Osofsky*, *supra* note 56, at 1333; *Hussey 1989*, *supra* note 53, at 251.

77. See *Oei & Osofsky*, *supra* note 56, at 1330 (describing instances where Hussey threw unhelpful participants out of the drafting session).

78. See generally Middleton Beaman, *Bill Drafting*, 7 L. LIBR. J. 64 (1914); Lee, *supra* note 38; Beaman 1945 Testimony, *supra* note 43; *Hussey 1989*, *supra* note 53; *Hussey 2000*, *supra* note 52; *Buckley Interview*, *supra* note 58.

experience, and some of it comes from information gathered quickly from talks with experts.<sup>79</sup>

Because the tax law is long and complicated with many, many interrelated parts, each area of inquiry could be very challenging. Beaman especially emphasized the forward-looking nature of legislation, requiring drafters to perceive the various contingencies and difficulties that might arise in the future.<sup>80</sup> He explained that lawyers drafting a contract or will must anticipate a number of contingencies, but they are “mere flyspecks compared with the contingencies that must be considered in the case of a statute.”<sup>81</sup> Since taxpayers may react to tax law changes in many different ways, drafters had to think creatively and be keenly sensitive to the possibility of unintended consequences.<sup>82</sup> Another important concern was administrability. Much of the tax law is at least initially self-administered by taxpayers, generally with the help of IRS guidance, and as Hussey said, “[t]here is no sense in passing a law that is not administrable.”<sup>83</sup>

In general, the Leg Counsel drafters knew the tax law very well. Indeed, in the case of Beaman and Hussey, much of the statute had been written by them or under their direction. But they were tax generalists—one day working on a corporate tax provision, another day changing a rule affecting cross-border taxation, a third day amending the pension and retirement income provisions, each area presenting special complications and challenge. In contrast, the other lawyers attending the sessions were generally experienced tax specialists who devoted most or all of their time to understanding just one or a few tax areas.<sup>84</sup>

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79. Beaman 1945 Testimony, *supra* note 43, at 419; *see also* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 826 (2014) [hereinafter Shobe, *Intertemporal*] (describing similar inquiries made by Leg Counsel attorneys to congressional policy staffers).

80. Beaman, *supra* note 78, at 65–66.

81. Beaman 1945 Testimony, *supra* note 43, at 419.

82. *See* SURREY MEMOIRS, *supra* note 2, at 239 (describing typical iterative process between tax planners and government before meaning of law becomes settled); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS., no. 4, 1969, at 673, 686 [hereinafter Surrey, *Complexity*] (providing illustrations).

83. Hussey 1989, *supra* note 53, at 250; *see* Beaman, *supra* note 78, at 67 (emphasizing “need for analysis [of] . . . administrative devices to make the law effective”). Both Hussey and Buckley thought the frequent exclusion of IRS attorneys from drafting sessions was a big mistake because they could alert drafters to administrative pitfalls and would be able to write regulations with better understanding of policymaker objectives. *See* Hussey 2000, *supra* note 52, at 6; Buckley Interview, *supra* note 58, at 20. A widely shared Capitol Hill story involved a Surrey effort to institute document matching to improve tax compliance. After unsuccessfully pressing his case many times, Surrey was finally taken to a warehouse in Maryland which housed many stacks of large boxes piled from floor to ceiling. “There are your documents,” Surrey was told. He dropped the idea. A recent photograph showing reams of tax documents stored in an IRS eating facility suggests its filing system remains problematic. *See* Catherine Rampell, *Why Does the IRS Need \$80 Billion? Just Look at Its Cafeteria*, WASH. POST (Aug. 9, 2022).

84. Unlike some partisan staffs in Congress, staff at the JCT or Treasury almost always have years of prior tax experience before working on Capitol Hill. Interestingly, Surrey was an exception to this practice. He was hired in 1938 as Treasury’s Assistant Legislative Counsel despite having limited prior tax experience. *See* SURREY MEMOIRS, *supra* note 2, at 36. Growth in the size of Leg Counsel’s staff may have permitted some increased tax specialization, *see* Shobe, *Intertemporal*, *supra* note 79, at 822, but nowhere near that at the JCT, Treasury, or IRS.

The Leg Counsel drafters benefited from assembling a diverse group of tax specialists who could help spot and resolve issues raised by the proposed change in their areas of expertise. Was a particular rule too broad or too narrow? Was there need for a special rule for taxpayers in special circumstances? Feedback of this sort helped ensure the substantive impact of the proposal would be what the legislative sponsor intended.

To that extent, the drafting process was a collaborative effort. But the translation of the substantive policy decisions reached by the group into specific statutory language was almost exclusively the bailiwick of the Leg Counsel drafters. They were the experts who, at least in the tax area, had devoted almost their entire professional lives to the proper drafting of statutes. No one else in the group came close to having their drafting experience and expertise. As Surrey related, the choice of particular words or phrases in the tentative drafts sometimes elicited considerable debate as the seminar group groped to identify the best way to express a specific concept.<sup>85</sup> But these were substantive concerns, not stylistic. Almost every word, as well as the style, structure and underlying interpretive assumptions embedded in the statutory draft, were determined by Leg Counsel. Though stylistic suggestions could be made, time was almost always precious and attendees understood that their main role was to share substantive tax knowledge, not stylistic preferences.<sup>86</sup> As Surrey wrote, the end result was “a finely tuned structure. . . . [but] everyone . . . construing the statute would have to play the game by the rules Beaman and his successors devised, would have to recognize the function he had decided a word or phrase should perform.”<sup>87</sup>

Perhaps the only meaningful exception to this procedure was the occasional reliance on Treasury drafts. Leg Counsel sometimes worked from proposed language from Treasury.<sup>88</sup> But often, it was easier to draft from scratch rather than try to rework someone else’s effort.<sup>89</sup> Long-time Hill tax staffers recall a drawer in which Beaman stashed rejected Treasury drafts. When Hussey retired forty years after Beaman, Hussey reported finding some unexamined Treasury

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85. SURREY MEMOIRS, *supra* note 2, at 39; see Clyde Farnsworth, *Two Staff Men Play Top Roles in Drafting New '77 Law*, N.Y. TIMES, Feb. 20, 1977, at 1 (describing participants “hollering at each other” as they tried to agree on the right words). Surrey proudly recalled instances when his recommended choice of words had made it into the final bill. SURREY MEMOIRS, *supra* note 2, at 103.

86. See Oei & Osofsky, *supra* note 56, at 1327 (reporting interviewee responses that raising stylistic concerns “would be viewed as nitpicking and a waste of time and resources”).

87. SURREY MEMOIRS, *supra* note 2, at 39–40; see Surrey, *Complexity*, *supra* note 82, at 695–97. Today, drafting seminars are less frequent and have been replaced by electronic and other forms of communication. In addition to the availability of new technology, this may reflect broader changes in the legislative process as well as, perhaps, the aging of the tax law. Over the years, there have been many, many unenacted tax proposals, some complete with statutory language. As ideas recycle, modern-day drafters may be able to draw upon earlier drafts to begin their work. See Oei & Osofsky, *supra* note 56, at 1331. In contrast, unless they had good non-U.S. models to consult, Beaman and Hussey had to prepare most of their statutory material out of whole cloth.

88. *Woodworth's Era*, *supra* note 49, at 12 (statement of Bob Shapiro).

89. Emphasizing the importance of starting a draft in the right place, Hussey sometimes said, “If we get the engine going in the right direction, the rest of the train will follow.” I thank Steve Shay for this memory.

drafts still in Beaman's drawer.<sup>90</sup> During Hussey's time and probably Beaman's as well, the use of drafts from any other outside source was rare. Hussey reacted very negatively if he sensed that some discussion of language had originated from lobbyists.<sup>91</sup> As a practical matter, the stylistic choices of the drafters were limited since any amendment had to fit within the tax code and the drafters sought to minimize changing statutory material that had already been interpreted or was well understood by tax practitioners.<sup>92</sup>

The critical question, therefore, in determining the proper approach to interpreting tax statutes is to understand the underlying assumptions of the Leg Counsel drafters. Not surprisingly for professional statute drafters, they saw their intended audience as primarily being the courts. Even before he began working in Congress, Beaman explained that "the main purpose [of a statute drafter] is so to phrase the bill that when it comes before the court it will be interpreted just as it was intended by the drafter it should be interpreted."<sup>93</sup> Quoting from earlier commentary, he wrote "[t]he draftsman must . . . have a competent knowledge of the use of words and a thorough understanding of the whole matter of judicial interpretation."<sup>94</sup> Much more recently, Douglass Bellis, then Deputy Legislative Counsel of the HLC, expressed the same sentiment:

One function of the legislative drafter . . . is to serve as a sort of interpreter between politicians and the courts. . . . [T]he judges have created various rules—I hesitate to call them legal fictions—that can have a dramatic effect if not taken into consideration. As we drafters are mostly aware of these legal fictions, we can provide what to our clients sometimes seem counterintuitive drafts that nonetheless will do exactly what they want, because the judges will understand a bill expressed in their own conventions better than one set forth in what to judges often seem vague political slogans.<sup>95</sup>

Other recent evidence supports this principal intended audience and these drafting practices of the Leg Counsel attorneys.<sup>96</sup> The HLC drafting manual advises drafters "to be aware of the numerous canons of construction used by courts" and to "use the dictionary" to identify the best word to include in a bill.<sup>97</sup>

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90. *Hussey 2000*, *supra* note 52, at 5; *Woodworth's Era*, *supra* note 49, at 12 (statements of Lindy Paull and Bob Shapiro). Paull was also a former chief of staff of the JCT.

91. *See generally Hussey 1989*, *supra* note 53, at 250; *Hussey 2000*, *supra* note 52, at 8; Oei & Osofsky, *supra* note 56, at 1330 (reporting Hussey's use of lobbyist language as "unimaginable"). Others, however, have explained how lobbyists may provide important information unknown to legislators and staff. *See generally Buckley Interview*, *supra* note 58, at 19; Nourse & Schacter, *supra* note 60, at 610–13; Ferguson, Hickman & Lubick, *supra* note 7, at 822; Shobe, *Intertemporal*, *supra* note 79, at 847–49. Initial drafts prepared by lobbyists or other outside sources may be more common today, at least in areas outside of tax. *See Bressman & Gluck*, *supra* note 7, at 758 (reporting about one-fourth of drafts originate from the White House or the agencies and one-third from outside groups or policy experts).

92. *See Hussey 2000*, *supra* note 52, at 7 (discussing drafting of 1986 Code); *cf.* Oei & Osofsky, *supra* note 56, at 1295, 1301–08, 1316–17, 1321–22 (raising tax code drafting style questions).

93. Beaman, *supra* note 78, at 69.

94. *Id.*

95. Bellis, *supra* note 50, at 42.

96. *See generally Nourse & Schacter*, *supra* note 60, at 603; *DORSEY*, *supra* note 55, at 61–63; *Bressman & Gluck*, *supra* note 7, at 736; Shobe, *Intertemporal*, *supra* note 79, at 831–32.

97. HLC DRAFTING MANUAL, *supra* note 54, at 5, 8.

Although other readers, such as the Treasury, IRS, and tax advisors, undoubtedly scrutinize the statutory text much sooner and more frequently than the courts, the judiciary has the last word when questions arise about the meaning of the text. All readers, therefore, are well-advised to take into account the judicial principles of statutory interpretation and the Leg Counsel attorneys draft with that expectation.<sup>98</sup>

But how can this description of the bill-drafting audience and practices of Leg Counsel be squared with the contrary findings reported by the recent empirical studies? The answer lies in the failure of the studies to take into account the specific roles performed by those surveyed. The respondents in both studies confirmed that statutory text was drafted almost exclusively by Leg Counsel attorneys,<sup>99</sup> meaning that the large majority of interviewees—whose responses dominated the survey results—*did not actually draft statutory language*. Thus, their survey answers were not first-hand accounts of how statutory text was prepared. Rather, their responses reflected at best how they *thought* such text was created,<sup>100</sup> and even that much more modest finding—of dubious utility—is undermined by the difficulty some respondents had “penetrating the language that Legislative Counsel generates” because of its technical nature.<sup>101</sup> Perhaps recognizing this mistake, Professors Gluck and Bressman performed a follow-up analysis focusing solely on their Leg Counsel respondents and concluded that the Supreme Court’s canons-focused approach is *validated* for statutory drafts (such as virtually all tax drafts) prepared by Leg Counsel.<sup>102</sup> The authors thus seemingly backed away from their earlier findings questioning the utility of textual canons and dictionaries in the congressional drafting process.<sup>103</sup>

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98. See DORSEY, *supra* note 55, at 62.

99. Gluck & Bressman, *supra* note 60, at 968 (“our respondents repeatedly suggested . . . that a great deal of actual statutory language is drafted by [Leg Counsel]”); Bressman & Gluck, *supra* note 7, at 740 (reporting comments that “99% is drafted by [Leg Counsel]” and “[n]o staffer drafts legislative language. [Leg Counsel] drafts everything”); Oei & Osofsky, *supra* note 56, at 1324 (“All interviewees indicated that [Leg Counsel] . . . was primarily responsible for making drafting choices. . . . [They] took the policies that Congress wished to enact and turned them into legislative language.”). Professors Oei and Osofsky also reported that in recent years, there is “more amorphous control” of the production of legislative language although “[Leg Counsel] still ultimately [holds] the pen.” *Id.* at 1330.

100. This perhaps explains some confident yet unfounded responses obtained. Compare *supra* text accompanying note 63 with *supra* text accompanying note 97.

101. Bressman & Gluck, *supra* note 7, at 743. Outside of the tax area, many congressional staffers working with Leg Counsel attorneys apparently lack substantive knowledge of the areas of law being drafted. Shobe, *Intertemporal*, *supra* note 79, at 827.

102. Bressman & Gluck, *supra* note 7, at 736. The authors also reported, however, that the knowledge of their Leg Counsel respondents of the rules of interpretation was not as strong as they had claimed. See *id.* at 744–45. This finding applicable to a heterogeneous group of drafters—senior and junior, tax and non-tax, House and Senate—may be of little significance for tax statutes prepared or directed by just a few highly experienced and often most senior attorneys in the office. See BJ Ard, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L. J. 185, 200 (2010) (reporting that the congressional drafting manuals—including the one prepared by Hussey—“validate textual canons and textualist methods”); compare Shobe, *Intertemporal*, *supra* note 79, at 859–60 (suggesting that more recently educated drafters may have better understanding of canons).

103. The precise view of the authors is uncertain because seven years after their study, one of them still maintained that it had “seriously undermine[d]” Justice Scalia’s canons assumption. Jesse M. Cross



### C. The Nature and Principal Function of Tax Legislative History

In urging the judiciary to stop relying on legislative history, Justice Scalia sometimes portrayed committee reports as if they directly contradicted the statute.<sup>104</sup> Surrey, who had intimate knowledge of legislative history as both its occasional producer and frequent consumer, knew that that description grossly mischaracterized the general nature and principal function of tax committee reports.<sup>105</sup>

During his first stint at Treasury, Surrey—along with Beaman, other Treasury staff, and JCT staff—participated in the markup sessions during which the tax committees decided whether to recommend tax legislation to the full House or Senate. Beaman generally described the details of legislative proposals to the committees and all staff responded to questions. The markups of that era were conducted in executive session, meaning that the public, including lobbyists and personal staffers of the legislators, could not attend. If the committee recommended legislation, Beaman and Treasury staff, including Surrey, collaborated in preparing the committee report. Surrey also sometimes sat on the Senate floor, helping Senators respond to questions or engage in colloquies during a tax bill debate.<sup>106</sup>

Tax committee reports during the first half of the twentieth century were generally much shorter than the ones published since that time. For example, the Revenue Act of 1918—a major piece of tax legislation and one of the first drafted by Beaman—spans ninety-five pages in the Statutes at Large yet its bill was accompanied by House and Senate committee reports of only forty and nineteen pages, respectively.<sup>107</sup> The reports generally included just two sections: a general description of the policy purposes of the legislative proposal and a somewhat more detailed discussion of individual parts of the bill that sometimes merely paraphrased the statutory language.<sup>108</sup>

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& Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1635 (2020). Professors Bressman and Gluck also concluded that drafts prepared by Leg Counsel validated the Court's *text-focused* approach to interpretation. Bressman & Gluck, *supra* note 7, at 736. If by that, they mean reliance upon statutory text to the exclusion of other interpretive sources such as legislative history, as often articulated by Justice Scalia, I don't agree with that conclusion (for reasons explained in the balance of this article), and I don't think they do either. See generally Gluck & Bressman, *supra* note 60, at 988–90.

104. See *Scalia Interview*, *supra* note 27, at 1612–13 (explaining that if the statute said “up” but the committee report showed Congress meant “down,” as supported by the testimony of 100 bishops, he would still say “too bad”).

105. There have, of course, been instances when bill and report language have conflicted. See ZELENAK, *supra* note 36, at 245 (describing conflict involving compensation provision in 1932 tax bill).

106. SURREY MEMOIRS, *supra* note 2, at 40–41, 44, 61–62, 65.

107. H.R. REP. NO. 65-767 (1918); S. REP. NO. 65-617 (1918).

108. See Ferguson, Hickman & Lubick, *supra* note 7, at 806. Surrey wrote that Beaman prepared the policy section and Treasury the detailed explanation, exactly the opposite of what Beaman testified to in 1945. Compare SURREY MEMOIRS, *supra* note 2, at 40–41 (“The first [policy] part was then written largely by Beaman’s office, though the Treasury sometimes participated. The technical part was written by our Treasury group and only quickly checked by Beaman.”) with Beaman 1945 Testimony, *supra* note 43, at 416 (“[I]nasmuch as we have no interest in policy we generally do not help in writing that part of the report.”). Surrey’s recollection was probably faulty since Beaman generally stayed out of policy

There were both practical and substantive reasons why the composition of tax committee reports changed. The limited availability of staff assistance in the early years was alleviated once the JCT staff assumed responsibility for preparing the reports sometime after mid-century.<sup>109</sup> In addition, during the first twenty-five years of the modern income tax, Congress frequently passed tax legislation reenacting virtually the entire tax law. Of the sixteen major income tax acts approved during that period, eleven, including the 1918 Act, were reenactments of the entire law.<sup>110</sup> This meant that at least in theory, a legislator scrutinizing the 1918 bill from beginning to end might get a sense of the entire tax law and meaning of its specific parts, despite the bill's being written in language most familiar to judges. The 1918 bill also came soon after, and repeated portions of, the 1913, 1916, and 1917 enactments. Therefore, many legislators may have already had familiarity with the 1918 bill's major provisions. These factors reduced the need for a detailed committee report explanation of the bill, especially if staff were few and time was short.

But the reenactment process had a significant drawback. It required tax leaders to propose bills to their committees and full House and Senate that exposed the entire tax law for possible amendment, including portions not intended by the leaders to be changed.<sup>111</sup> Floor debate sometimes consisted of a section-by-section reading of the entire bill—that is, the entire law—interspersed with questions and proposed amendments demanding responses from the bill's proponents. Just imagine the challenge today if the entire Internal Revenue Code of 1986 were presented to Congress for possible amendment! As the tax law became longer and more complicated, the reenactment process proved too burdensome for tax leaders and their staffs. In part for this reason, Congress enacted the Internal Revenue Code of 1939, a positive-law codification of the tax

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discussions—typically Treasury's role—while he could easily have described the specifics of the bill he had drafted.

109. At some point, Legislative Counsel stopped participating in the preparation of committee reports and presently plays no role in that activity. See *Ballou Testimony*, *supra* note 59, at 4.

110. See *Tariff Act of 1913*, Pub. L. No. 63-16, § 2, 38 Stat. 114, 166; *Revenue Act of 1916*, Pub. L. No. 64-271, § 902, 39 Stat. 756, 801; *Revenue Act of 1918*, Pub. L. No. 65-254, § 1400, 40 Stat. 1057, 1149-50; *Revenue Act of 1921*, Pub. L. No. 67-98, §§ 1400, 1404, 42 Stat. 227, 320-21; *Revenue Act of 1924*, Pub. L. No. 68-176, § 1100, 43 Stat. 253, 352-53; *Revenue Act of 1926*, Pub. L. No. 69-20, § 1200, 44 Stat. 9, 125-26; *Revenue Act of 1928*, Pub. L. No. 70-562, §§ 1, 714, 45 Stat. 791, 795, 882; *Revenue Act of 1932*, Pub. L. No. 72-154, § 1, 47 Stat. 169, 173; *Revenue Act of 1934*, Pub. L. No. 73-216, § 1, 48 Stat. 680, 683; *Revenue Act of 1936*, Pub. L. No. 74-740, § 1, 49 Stat. 1648, 1652; *Revenue Act of 1938*, Pub. L. No. 75-554, § 1, 52 Stat. 447, 452. The other five acts were generally smaller and of lesser importance and simply amended prior tax enactments; tax professionals tended not to like that procedure because it made identifying the tax law more difficult. See George K. Yin, *How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process*, 71 TAX L. REV. 723, 736-37 n.66 (2018) (“The process of amending prior law rather than reenacting the entire law was criticized because it required taxpayers to examine and understand more than one version of the statute.”) [hereinafter Yin, *Codification*].

111. *Id.* at 735-36. See also HLC DRAFTING MANUAL, *supra* note 54, at 26 (noting that amending a statute by restatement “is often tactically unacceptable, invites further amendment, and has the legal effect of reenacting the unchanged provisions included in the restatement”).

law.<sup>112</sup> This step enabled subsequent tax bills to consist only of the specific changes being proposed, all in the form of selected amendments to the tax code.

While codification therefore simplified the process of enacting new legislation, it dramatically changed the content of tax bills. Since 1939, tax bills generally have consisted of just a series of snippets—some connected but many not connected—representing amendments to separate portions of the tax code.<sup>113</sup> Carefully reading a post-1939 tax bill from beginning to end is thus largely a pointless exercise for even the most knowledgeable tax expert; certainly, it has little educational value for legislators, their staffs, and the judiciary.<sup>114</sup> Moreover, during periods when Congress has legislated frequently in the tax area, there is little “repeat” benefit for legislators since the bills often have nothing to do with one another; they amend different parts of the tax code.

Reading a tax bill alongside the tax code and finding where the bill’s individual changes fit within the gigantic tax jigsaw puzzle provides only limited additional benefit because of the whole-text canon. As Justice Scalia explained (quoting Justice Cardozo), “the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.”<sup>115</sup> In other words, the meaning of individual tax law changes may require an understanding of the voluminous and oft-amended tax code with all of its “maddening” overlaps, intersections, and contradictions.<sup>116</sup>

With the text of tax bills so inscrutable, it became essential for the tax committees to provide detailed explanations or translations of their legislative product if they had any hope of communicating with other legislators and their staff to gain sufficient support for the initiative.<sup>117</sup> For this audience and others, including the courts, agencies, taxpayers, and tax advisors, the explanations

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112. See Yin, *Codification*, *supra* note 110, at 744 (“If there had existed a tax code constituting positive law, Congress could have passed amendments to it (rather than completely re-enacting the entire law.)”); Internal Revenue Code, Pub. L. No. 76-1, § 2, 53 Stat. 1, 1 (1939). As a technical matter, because the Internal Revenue Code of 1939 was enacted and not Title 26 of the U.S. Code (which incorporates the text of the Internal Revenue Code), the U.S. Code does not indicate Title 26 as having been enacted as positive law. U.S. Code (2018 ed.) at III. The tax law was the first portion of the U.S. Code to be enacted as positive law, eight years before the next title was so enacted. Yin, *Codification*, *supra* note 110, at 763–64 n.225.

113. Cf. KATZMANN, *supra* note 3, at 18–19 (noting a similar phenomenon with an excerpt from a bill amending The Hobby Protection Act).

114. See Ferguson, Hickman & Lubick, *supra* note 7, at 807 (“It is safe to assume . . . no member of Congress gleans the sense of any provision of a tax bill by reading the bill itself.”).

115. READING LAW, *supra* note 8, at 168 (quoting from *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting)).

116. Livingston, *supra* note 7, at 827.

117. See KATZMANN, *supra* note 3, at 19 (“Committee reports accompanying bills 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.”); *Woodworth’s Era*, *supra* note 49, at 4 (statement of Bob Shapiro) (explaining how Senate tax committee members learned about a House bill from, among other things, the House committee report); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1281–82 (2009) (describing how members voting on tax bill relied heavily on committee report explanations).

needed to be expressed in language not just familiar to judges or tax experts.<sup>118</sup> Critically important would be to provide not only the meaning of the proposed changes, perhaps with illustrative applications, but also their *context* within the large body of tax law. Without that help, non-tax-expert readers could be expected to be completely lost in the tax maze and fail to appreciate the significance of the change.<sup>119</sup>

Surrey's first service at Treasury straddled enactment of the 1939 Code. He joined Treasury just after passage of the 1938 Act, an important tax bill that completely reenacted the tax law. He subsequently worked closely on the bill that would become the very significant 1942 Act, the longest bill in U.S. tax history at the time that transformed the income tax from a "class" to a "mass" tax.<sup>120</sup> Passed after enactment of the 1939 Code, it did not re-enact the entire law but merely amended the new code. Although there are many possible explanations, it may be noteworthy that while the 1942 enactment (187 pages in Statutes at Large) was about thirty-seven percent longer than the 1938 Act (137 pages), the 1942 Act's House and Senate committee reports (187 and 296 pages, respectively) were a combined 255 percent longer than those for the 1938 bill (eighty-four and fifty-two pages, respectively).<sup>121</sup>

Tax committee reports during the "modern" era can be much longer than the 1942 reports. In 1984, the year Surrey died, Congress passed a major tax law changing, among other things, the timing of taxable income to be more consistent with basic economic principles and raising enough revenue to enable debate on the subsequent Tax Reform Act of 1986 to be carried out with a revenue-neutral objective. The 1984 enactment—just one of the over 1,000 public laws in the tax area since 1913—made 2,245 separate amendments to the tax code,<sup>122</sup> is 716 pages

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118. See Bellis, *supra* note 50, at 43 (explaining how different audiences required different textual descriptions); Ferguson, Hickman & Lubick, *supra* note 7, at 809 ("The staff's job is to translate the technical jargon of tax professionals into words understandable by informed laypersons, the committee members."); *cf.* Gluck & Bressman, *supra* note 60, at 972–73 (identifying different intended audiences for legislative history).

119. See William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 598 (1988) ("The statute's text may have a plain meaning, but that is not the same as the statute's meaning being plain. External context always threatens to unsettle the plain meaning of the statutory language."); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 253 (1998) (explaining that it is "hard for judges . . . to see a complex statute as an integrated whole, or to grasp meanings that may be quite firmly settled in the public and private communities that deal with the statute on a daily and intimate basis." (emphasis omitted)); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 448 (1988) (describing committee reports as frequently "the most intelligent exposition" of what a statute is all about).

120. SURREY MEMOIRS, *supra* note 2, at xxii, 52.

121. Revenue Act of 1938, Pub. L. No. 75-554, 52 Stat. 447 (137 pages); H.R. REP. NO. 75-1860 (1938) (eighty-four pages); S. REP. NO. 75-1567 (1938) (fifty-two pages); Revenue Act of 1942, Pub. L. No. 77-753, 56 Stat. 798 (187 pages); H.R. REP. NO. 77-2333 (1942) (187 pages); S. REP. NO. 77-1631 (1942) (296 pages).

122. Livingston, *supra* note 7, at 827.

long in Statutes at Large, and was accompanied by House, Senate, and Conference committee reports totaling 4,333 pages.<sup>123</sup>

Tax reports now generally consist of three main sections for each provision in the bill: “prior law,” “reasons for change,” and “explanation of provision.” The first and third sections bookend the change being made by the provision and the second describes the reason it was chosen. Taken together, the sections help to explain the meaning of the bill’s statutory language and the context of each change within the large body of tax law. The “prior law” section also often includes descriptions of the structural features of the law relating to the change. Surrey early on learned the theoretical strands that give the law an internally consistent framework and make it much more than a random collection of rules.<sup>124</sup>

Some report material arises from the drafting sessions. As Beaman explained in 1945, one of the most difficult tasks for tax bill drafters is to imagine every way a change in law might be used or misused by taxpayers.<sup>125</sup> With time running short and no consensus yet reached, Leg Counsel—perhaps concerned about the *inclusio unius* canon (the inclusion of one thing implies the exclusion of all others) if an incomplete application of a rule were included in the statute—might direct the assembled group to address the issue in the committee report.<sup>126</sup> In that case, the statute might include general, somewhat ambiguous language with the report identifying specific applications of the rule without implication for situations not addressed.<sup>127</sup> Reports also may clarify statutory language strategically left ambiguous to avoid providing roadmaps for tax abuse.

The reports are entirely prepared by staff but, as we have seen, so is the statutory text. Ward Hussey described how, following House tax committee markups, he and Larry Woodworth—JCT chief of staff—would sit side-by-side at a very small table carrying out their respective tasks: Hussey drafting the statutory language and Woodworth preparing lengthy press releases—

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123. See Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (716 pages); H.R. REP. NO. 98-432, pt. 2 (1984) (1,852 pages); 1 STAFF OF COMM. ON FIN., 98TH CONG., EXPLANATION OF PROVISIONS APPROVED BY THE COMM. ON MARCH 21, 1984, S. PRT. NO. 98-169 (1984) (1,028 pages); H.R. REP. NO. 98-861 (1984) (Conf. Rep.) (1,453 pages). Part 1 of the House report described an earlier version of the bill and Volume II of the Senate print contained the text of the committee bill.

124. SURREY MEMOIRS, *supra* note 2, at 7. Professor Boris Bittker, a very distinguished tax law scholar and a Surrey contemporary, also appreciated the logical structure of the tax code: “[T]he proportion of senseless detail to pervasive structural principles is relatively low, and . . . the [tax code], while not the most majestic attainment of human thought, is much less rickety than is commonly believed.” *Id.* at 7 n.17 (quoting 1 BORIS BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS vii (1st ed. 1981)).

125. See *supra* text accompanying notes 80–82; Surrey, *Complexity*, *supra* note 82, at 687 (“[S]oon those [tax bill drafters] working on the problem perceive that they are grappling with a much wider and more complex problem whose ultimate solution will be far different from the almost pathetically inadequate answer first tendered.”).

126. See SURREY MEMOIRS, *supra* note 2, at 41 (quoting Beaman giving that instruction).

127. See Ferguson, Hickman, & Lubick, *supra* note 7, at 815 & n.20 (explaining that when tax statute drafters have difficulty defining the outer boundaries of cases to be treated in a particular way, the committee report can give a more concrete sense of the limits and still leave flexibility in the statute).

essentially, first drafts of the committee report—to explain the committee’s decisions during the executive session they both had attended.<sup>128</sup> Press releases are no longer issued today because tax markups are open to the public, but the tasks remain largely performed in the same way by the members of two nonpartisan staffs—Leg Counsel and JCT—who attended the markup and drafting sessions. It would seem strange if, solely because of staff authorship of the material, one text is treated as authoritative but the other is not.<sup>129</sup>

Justice Scalia’s further criticism of legislative history—that it is prepared by untrustworthy staff who do not even describe the history of a bill’s development for the benefit of legislators who will vote on it, but rather include phony material desired by lobbyists to influence subsequent judicial interpretations—is particularly inapt for tax legislation. For one thing, JCT staff does provide the history of a bill in the sense that Justice Scalia uses that term. In addition to preparing committee and conference reports, the staff commonly publishes material describing the issues to be considered at hearings, markups, and conferences of tax bills; detailed revenue estimates of individual tax provisions at various stages of the process (including whenever a measure is up for a vote); and summaries and reports describing enacted tax legislation. Together with introductory material supplied by a sponsor of the legislation and transcripts of public congressional sessions, the collection represents a fairly comprehensive description of a bill’s evolution and the public decisions leading to passage.<sup>130</sup> In recent years, some material has been omitted because key steps, including extensive hearings, markups, and conference, have been skipped in the legislative process, but that deficiency obviously cannot be blamed on the staff.<sup>131</sup>

The JCT staff prepares the committee reports under the supervision of legislators.<sup>132</sup> Although there is always risk that agents will act outside the scope

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128. *Hussey 2000*, *supra* note 52, at 5.

129. Outside of the tax area, there may be justification to differentiate between the two texts because partisan staffers prepare the committee reports. *Compare* Brudney & Ditslear, *supra* note 117, at 1282 (describing “unusually bipartisan and objective” tax committee reports prepared by JCT staff that have a “remarkable dearth of substantive minority views”) *with* Shobe, *Intertemporal*, *supra* note 79, at 870 (describing partisan staff efforts “to draft legislative history in a way that will influence judicial opinion toward their preferred interpretation”).

130. Because some tax bills are not written until after committee markup, some descriptions only provide the conceptual evolution of proposals. Tax legislative history typically does not describe the amendment history of a provision from prior enactments although that information is commonly included in footnotes to the tax code. Both the statutory history of successive versions of a given bill and successive enacted amendments of a given provision have been used as interpretive aids by textualist judges. Anita Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271–73 (2022). *See generally* Daniel J. Hemel, *The Passthrough Entity Tax Scandal*, 26 FLA. TAX REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4142575](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4142575) [<https://perma.cc/N8L6-45NH>] (describing a recent important example of tax legislative history serving as *history* to help clarify the meaning of the statutory text).

131. Cross & Gluck, *supra* note 103, at 1643–45.

132. *See* 128 CONG. REC. 16,919 (1982) (statement of Sen. Robert Dole (R.-Ks.)) (describing efforts he undertook to make sure the text of the committee report “was solid”). Dole’s explanation was part of a colloquy with Senator William Armstrong (R.-Colo.) during the 1982 tax bill debate in which Armstrong suggested that because the Senate could not vote on or amend committee reports, which were

of their delegated responsibility, the special organizational characteristics of the JCT staff help to preclude such misbehavior. The nonpartisan staff serves every member of Congress, working most closely under the direction of the chairs and ranking members of the tax committees and their partisan policy staff. Since those principals are often at odds with one another, the JCT staff has a certain amount of independence.<sup>133</sup> But in Congress, the price of independence may be vulnerability. Unlike partisan staffers in Congress, the JCT staff has no single congressional patron or party leader who would give top priority for shielding it in the event some question were raised about its performance.<sup>134</sup> At the same time, because the staff regularly and concurrently assists all sides in legislative fights, it is closely scrutinized by partisans to make sure it has not revealed some confidence or inappropriately advantaged some other side in some way. The result is a greater likelihood that any staff impropriety would be discovered and result in serious repercussions including loss of employment.<sup>135</sup> Leg Counsel staff is in much the same situation,<sup>136</sup> but because the JCT staff provides a broader

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neither written nor read in their entirety by legislators, the IRS and courts should not take guidance from them. Justice Scalia repeatedly excerpted an extended portion of the colloquy but omitted Dole's explanation. INTERPRETATION, *supra* note 9, at 32–34; READING LAW, *supra* note 8, at 384–85; Hirschey v. FERC, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring); Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 783–84 n.\* (2018) (Thomas, J., concurring in part and concurring in the judgment) (reproducing and characterizing as “telling” the same excerpt used by Justice Scalia); Farber & Frickey, *supra* note 119, at 440–42 & n.61 (noting this and other omissions from the excerpt); Brudney & Ditslear, *supra* note 117, at 1292–94 (same). Armstrong's claim that committee reports cannot be amended was incorrect. See *infra* text accompanying notes 158–159. Armstrong also was apparently not as much of a committee report skeptic as his words first suggested and Justices Scalia and Thomas may have believed. Later during the same debate, he read to the Senate part of a 1978 House tax committee report that he claimed validated one of his amendments. 128 CONG. REC. 17,538 (1982).

133. See Yin, *Codification*, *supra* note 110, at 730 (“With two, or possibly four, principal masters (the chair and ranking member of each tax committee) who do not necessarily see eye to eye on legislative functions and priorities, the JCT staff has effectively been allowed to serve without a master.”).

134. The members of the JCT, all senior members of the tax committees, are naturally closer to their partisan committee and personal staffers. In earlier periods before partisan staffers became so prevalent in Congress, some JCT staff were very close to prominent legislators who relied heavily on them for their expertise. See JULIAN E. ZELIZER, *TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945–1975*, at 49 (1998) (“More than any other individual, [House Ways and Means Committee chair Wilbur] Mills would come to rely on [JCT chief of staff] Woodworth as a confidant and advisor.”); *Woodworth's Era*, *supra* note 49, at 9 (statement of Bill Archer, former chair, House Ways and Means Committee) (same); cf. Yin, *Codification*, *supra* note 110, at 764–78 (describing how JCT staff demonstrated to Congress the value of professional staff and, in effect, brought about its own decline in influence).

135. See KATZMANN, *supra* note 3, at 20, 49 (“[Staffers] recognize that their tenure will be shortlived if they undertake actions that do not reflect what their principals want, or pursue agendas independent of or contrary to those of their principals.”). According to Professors Cross and Gluck, the primary allegiance of nonpartisan staffs is “to the institution of Congress as a whole,” giving them no single important defender in the event of some controversy. Cross & Gluck, *supra* note 103, at 1615.

136. See Beaman 1945 Testimony, *supra* note 43, at 414 (explaining that Leg Counsel had “constantly worked . . . for both sides on the same question at the same time, without any suspicion on the part of either that we are betraying their secrets to the other”); Bellis, *supra* note 50, at 42 (explaining that each side in Congress must have confidence there are no unknown implications hidden in the drafts produced by Leg Counsel).

range of services for legislators, it may be more susceptible to becoming entangled in controversy.

Finally, far from doing the bidding of lobbyists, the JCT staff, as well as Leg Counsel tax drafters, have the reputation of defending the integrity of the tax system.<sup>137</sup> Along with apolitical Treasury staff, there are essentially three filters to prevent unwanted lobbyist intrusions into the tax legislative process.

#### IV

##### THE AUTHORITATIVENESS OF CONGRESSIONAL COMMITTEE REPORTS

Surrey may not have given much thought to a final contention of Justice Scalia questioning the authoritativeness of committee reports because they are not approved through the constitutional enactment process of bicameralism and presentment. Throughout Surrey's professional lifetime, the Supreme Court generally treated statements in committee reports as authoritative evidence of statutory meaning.<sup>138</sup> This practice led Congress to believe that a favorable vote for a bill was to some extent an acceptance of the explanation in the report, and there is no indication that Surrey doubted that result.<sup>139</sup>

But times change. Over the last three decades, thanks partly to the efforts of Justice Scalia, there has been increased doubt that "an affirmative vote signals . . . assent to the snippets of legislative history that fill an often voluminous legislative record."<sup>140</sup> Early textualists like Justice Scalia justified their skepticism out of the belief that some legislative history is simply a cheap good purchased by special interest groups and not necessarily the position of the median legislator.<sup>141</sup> Later generation textualists have offered a more nuanced, less cynical justification: If the statute is a carefully worked out compromise

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137. See Oei & Osofsky, *supra* note 56, at 1327 (describing JCT staff efforts to prevent loopholes); *Hussey 1989*, *supra* note 53, at 250 (discussing Hussey's attempts to "scare lobbyists away"); *Hussey 2000*, *supra* note 52, at 5; Ferguson, Hickman & Lubick, *supra* note 7, at 811, 822 (referring to JCT staff as the "guard dogs" of the tax system).

138. William N. Eskridge, *Legislative History Values*, 66 CHI-KENT L. REV. 365, 365-66 (1990); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1291 (2010) [hereinafter Manning, *Second Generation*]; HART & SACKS, *supra* note 35, at 1235 (describing committee reports as historically "carry[ing] a circumstantial guarantee of special trustworthiness"); see also Eskridge, *Textualism*, *supra* note 1, at 683 ("[F]or most of this century the Court has told Congress, 'We shall attend to committee reports, at least.'"); Surrey, *Complexity*, *supra* note 82, at 694 ("The courts in deciding cases under the Internal Revenue Code have for some time rejected a literal application of the statutory language in favor of . . . [an] approach which seeks to apply the Code provisions in keeping with the Congressional purpose . . .").

139. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 693 (1997) [hereinafter Manning, *Nondelegation*]; see also James M. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 888-89 (1930) ("Through the committee report, [or] the explanation of the committee chairman, . . . a mere expression of assent becomes in reality a concurrence in the expressed views of another.") (footnotes omitted).

140. Manning, *Nondelegation*, *supra* note 139, at 687 (footnote omitted).

141. Manning, *Second Generation*, *supra* note 138, at 1293 (explaining that early textualists viewed legislative history as material "procured by lobbyists who did not wish, or could not afford, to pay full freight to get their desired language into the text"); Manning, *Nondelegation*, *supra* note 139, at 687-88.



negotiated by the legislators, then judges upset that bargain if they rewrite the statute to conform to a congressional purpose stated in the committee report.<sup>142</sup> In either case, textualists argue that some portion of the legislative history should be disregarded as unauthoritative—that is, not representative of the views of the necessary legislative majority.<sup>143</sup>

This changed attitude of textualist judges has led Harvard Law School Dean John Manning to wonder why Congress has not responded. If committee reports are as essential as claimed to understanding the proper meaning of a statute, then:

[W]hy 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? . . . [W]hat are we to make of the fact that Congress typically *chooses* to vote on the bill alone?<sup>144</sup>

According to Dean Manning, “any useful exposition now written out in the legislative history can itself be enacted into law according to the procedures established by the Constitution.”<sup>145</sup> The only impediment is the burden of bicameralism and presentment, “a burden that the Constitution expressly contemplates and requires.”<sup>146</sup>

There would certainly be serious practical ramifications to the enactment of legislative history. For example, suppose the over 4,000 combined pages of the 1984 committee and conference reports were all included in a lengthy appendix to the 1984 tax bill and passed by Congress. How would this new law be interpreted? Part of it would directly amend the tax code and therefore comport with its organizational structure that helps to maintain the law’s coherence.<sup>147</sup> The other part would relate to the tax code but not directly amend it; it would, in effect, be a free-floating document whose integration with the tax code and other enacted legislative history (assuming the practice becomes routine) would be far from clear.<sup>148</sup> One part would be written primarily for courts by drafters trained and sensitive to the judicial principles of statutory interpretation (including reliance on textual canons). The other part would be written with a broader

142. Manning, *Second Generation*, *supra* note 138, at 1290, 1304.

143. Manning, *Nondelegation*, *supra* note 139, at 689 (“[Early] [t]extualists . . . argue that committee reports and sponsors’ statements speak only for a minority of Congress . . .”); Manning, *Second Generation*, *supra* note 138, at 1317 (“[T]he aim of second-generation textualists is to protect, rather than control, Congress’s choices.”).

144. John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559, 561–62 (2016) (emphasis in original) [hereinafter Manning, *Vote*]; see also John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1946–47 (2015); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2123–24 (2016) (explaining that failure to address possibility of enacting committee report “leaves something of a hole” in argument that legislative history is authoritative).

145. Manning, *Nondelegation*, *supra* note 139, at 729 (citation omitted).

146. *Id.* at 728.

147. See Surrey, *Complexity*, *supra* note 82, at 695–96.

148. Dean Manning would not require “codifiers to wedge the legislative history into the U.S. Code” but suggests it might be included in a Code appendix. Manning, *Vote*, *supra* note 144, at 569. Since the tax code is positive law, Congress would have to do any wedging. See Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640, 676–77 (2014) (“[O]nly Congress can change positive law.”).

audience in mind by drafters not necessarily familiar with or sensitive to those same principles.<sup>149</sup> One part would be intended to produce (with the tax code being amended) a coherent whole, with loose ends generally left for inclusion elsewhere. The other part would not necessarily be drafted as a coherent whole but may often be “murky, ambiguous, and contradictory”<sup>150</sup> and include mere fragments of ideas elaborating on the rest of the law. The two parts would presumably overlap substantially but not completely; how should the new law be interpreted when the parts slightly differ? Overall, the potential for confusion and errors in interpreting the law would seem to be quite high.

Some might argue that these difficulties are faced by judges today who take committee reports and other legislative history into account in interpreting the law. But there would be one very important difference. Today, a judge who finds legislative history unhelpful in the interpretive process can just ignore it; the material is there to aid understanding, not complicate it. Once enacted, however, legislative history could not simply be ignored; it would be part of the “text that must be observed.”<sup>151</sup> Consequently, even non-willful judges would have more discretion to “pick out [their] . . . friends.”<sup>152</sup> Textualists may rue the day they suggested enactment of legislative history.

Though aware of possible practical difficulties, Dean Manning and other textualists suspect a different reason for Congress’s continued refusal to vote on legislative history. Unlike the statutory text, they suspect the legislative history would not be approved by the legislature.<sup>153</sup> They thus imagine the possibility of a sleight-of-hand occurring, with committee leaders conceivably “slipping something into the legislative history rather than the text” to game the system and gain political advantage.<sup>154</sup> To protect the interests of the median legislator who is not in on and does not favor the scheme, but who only gets to vote on the bill and not the report, they believe judges should disregard portions of the reports as unauthoritative.<sup>155</sup>

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149. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 676 (1999) (questioning whether the *inclusio unius* canon is commonly observed in ordinary writing).

150. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

151. INTERPRETATION, *supra* note 9, at 22.

152. Wald, *supra* note 31, at 214 (quoting Judge Leventhal).

153. Kavanaugh, *supra* note 144, at 2124 (“Congress may not vote on the reports because it might not approve the reports if they came up for a vote.”); see also Manning, *Vote*, *supra* note 144, at 570 (asking why legislative leaders wouldn’t put legislative history “to a vote *if they thought it would pass?*”) (emphasis in original); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (speculating that bill consistent with legislative history “would not have survived the legislative process”); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 168 (2012) (same).

154. Manning, *Vote*, *supra* note 144, at 570. See also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (explaining that judicial reliance on committee reports “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”).

155. Dean Manning would respect some legislative history but not the portion whose “value comes from its status as an authoritative exposition of the [statutory] text.” Manning, *Vote*, *supra* note 144, at

This worry obviously overlooks the long-term nature of relationships in Congress. Any leader attempting this scheme would likely suffer reputational harm—reduced influence in future legislative initiatives—exceeding any benefit from succeeding in the maneuver.<sup>156</sup> Members of Congress are keenly aware that they must continue to do business with one another again and again.<sup>157</sup>

But let us set aside that significant deterrent and play out the textualists' concern. Assume there is a controversial tax provision that a majority of Senators or Representatives would oppose if put to a vote. Perhaps it represents a minority tax policy view or undermines a carefully negotiated compromise contained in the statutory text. Would it make sense for a tax committee leader, trying to sneak the provision into law despite the opposition, to include it in the far more visible and widely-read tax committee report, rather than the almost never read and not well understood tax bill?<sup>158</sup> Though many legislators and their staffs may not be diligent readers of *either* the bill *or* the committee report, if opposition to the provision were as widespread as hypothesized, wouldn't we expect at least one legislator or staffer to notice its inclusion in the report—perhaps alerted by a lobbyist also finding the report more intelligible than the bill—and call it out? In that case, a sufficient majority of legislators could have the offending provision removed from the report if noticed early enough, have the committee leader disavow it in a floor statement, amend the bill to override its significance, or defeat the bill.<sup>159</sup> If none of these were to occur, would there be any reason to disregard any material in the committee report?

This example illustrates a broader misconception of textualists. The authoritativeness of a committee report does not turn on the identity of its drafter or the source of its contents. Rather, a pre-enactment committee report is authoritative evidence of statutory meaning because its contents were known (or should have been known) by the legislators passing on the bill.<sup>160</sup> Unlike the bill,

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571. At one point, Justice Scalia drew a similar distinction, accepting reliance on legislative history that is “(mildly) informative” of statutory meaning but not material claiming to be “authoritative.” *Scalia Interview*, *supra* note 27, at 1616.

156. See KATZMANN, *supra* note 3, at 20, 49 (“The system works because committee members and their staffs will lose influence with their colleagues as to future bills if they do not accurately represent the bills under consideration within their jurisdiction.”); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 54 (1994) (explaining that long-term relationships provide legislators incentive to be viewed as honest and fair); ROBERT A. CARO, 1 THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER 559 (1990) (“In the world of Capitol Hill, where a congressional session was round after round of hastily formed alliances, trust in a man’s word was all-important . . .”).

157. Appellate judges and academic deans must surely understand this. Would they jeopardize their long-term relationships with colleagues by trying to gain advantage over some of them through some trick?

158. KATZMANN, *supra* note 3, at 18–19; see also Gluck & Bressman, *supra* note 60, at 968 (reporting that members of Congress “are more likely to vote (and staffers are more likely to advise their members) based on a reading of the legislative history than on a reading of the statute itself”); see *supra* text accompanying notes 117–119.

159. Cf. Ferguson, Hickman & Lubick, *supra* note 7, at 818. The perpetrator would suffer reputational harm regardless of the fate of the trick.

160. See DORSEY, *supra* note 55, at 97 (“[L]egislative history matters not because it was said or written

the reports were written principally for them in language that should have been reasonably understandable to them.<sup>161</sup> And crucially, though they vote on the bill and not the report, if enough legislators object to *either text*, they can fix it. Hence, the formal vote is in effect an approval of *both* texts.<sup>162</sup> This is true for pre-enactment reports of all federal legislation, not just tax legislation, no matter who prepares them or supplies their contents. Given the comparative accessibility of the texts to legislators, the vote may be more a validation of the committee report than the bill. To answer Dean Manning's question of why Congress doesn't vote on legislative history: Because in their mind, they already do.

## V

### CONCLUSION

This article has explained why, in interpreting tax statutes, courts should properly rely upon textual canons and other common tools of judicial interpretation as well as legislative history. Several features of the tax legislative process support this conclusion:

1. the extraordinary role played by just a handful of Leg Counsel attorneys who have drafted virtually all of the statutory material for the 110-year history of the modern income tax in a manner sensitive to judicial principles of statutory interpretation (including reliance on textual canons);
2. the rigorous collaborative process with experienced government tax experts through which Leg Counsel attorneys have learned the nature and parameters of tax policy changes while retaining essentially exclusive control over the drafting of statutory language;
3. the positive-law enactment of the Internal Revenue Code of 1939 (and 1954 and 1986 Codes) that changed dramatically the content of tax bills and necessitated the preparation of detailed committee reports explaining primarily to legislators the meaning and significance of bill proposals within the large and oft-amended body of tax law; and finally,
4. the role played by the nonpartisan staff of the JCT (still a unique institution in Congress after almost 100 years<sup>163</sup>) that serves at the

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by lawmakers but because it was heard or read by other lawmakers.”). The pre-enactment character of a committee report also insulates its use from being an unconstitutional self-delegation by the legislature. Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1460–61 (2000). This article does not address the authoritativeness of post-enactment reports such as the “Blue Book” regularly prepared by the JCT staff. See Michael A. Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of “Subsequent” Tax Legislative History*, 11 AM. J. TAX POL'Y 91 (1993).

161. See *supra* text accompanying notes 117–119.

162. See Brudney, *supra* note 157, at 53 (“[T]here is no reason to conclude that committee-drafted legislative history is significantly less imputable to Congress than committee-drafted text.”).

163. For background on the origins and development of the JCT staff, see generally George K. Yin, *James Couzens, Andrew Mellon, the “Greatest Tax Suit in the History of the World,” and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787 (2013); Yin, *Codification*, *supra* note

intersection of three great divides in government—those between the parties, the Houses of Congress, and the branches—and helps to carry out almost every aspect of the tax legislative process.<sup>164</sup>

In addition, this article has argued that the authoritativeness of all pre-enactment congressional committee reports, not just tax reports, derives from the ability of legislators passing on the bill to understand and change, if necessary, the meaning of their contents.

Though Surrey understood these features, we of course will never know whether he would have agreed with any of the arguments contained in this article. What we can be confident of, however, is that had he lived long enough and had an opportunity to debate Justice Scalia and other textualists in the same manner he once debated Firing Line host William O. Buckley,<sup>165</sup> we would have benefited from a terrifically enlightening educational experience.

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164. Cf. Wallace, *supra* note 7, at 183 (proposing “JCT Canon” to interpret tax statutes in manner consistent with revenue estimates and explanations provided by JCT staff).

165. See SURREY MEMOIRS, *supra* note 2, at xli–xliii.