

## ARTICLES

# STATUTORY INTERPRETATION FROM THE INSIDE—AN EMPIRICAL STUDY OF CONGRESSIONAL DRAFTING, DELEGATION, AND THE CANONS: PART I

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*What role should the realities of the legislative drafting process play in the theories and doctrines of statutory interpretation and administrative law? The ongoing debates frequently turn on empirical assumptions about how Congress*

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*drafts and what interpretive rules Congress knows, but, until now, there has been almost no testing of those assumptions. This is the first of two Articles reporting the results of the most extensive empirical study to date—a survey of 137 congressional staffers drawn from both parties, both chambers of Congress, and spanning multiple committees—on topics ranging from their knowledge and use of the canons of interpretation, to legislative history, the administrative law deference doctrines, the legislative process, and the courts-Congress relationship.*

*Our findings have implications for virtually every swath of the interpretive debates. We can report, for instance, that there are some canons that our drafters know and use—Chevron and the presumption against preemption, for example; but that there are other canons that many drafters know but consciously reject in favor of political or other considerations, including the presumption in favor of consistent usage, the rule against superfluities, and dictionary use; and that there are still other canons, like Mead and noscitur a sociis, that our drafters do not know as legal rules but that seem to be accurate judicial reflections of how Congress drafts. Our interviews also elicited a treasure trove of information about key influences on the drafting process that legal doctrine rarely acknowledges.*

*These findings also allow us to press for a more precise answer to a foundational question: what should be the purpose of these rules? Judges, often using the unhelpful generalization that they are Congress’s “faithful agents,” have legitimized them using conflicting justifications, some of which turn on empirical reality, some of which do not, and most of which treat together many different types of rules that do very different types of work. Do the canons reflect how Congress drafts, and so effectuate legislative supremacy? Or do judges use the canons for more dialogical reasons, such as to encourage Congress to draft more precisely—and does Congress listen? Might the canons instead best be understood to effectuate judicial responsibilities that are external to the legislative process, such as advancing constitutional values or legal coherence? Our study disaggregates the canons, revealing the variety of justifications for the current regime and how each rests on different visions of the judicial power and the courts-Congress relationship.*

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## INTRODUCTION

Judge Jones, a strict textualist, is interpreting an appropriations statute. He knows that, unlike other statutes, appropriations bills place most key directives in the legislative history rather than in the enacted text. Should the judge depart from his normal practice and consider legislative history?

Judge Smith is interpreting the term “work,” which appears several times throughout a statute that she has learned was drafted in different parts by seven different congressional committees. Should the judge apply the usual “whole act rule” of interpretation, which presumes that words are used consistently throughout statutes?

Judge Jacobs is reviewing Agency A’s interpretation of an ambiguous statute. He has information that insiders tell him counsels against deferring to A’s interpretation, namely, that the Secretary of A has a bad reputation inside of Congress. Should the judge take this factor into account?

What role should the realities of the legislative drafting process play in the theories and doctrines of statutory interpretation and administrative law? Although the past several decades have seen exhaustive debates about how courts and agencies should interpret federal statutes, almost no empirical work has been done to shed light on the relationship, if any, between the theories and doctrines of the fields and the actual statute-creating process.

From a theoretical perspective, the relevance of the realities of legislative drafting depends entirely on the answer to another fundamental question: namely, what is, or should be, the objective of the so-called “canons” of statutory interpretation, the default presumptions that judges apply to interpret ambiguous statutes? There are many possible normative frameworks judges could use to answer this question. Judges might believe that the canons reflect how Congress actually drafts, and therefore that applying them effectuates legislative supremacy. Or judges might use the canons for more dialogical reasons, such as to encourage Congress to draft more precisely or in other ways that judges think would be preferable. Or the canons might be understood to effectuate judicial responsibilities that are essentially external to the legislative process—such as advancing constitutional values or furthering the “rule of law” by coordinating systemic behavior or imposing coherence on the U.S. Code.

Deciding which (or how many) of these objectives should be the goal is a foundational inquiry that goes to the nature of the courts-Congress relationship and the scope of the judicial power. But there has been some profound imprecision with respect to how this inquiry has been addressed. Most practicing judges claim allegiance to an exceedingly general model of the judge as a “faithful agent” of the legislature, and that model has been deployed to justify an enormous number of canons that seem to be doing very different types of work. There is arguably a major difference, for instance, between a theory of the judicial role in statutory interpretation that grounds its legitimacy in whether it is accurately reflective of congressional practice and one that, instead, aims to *change* how Congress itself deliberates and drafts. And there is perhaps an even greater difference between those visions and one grounded in the view that judges have an obligation to impose coherence on the U.S. Code, even where imposing such coherence achieves results never intended by its drafters. Allegiance to the faithful-agent model also often translates to claims that interpretive methods reflect actual congressional practice—claims at odds with the admission by most judges and scholars that many of the canons on which they rely are “fictions.”<sup>1</sup>

This Article offers the most extensive empirical study to date about this intersection of statutory interpretation, administrative law doctrine, and the process of legislative drafting. Over five months in 2011 and 2012, we interviewed

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1. See *infra* Part II.A.

137 congressional counsels with responsibilities over drafting legislation.<sup>2</sup> We surveyed counsels, rather than elected members of Congress, for several reasons, which we elaborate in Part I. Most importantly, current doctrine makes assumptions about what legislative drafters know, and it is widely acknowledged (and our study confirms) that members do not do the actual drafting. Interpretive doctrines designed to reflect how members actually participate in the drafting process would look very different, and certainly less text oriented, than the ones that we currently have. Moreover, doctrine rarely grapples with the role of staff, and judges often make assumptions about staff accountability to members in the drafting process that have never been empirically verified.

Our respondent-counsels were approximately equally divided between the House and the Senate, both political parties, and whether they worked for members in the majority or the minority in each legislative body.<sup>3</sup> They worked on twenty-six different committees, as well in as the professional drafting offices known as the Offices of House and Senate Legislative Counsel. Every survey consisted of the same 171 questions,<sup>4</sup> which covered topics ranging from the role of canons such as the presumption against preemption, *expressio unius*, and *Chevron*<sup>5</sup> deference, to legislative history, the legislative process, and the way that staffers perceive the responsibilities of courts and agencies in statutory interpretation. In addition, our survey provided unlimited opportunities for qualitative explanations. Our respondents used those opportunities not only to provide more texture to their responses, but also to highlight important influences in the drafting process not captured by our questions or legal doctrine.

Our findings shed light on some of the key debates of both fields. They also allow us to categorize the canons in ways that reveal many still-unanswered questions about the normative frameworks that underlie them. Contrary to the prevailing wisdom, a majority of our respondents were not only aware of some of the interpretive rules that courts employ—including the presumption against preemption and *Chevron*—but told us that these legal rules affect how they draft, although not always in ways that courts expect. We call these rules

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2. Eighteen did not have formal counsel titles but performed substantially the same (or a more supervisory) role. Fourteen respondents (including one law student) were nonlawyers specifically identified to us by others as staffers who serve in the capacity of counsels. For a detailed description of our sample and our methodology, see Part I.B, below, as well as Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, STAN. L. REV. (May 2013), [http://www.stanfordlawreview.org/sites/default/files/Gluck\\_Bressman\\_65\\_Stan.\\_L.\\_Rev.\\_Methods\\_Appendix.pdf](http://www.stanfordlawreview.org/sites/default/files/Gluck_Bressman_65_Stan._L._Rev._Methods_Appendix.pdf) [hereinafter *Methods Appendix*].

3. See *Methods Appendix*, *supra* note 2; *infra* Part I.B.

4. Specifically, we asked eighty-five questions, with fifteen questions containing three to ten subparts. Throughout this Article, we refer to those questions and responses using the question number with the prefix “Q.”

5. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

“feedback canons,” as they at least partially substantiate the existence of an interpretive conversation between the Supreme Court and Congress that many have assumed impossible. For other canons, such as many textual canons like *nosctur a sociis* and a surprising number of the administrative delegation doctrines—including *Mead*,<sup>6</sup> *Barnhart*,<sup>7</sup> and the major questions doctrine—our respondents displayed unfamiliarity with them as legal doctrines but told us that the assumptions underlying those rules accurately reflect how they draft legislation. We call these rules “approximation canons”—rules in which the Court seems to be correctly intuiting how Congress signals its intent even as Congress remains unaware of the rules’ existence.

At the same time, however, there were a host of canons that our respondents told us that they do not use, either because they were unaware that the courts relied on them or *despite* known judicial reliance. For example, our respondents were mostly unaware of and do not use “clear statement rules”—an example of a rule that we therefore call a “disconnected canon.” And although they were well aware of other rules, including the rule against superfluities, the Court’s penchant for dictionary consultation, and some Justices’ distaste for legislative history, our respondents told us that they nevertheless do not generally draft in accordance with the rule against superfluities, that they do not consult dictionaries when drafting, and that legislative history remains a critical tool regardless of whether courts use it. Indeed, despite the decades of judicial squabbling over it, legislative history was overwhelmingly viewed by our Democratic and Republican respondents alike as the most important tool of interpretation after statutory text. We call this last set of rules, collectively, “rejected canons,” because our drafters knowingly reject judicial preferences relating to their application in favor of institutional or other pragmatic considerations.

Our aim in thus disaggregating and typologizing the canons is not to say that certain rules are necessarily illegitimate. Rather, our aim is to illustrate how undertheorized the canons have been and to highlight the kinds of normative questions that arise from testing the connection between legal doctrine and legislative drafting practice. What model of the judicial role justifies the use of canons that legislative drafters know but consciously do not employ? Is this the same model that justifies the use of canons that depend on an interbranch interpretive feedback loop? The faithful-agent model has had remarkable staying power as the “umbrella” justificatory model of most interpretive approaches, even though it offers little specific assistance in answering questions at this level of detail. Indeed, in light of our findings, the faithful-agent model seems incapable of bearing the full weight of modern interpretive practice.

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6. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

7. See *Barnhart v. Walton*, 535 U.S. 212 (2002).

Our interviews also elicited a treasure trove of information about key influences on the actual drafting process that courts and scholars rarely, if ever, consider. For example, our drafters highlighted the importance of congressional-committee jurisdiction; the type of statute being interpreted (e.g., single-subject versus omnibus legislation); the specific path that legislation takes through Congress; the personal reputation of the relevant drafter or agency; the various audiences for and the type and timing of legislative history; and the centrality of the nonpartisan Offices of Legislative Counsel in drafting statutory text—all as critical to understanding how statutes should be interpreted.

We detail these findings, and many more, in this Article and its companion piece, which will appear in the following volume of the *Stanford Law Review*.<sup>8</sup> But by way of making the stakes clear, the findings have potential relevance for virtually all of the major interpretive debates, both at the canon-specific level and also more broadly at the theoretical level. At the canon-specific level, for example, understanding that statutes are drafted by congressional committees that generally do not communicate with one another pulls the rug out from under the bases of many interpretive rules, beloved by textualists, that presume that statutory terms are used consistently within and across statutes. Understanding that legislative history plays an entirely different role in ordinary statutes than it does in omnibus or appropriations statutes arguably should affect how it is used by courts, but even purposivist proponents of legislative history do not make such distinctions. Realizing that Congress uses certain signaling conventions—for example, the words “in consultation with” to indicate that it wishes one agency to take the lead in a multiagency statute—might resolve continuing interpretive disputes.

At the broader level, for instance, our findings have direct relevance for ongoing debates about the administrative law doctrines, which many have charged are too disconnected from congressional practice to be legitimate; according to our respondents, the Court has actually done a surprisingly good job at approximating how Congress delegates. So, too, understanding that members and staff focus more on *policy*, while the nonpartisan, professional Offices of Legislative Counsel draft much of the actual statutory *text*, should change entirely the contours of the debate over legislative history. As it turns out, much enacted statutory text is not drafted by the staff most accountable to the members, but legislative history is.

Our findings have relevance not only for faithful-agent-based theories of interpretation, but also for theories that additionally rely on rule of law arguments, such as the idea that judges should interpret statutes in ways that are predictable for systemic actors or in ways that impose coherence on the *corpus*

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8. 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. (forthcoming 2014).



*juris*. Few practicing judges justify their interpretive approach solely on the basis of such rule of law arguments—most claim that the rules that they apply capture intended or ordinary meaning and so also are consistent with the faithful-agent paradigm. Our study calls those faithful-agent justifications into question for many canons and so raises the question whether the rule of law model, alone, can justify the continuing application of those doctrines. For example, if coherence or predictability were really the goal, one might expect interpretive doctrine to be applied much more consistently than it has been and in a less complex manner. Moreover, without a link to congressional practice, it becomes clear that these rule of law canons allow judges to shape statutes in ways that may diverge from congressional expectations as much as do more openly pragmatic approaches to statutory interpretation that are more frequently attacked as improper exercises of judicial activism. The pervasive modern discomfort with federal judicial “lawmaking,” we believe, has led judges to take shelter behind seemingly neutral interpretive rules whose use is bolstered by the assumption that they also reflect how Congress works or understands statutory language. To the extent that our study undermines that empirical claim for some rules, those rules are not necessarily illegitimate, but should be acknowledged and assessed for what they are.

Not all of the findings that we relay are amenable to incorporation by legal doctrine. Some of the key factors that our respondents consider—for example, the personal reputation or sophistication of the staffer responsible for a piece of legislation—seem impenetrable by courts. Even those factors that courts may be able to discern themselves—for instance, whether multiple committees participated in drafting a single piece of legislation or the timing of legislative history—may prove too costly for use in everyday legal practice. We also recognize that building a typology of the canons around their link to the legislative drafting process is just one of many possible organizing frameworks that might be employed.<sup>9</sup> We focus on this organizing principle because drafting “reality” has been a central component of virtually all of the theoretical and doctrinal debates, but another unanswered question is whether a more tailored set of interpretive rules is desirable in the first place and, if so, tailored along what dimension. Yet another question is whether a partially tailored set of legal doctrines is better than none at all.

To date, there has been almost no other empirical research of this kind. Only one previous article, an important 2002 study by Victoria Nourse and Jane Schacter, began to make inquiries of the nature that this Article undertakes, but

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9. Some statutory interpretation doctrines are already tailored by subject matter—for example, the canon that bankruptcy statutes should be construed to give the debtor a “fresh start”—or by institution, as *Chevron* exemplifies. Others theorists might offer more functional typologies: for example, one might construct different interpretive rules for statutes with different objectives—for instance, appropriating statutes versus rights-protective statutes. Thanks to Bruce Ackerman, who suggested this functional alternative.

was admittedly limited in its sample and its methodology.<sup>10</sup> Despite those limitations, that study has had major influence on legal scholarship,<sup>11</sup> offering proof of the hunger for empirical data about legislative drafting and also the difficulty of ignoring such data once they are discovered.

In this publication, we offer the first half of our results, focusing on our respondents' awareness and use of the interpretive rules that courts routinely employ. In the companion Article, we elaborate on the various influences on the drafting process that our respondents told us are central but are rarely considered by courts. We also relay some rather startling findings about our respondents' view of courts as interpreters. We were not surprised that our respondents saw agencies as the primary statutory interpreters, but we were surprised to learn that our respondents generally did not view courts as delegates or as welcome "partners" in their work, a finding that may pose challenges for broader theories of interpretation that advocate a more engaged judicial role. The second Article also considers more specifically how interpretive theory and doctrine might change in light of our findings.

The discussion of this first Article proceeds in four Parts. Part I provides the theoretical background and an explanation of our methodology. Part II relays our findings concerning our respondents' awareness, use, and perceptions of the textual and substantive canons, while Part III relays those findings with respect to legislative history and Part IV does so with respect to the administrative law doctrines. We conclude by comparing our findings across canons. Interestingly, the canons that have provoked the most scholarly and judicial debate—legislative history and the administrative law doctrines—find the greatest support in our respondents' drafting practices, while less controversial canons, including many textual rules and clear statement rules, were more disconnected from how our respondents described the statute-creating process. The Conclusion also presses the question of the utility of the faithful-agent model and calls attention to the lack of a parallel model on the congressional side. Although judges and scholars often refer to the courts-Congress interpretive dialogue in statutory interpretation, little has been said about what normative model should drive *congressional* behavior in that relationship. Does Congress, for example, have an obligation to pay more attention to, or try to affect, how courts interpret statutes? Is Congress, or should it be, a "faithful principal"?<sup>12</sup>

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10. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002). Nourse and Schacter readily acknowledged the limitations of their study. They interviewed only eighteen staffers, all but two of whom worked on the Senate Judiciary Committee, and their study focused on a few broad questions about how text is drafted rather than a more specific or quantitative inquiry into different kinds of canons or other drafting influences. *See id.* at 578-83.

11. *See Methods Appendix, supra* note 2; *infra* Part I.B.

12. Thanks to Brad Clark for suggesting this term.

Ultimately, we believe that our findings, even if only suggestive, demonstrate the need for a more nuanced account of how statutes are produced in the modern regulatory state. The foundational scholarship of federal legislation has, for the most part, been based on a generic and stylized account of statutory drafting—an understandable focus for a field that is still in its relative infancy. However, there is great variety that exists across drafters, types of statutes, the reasons why and ways in which Congress delegates, and countless other aspects of the drafting process. A mature theoretical account will have to contend with that variety or else come up with better justifications for ignoring it. In this first outing, we can only begin to develop these ideas, but we hope that this Article will encourage more work in a similar vein.

### I. THE STUDY AND WHY IT MATTERS

What is the relevance of a study of this nature to the theories and doctrines of statutory interpretation and administrative law? Should we care whether Congress is aware of the interpretive rules that courts employ or whether congressional drafting practice corresponds to the assumptions that legal doctrine makes?

The answer to this inquiry implicates some of the most important, and still unresolved, questions of both fields. It turns on the reasons that courts look to those interpretive tools in the first place, a question inextricably tied to one's views about the proper role of judges, the judicial power, and the courts-Congress relationship. Doctrine and theory have remained surprisingly vague about how exactly the various rules of interpretation effectuate different normative visions of the judicial role, even as judges and scholars continue to contest which of the rules are appropriate.

Some interpretive tools seem designed merely to reflect how Congress actually drafts; others seemed more proactively aimed at affecting how Congress should draft in the future. Still others do not seem related to Congress at all, but rather enable judges to layer policy preferences, or constitutional law norms, atop Congress's work product. A study of drafting "reality" has obvious significance for evaluating canons that are intended to reflect or affect Congress. It also exposes more clearly those canons that are unrelated to drafting practice and that, as a result, may require more explicit justifications on other grounds.

Examining the relationship between Congress and the canons also raises questions about courts-Congress communication. Many scholars and judges have argued that judicial interpretive practice has a salutary, "teaching" effect on legislative drafting,<sup>13</sup> or that consistently applied interpretive rules help

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13. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 61 (2012) ("The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.").

courts and legislators coordinate their behavior. But those types of arguments depend entirely on whether Congress is aware of the rules that courts employ. New empirical work, moreover, shows that Congress rarely overrides judicial statutory decisions,<sup>14</sup> a finding that heightens the importance of an interbranch interpretive dialogue from a democracy-theory perspective: if *ex post* overrides are rare, the *ex ante* drafting process becomes Congress's central means of communicating with courts and shaping their interpretive behavior.

Profound disagreements exist with respect to most of these framework questions about statutory interpretation, and it is not the goal of this Article to resolve them. Our goal, rather, is to illustrate that—no matter where one comes down on these questions—investigating the realities of the congressional drafting process advances the debates. Our study permits us to intervene in rule-specific battles; for instance, the battle over whether judicial reliance on legislative history affects congressional production of it, or whether Congress really uses ambiguity to signal delegation of interpretive authority to administrative agencies. Our study also sheds light on larger jurisprudential divides, such as the question of which branch of government—judicial, legislative, or both—has power over interpretive rules.<sup>15</sup> The case for congressional power to change interpretive rules, for instance, might be more compelling for rules whose justifications turn on legislative reality than for more disconnected rules that courts employ for other purposes, such as coordinating judicial behavior or enforcing constitutional norms. Our efforts to disaggregate the various canons, their normative bases, and their connections to actual drafting practice help to reveal such distinctions.

The remainder of this Part offers a brief sketch of the relevant theoretical and empirical landscape. It concludes with an outline of our study's methodology.

#### A. *Faithful Agency, Fictions, and Empirics in Statutory Interpretation*

One need look no further than the furor over Justice Scalia and Bryan Garner's new book for proof that intense discord remains over the proper role of

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14. See Matthew Christiansen & William N. Eskridge, Jr., *Overriding the Supreme Court's Statutory Interpretation Decisions, 1967-2011* (unpublished manuscript) (on file with authors) (showing that congressional overrides of Supreme Court decisions declined dramatically after the 1998 impeachment of President Clinton); see also Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. (forthcoming 2013) (manuscript at 105), available at <http://ssrn.com/abstract=2130190> (arguing that a "dramatic[]" drop in overrides began even earlier).

15. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

judges in statutory cases and which tools of interpretation support that role.<sup>16</sup> This is so despite the fact that the two leading theories, purposivism and textualism, both claim consistency with a “faithful-agent” vision of the judicial role. But for each set of interpreters, the faithful-agent concept provides an extremely broad umbrella for the application of many different kinds of interpretive rules.

Purposivists, for instance, make faithful-agent-based arguments that judicial reliance on legislative history helps to cabin judicial discretion and effectuate congressional intent,<sup>17</sup> but also argue, somewhat in conflict, that judges are legislative partners who should interpret statutes “in a manner that . . . will produce a workable set of laws,”<sup>18</sup> even if the outcome reached is not one specifically intended by Congress.<sup>19</sup> Textualists, in turn, argue that their version of faithful agency hews more closely to legislative supremacy and that “texts should be taken at face value,”<sup>20</sup> but at the same time argue that judges should adopt particular linguistic conventions that, even if they do not reflect how Congress drafts, will either teach Congress how to draft better in the future or make the law more predictable for those outside of Congress.<sup>21</sup> Both sets of theorists also routinely apply many policy presumptions, such as the presumption that ambiguous statutes will not be construed to preempt state law, without consistently justifying them as reflective of congressional intent, common sense, actual drafting practice, constitutional values, judicial policy preferences, or something else.<sup>22</sup> Underpinning these interpretive approaches are obviously varied visions of how reflective or how proactive courts should be.

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16. See SCALIA & GARNER, *supra* note 13; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 13); Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.tnr.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism> (reviewing SCALIA & GARNER, *supra* note 13); David Lat, *The Benchslap Dispatches: Posner v. Scalia—Is It Personal?*, ABOVE THE LAW (Sept. 5, 2012), <http://abovethelaw.com/2012/09/the-benchslap-dispatches-posner-v-scalia-is-it-personal>.

17. See John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 1-2 (2005); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548-49 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

18. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 867 (1992).

19. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 92 (2010).

20. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005); see SCALIA, *supra* note 17, at 23-25.

21. See SCALIA & GARNER, *supra* note 13, at 51, 61.

22. Cf. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (suggesting that application of the substantive canons is inconsistent with faithful-agent theory); Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1596-97 (2010) (same).

Some pragmatic theorists have argued explicitly for interpretive methodologies less tethered to congressional reality. Cass Sunstein and Adrian Vermeule, for example, focus on the limited institutional capacity of courts in arguing that faithful agency is best advanced through “non-ideal interpretive theory”<sup>23</sup> that relies on simple decision rules and/or transfers of decisionmaking authority to other institutions, such as agencies.<sup>24</sup> Still other theorists—although a minority, if any, among practicing judges—have moved away from faithful agency altogether and focus on matters such as the importance of the rules as coordinating devices for courts<sup>25</sup> or the duty of courts to impose coherence on the statutory landscape, even where such coherence is not intended by Congress.<sup>26</sup>

Of particular relevance to this Article, all of these theories make different assumptions about the realities of the legislative process. Textualists have argued, for instance, that most members of Congress do not read legislative history.<sup>27</sup> Purposivists, in response, claim that their understanding of statute-making is more realistic and that Congress welcomes the kind of judicial assistance that their methodology offers. Pragmatic theorists, in turn, often assume the existence of an interbranch dialogue—a “feedback loop” between the courts and Congress that puts interpreters and drafters on the same page with respect to the interpretive conventions that both will follow. Many others, however, have argued that such a dialogue simply does not exist.<sup>28</sup>

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23. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 583 (2005).

24. ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 1 (2006); see Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 887, 921-22, 929-31 (2003). For a different view of how to effectuate legislative supremacy, see Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2030, 2032 (2002) (advocating for default rules designed to maximize political preferences); and Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165 (2002) [hereinafter Elhauge, *Preference-Eliciting*] (advocating for default rules that “provoke a legislative reaction”).

25. See, e.g., Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (advocating the plain meaning rule as a “second-best coordinating device”).

26. See Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES LEGAL SCHOLARSHIP, art. 1, 2002, at 7, available at <http://www.bepress.com/ils/iss3/art1> (subscription required).

27. See SCALIA, *supra* note 17, at 32; Manning, *supra* note 20, at 420-21.

28. See, e.g., Nourse & Schacter, *supra* note 10, at 597-616; see also Sunstein & Vermeule, *supra* note 24, at 922-25 (arguing that generalist courts are not competent to accurately ascertain congressional preferences).

1. *Fictions*

Somewhat paradoxically, interpreters of all stripes also have acknowledged that many of the rules that they routinely apply rest on “fictions.”<sup>29</sup> Such admissions pose particular difficulties for those faithful-agent theorists who claim that their interpretive rules reflect how Congress actually drafts.<sup>30</sup>

For instance, the fiction of the unitary drafter—the idea that all laws are drafted by the same group of legislators—undergirds a huge number of interpretive rules applied by textualists and purposivists alike. But this principle, as even the Justices who use it admit,<sup>31</sup> is most certainly false. So, too, is the notion of a single “congressional intent,” although purposivists continue to assert that such a fiction is useful nonetheless.<sup>32</sup> And, in the context of congressional delegations to agencies, judges on all sides have recognized the fictitious nature of using statutory ambiguity as a signal of congressional intent to delegate.<sup>33</sup> Justice Scalia views this fiction as a useful “background rule of law against which Congress can legislate,”<sup>34</sup> and Justice Breyer believes it is a rule that Congress likely intends because it facilitates “a workable partnership”<sup>35</sup> with the courts. Each, of course, assumes something *nonfictitious* about which we, to date, have no proof. Justice Scalia’s view assumes that Congress is aware of this allegedly fictitious rule and accordingly legislates in its shadow. Justice Breyer’s approach, meanwhile, assumes both that Congress seeks such a partnership with the courts and that the rule effectuates that relationship.

A threshold question for any empirical study of Congress is why interpreters treat rules that they believe to be fictions as benign ones. Perhaps some rely on them as proxies for data they do not (but wish to) have about how Congress works. For those theorists, empirical research might affect whether those doctrines are utilized in the future. But others might rely on the fictions *despite* knowing how Congress works—perhaps because they assume that the legislative process is too complex ever to be captured by legal rules or because they wish to enforce external norms. For those theorists, the real-world data might

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29. See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503-04 (1989).

30. Amy Barrett’s important article, *supra* note 22, has fleshed out this argument in detail with respect to the substantive canons.

31. See SCALIA, *supra* note 17, at 16-17; Bradley C. Karkkainen, “Plain Meaning”: Justice Scalia’s Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL’Y 401, 407 (1994).

32. See BREYER, *supra* note 19, at 98-99.

33. See David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203; Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

34. Scalia, *supra* note 33, at 517.

35. See BREYER, *supra* note 19, at 119.

force a more explicit recognition of the extralegislativ nature of their approach and its implications for the judicial power and the interbranch relationship.

## 2. *Previous empirical work*

There has been only one empirical study that attempted to link the doctrines of statutory interpretation to the actual legislative drafting process. That work—the important case study by Nourse and Schacter<sup>36</sup>—has had much influence despite its narrow scope.<sup>37</sup> As the authors themselves acknowledged, the study’s small sample size (eighteen counsels) and its confinement to the rather atypical Senate Judiciary Committee<sup>38</sup> limited the generalizability of its results.<sup>39</sup>

The Nourse and Schacter study also asked only several broad questions and, because it used open-ended interview questions rather than a standardized format, relayed its findings anecdotally rather than quantitatively.<sup>40</sup> Specifically, the study produced four principal findings: (1) that staff, and to a lesser extent, lobbyists, have central roles in the statutory drafting process and that legislation is drafted in a variety of ways, ranging from a deliberate multi-staffer mode of drafting to last-minute drafting on the Senate floor; (2) that although staffers value legislative clarity, the pressures of time and compromise make ambiguity inevitable; (3) that drafters do little legal research about interpretive tools; and (4) that legislative history continues to be produced despite the textualist critique of it.<sup>41</sup>

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36. Nourse & Schacter, *supra* note 10.

37. The article has been cited in sixty-four law review pieces, including Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 MCGEORGE L. REV. 785, 820 n.48, 822 n.54 (2003); Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 13 n.55 (2009); Todd D. Rakoff, Essay, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1579 n.60 (2010); and Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 822 n.167 (2010).

38. Sixteen of their respondents were Senate Judiciary staff counsels; two were counsels in the Senate Office of Legislative Counsel with responsibilities for working on statutes drafted by the Judiciary Committee. Nourse & Schacter, *supra* note 10, at 578-79.

39. *Id.* at 581. By most accounts, the Senate Judiciary Committee is an atypical committee; it is staffed almost entirely by lawyers who are widely viewed to have more drafting expertise than most other congressional counsels. *See id.*

40. *Id.* at 579 (“We decided to avoid questions based on numerical values and, instead, opened each interview by asking those interviewed about their ‘most recent’ drafting experience. Based on the account given, we could then proceed to ask whether that drafting experience was typical or not of general practice.”).

41. For a summary of their findings, see *id.* at 575-76, 583.



With some exceptions, as elaborated in the Parts that follow, we generally do not quarrel with these findings, and our study replicates most of them. Our interest is in deepening the Nourse and Schacter account and going beyond it. We inquired about more than twenty different interpretive doctrines and the different types of legislative history. We also investigated more specifically the ways in which and reasons why Congress delegates, and examined how the particulars of the legislative process—the path that statutes take from introduction to enactment—affect how statutes are drafted.

Part of our motivation stems from how much the scholarship has relied on the Nourse and Schacter study. For example, their argument that interpretive rules play little role in the drafting process has been cited as fatal to hopes of any interpretive dialogue between courts and Congress—a dialogue upon which much interpretive theory and doctrine depends.<sup>42</sup> The Supreme Court, for instance, has often said that the canons are background rules against which Congress presumptively legislates;<sup>43</sup> textualists argue that a text-centric approach will spur Congress to draft statutes more carefully;<sup>44</sup> and rule of law theorists claim that that judicial consistency will have coordination benefits for courts, litigants, and statutory drafters alike.<sup>45</sup> All of these arguments depend on some congressional awareness and responsiveness to the rules that courts employ.

At the same time, the Nourse and Schacter findings have not been cited by any federal court. Nor, to our surprise, has some important political science literature about congressional drafting. Although certain strands of the political

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42. See, e.g., Krishnakumar, *supra* note 37, at 13 & n.55 (citing the Nourse and Schacter article for the proposition that, “in the vast majority of cases, Congress is likely to ignore these [interpretive] rules”); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2049 n.32 (2006) (book review) (citing the Nourse and Schacter article for the proposition that “congressional drafters generally do not consider and often are unaware of the textual and substantive canons the Court uses”).

43. *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“[L]egislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware.”); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (“Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.” (citation omitted)); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 n.22 (1983) (“Congress . . . appear[s] to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons.”).

44. See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 381-82 (2005).

45. See EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 235 (2008); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66-67 (1994); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1757 (2010); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1418-21 (2005).

science literature have had a major impact on interpretive doctrine,<sup>46</sup> courts largely seem to have overlooked other important work on how the congressional committee system affects how statutes are drafted<sup>47</sup> and how the “textbook” legislative process no longer exists.<sup>48</sup> On the administrative law side, there has been more empirical work, mostly focusing on the structure of delegation<sup>49</sup> and how consistently the Court employs its deference doctrines.<sup>50</sup> Apart from Nourse and Schacter, however, no one has addressed the precise question of whether Congress thinks about the delegation of interpretive authority in the same way that the Court does.

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46. See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 240 (1992) (summarizing the major impact of economics and public choice theory on statutory interpretation theory and doctrine). For a classic in this genre, see DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004).

47. For a few of many examples of the literature on the committee system, see E. SCOTT ADLER, *WHY CONGRESSIONAL REFORMS FAIL: REELECTION AND THE HOUSE COMMITTEE SYSTEM* (2002); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1973); DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* (1997); and KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991).

48. The pathbreaking work here is BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (4th ed. 2012).

49. See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 91-93 & tbl. 5.1 (1999); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997*, at 39-69 (2003); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-66 (1984); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468-81 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 267 (John E. Chubb & Paul E. Peterson eds., 1989).

50. For empirical studies of the Court’s deployment of *Chevron*, see generally Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 981-84 & tbls. 1-2 (1992); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Examination of Chevron*, 73 U. CHI. L. REV. 823, 835-36 & tbls. 2-3 (2006); and Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984. For studies focusing on the application of *Mead* and *Skidmore*, see generally Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); and Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007). William Eskridge and Lauren Baer have also examined how the Court applies the various deference doctrines. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090, 1098-1120 (2008); see also Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727 (2010).

A variety of scholars have noted the distinct challenges of using empirics to evaluate and change statutory interpretation doctrine.<sup>51</sup> But even those scholars have recognized that “there is surely a nontrivial range of questions amenable to research, and having some data is usually better than having no data.”<sup>52</sup> Judge Robert Katzmann (himself a political scientist) recently lamented that the ongoing interpretive debates have “taken place in a vacuum, largely removed from the reality of how Congress actually functions.”<sup>53</sup>

The primary caution has been against assuming that empiricism can answer all questions in the field. We certainly agree and have tried to be clear about the linkages between the relevance of the data that we have collected and normative theories of the relationship between courts and Congress. We also fully acknowledge that there are countless other influences on the drafting process that our survey does not address. But given that the field has placed much reliance on the limited data that do exist, there is value in attempting to expand upon it.

### B. *Methodology: Our Survey of 137 Congressional Staffers*

As elaborated in the accompanying Methods Appendix,<sup>54</sup> our study builds on what the Nourse and Schacter project began in several ways. First, we have engaged in a broader study, with quantifiable results. To that end, we asked 171 questions<sup>55</sup> of 137 staffers in Congress, and respondents were given the opportunity to offer additional qualitative comments to explain their answer to any question. Respondents were also asked at the end of most sections whether “we

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51. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 675 (1999) (noting the difficulty in testing assumptions such as whether canons have prodemocracy effects); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 642 (1999) (“The principal qualification to my basic thesis—that formalism must be defended empirically—comes from the fact that without normative claims of some kind, it is impossible to know what counts as a ‘mistake’ or an ‘injustice’ in interpretation . . . .”); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 701 (1999) (“Many of the empirical questions relevant to the choice of interpretive doctrines are . . . unanswerable, at least at an acceptable level of cost or within a useful period of time.”).

52. Vermeule, *supra* note 51, at 703 (footnote omitted); see also Eskridge, *supra* note 51, at 675; Sunstein, *supra* note 51, at 644.

53. Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 660 (2012).

54. See *Methods Appendix*, *supra* note 2.

55. Specifically, we asked eighty-five questions with fifteen questions containing three to ten subparts. Two of these questions (77A and 32a) were added after the first batch of interviews took place. We designed the questions ourselves and based most of them on current doctrinal tests applied by courts or on arguments that have been central to the academic debates. We tested the questions on four colleagues with law and political science backgrounds, as well as four students who had worked on Capitol Hill, and we amended the questions based on their feedback.

were asking the right questions” about the topic at issue, and were further asked if there was anything that we left out or that they wished to add at the end of the entire survey. We received more than 4000 comments, which we coded and quantified where possible.<sup>56</sup> Our goal in using this format was to combine the objectivity of a standardized survey format with the benefits of a more open-ended interview, although we recognize that there are inevitable dangers and biases associated with both formats.<sup>57</sup> All interviews were conducted orally. The majority were conducted in person, but forty-one (30%) were conducted by telephone due to scheduling difficulties.

The survey also engaged in a more specific set of inquiries than the Nourse and Schacter study: we asked about particular interpretive rules and different groups of rules rather than inquiring about them as a whole. We also asked questions that went beyond the canons, including questions about how the legislative process (for example, the use of omnibus versus single-subject legislative vehicles, or the relevance of committee consideration) affects how statutes are put together; the causes of statutory ambiguity; the role of states, agencies, and other actors in drafting and implementing legislation; and the role of Legislative Counsel (the nonpartisan, professional drafters in Congress). Finally, we asked more general questions about how the Supreme Court’s current approach to statutory interpretation affects, or does not affect, how statutes are drafted.

Our project targeted a much broader population of staffers. Like Nourse and Schacter, we essentially confined our study to committee counsels with drafting responsibility.<sup>58</sup> But unlike their study, we interviewed counsels across both houses and across twenty-six different committees (thirteen in the House, twelve in the Senate, and one joint committee; many worked on subcommittees within these committees). We had a near perfect split between staffers working for Republicans and Democrats (fifty-two and fifty-four respectively out of 137) and between staffers working in the House and Senate (sixty-seven and seventy respectively out of 137), and a 58/48 split between staffers working in the majority and the minority.<sup>59</sup> The remaining staffers were nonpartisan.<sup>60</sup> We

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56. For details on how we coded the comments, see *Methods Appendix, supra* note 2.

57. See generally GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994); Herbert M. Kritzer, *Stories from the Field: Collecting Data Outside Over There*, in *PRACTICING ETHNOGRAPHY IN LAW: NEW DIALOGUES, ENDURING METHODS* 143, 154 (June Starr & Mark Goodale eds., 2002); Helen Metzner & Floyd Mann, *A Limited Comparison of Two Methods of Data Collection: The Fixed Alternative Questionnaire and the Open-Ended Interview*, 17 *AM. SOC. REV.* 486 (1952).

58. See *Methods Appendix, supra* note 2 (explaining the inclusion of thirteen nonlawyers and one law student).

59. At all points during our survey, Democrats held the majority in the Senate and Republicans held the majority in the House.

also included twenty-eight counsels from the nonpartisan drafting Offices of the House and Senate Legislative Counsel;<sup>61</sup> their role in the drafting process, though potentially significant, has generally been given little attention in the study of statutory interpretation.

TABLE 1  
Empirical Survey of 137 Congressional Staffers 2011-2012:  
Breakdown of Respondents by Party, Chamber of Congress, and  
Majority/Minority Status

	Democ.	Repub.	House	Senate	Minor.	Major.	Nonpartisan
Democ.	54	n/a	24	30	24	30	n/a
Repub.	n/a	52	28	24	24	28	n/a
House	24	28	67	n/a	24	28	15
Senate	30	24	n/a	70	24	30	16
Minor.	24	24	24	24	48	n/a	n/a
Major.	30	28	28	30	n/a	58	n/a
Non-partisan	n/a	n/a	15	16	n/a	n/a	31

That said, there are important limitations to our study, particularly as related to the ability to obtain a random sample. As detailed in the Methods Appendix, there are no sources available that designate which among all 6099 congressional staffers have drafting responsibility, and congressional staff perform a wide variety of other tasks as well. The bulk of legislative consideration occurs at the committee level, however, and although there are nonlawyer committee staffers, many do not draft legislation. We therefore limited our pool almost entirely to counsels serving on congressional committees or in the Offices of the House and Senate Legislative Counsel. In general, we surmised that counsels were likely to be the most aware of the Supreme Court's practices with respect to statutory interpretation, and so to the extent that counsels were

60. Three of the nonpartisan staffers worked on congressional committees; the rest were Legislative Counsels. The Nourse and Schacter study was also bipartisan. *See* Nourse & Schacter, *supra* note 10, at 578.

61. *See* MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., RS20856, OFFICE OF LEGISLATIVE COUNSEL: SENATE 1-2 (2008); THOMAS P. CARR, CONG. RESEARCH SERV., RS20735, OFFICE OF LEGISLATIVE COUNSEL: HOUSE 1-2 (2004).

unaware of, or uninterested in, those rules, such evidence would be particularly useful.<sup>62</sup>

Congressional staffers are a notoriously difficult population to study, both because of the difficulty of identifying the relevant staffers and also because of the strong culture of confidentiality and the fear of “leaks” that permeates Congress. Staffer schedules are also constantly in flux and the pace of the work is intense, making it difficult for staff to set aside time for projects like this one. As such, the level of response to our survey—137 out of the approximately 650 Committee and Legislative Counsels in Congress—greatly surpassed our expectations.<sup>63</sup> However, we recognize the limitations. For example, there is a danger of self-selection bias in surveys of this nature: those who responded might have been more interested in or more knowledgeable about these issues than those who did not. Unfortunately, such problems are unavoidable in a project like this one, with a generally reticent population that necessarily depends on volunteers.

We did our best to mitigate these concerns. Where possible, we have verified many of our respondents’ observations with external sources. We also confirmed that our sample drew from many committees, both political parties, and both houses of Congress. In addition, we compared the publicly available data about our sample with publicly available data about a random selection of roughly 30% of the full committee-counsel population relating to factors including House/Senate employment, political party, majority/minority party status, committee assignment, age, law school graduation date, law school ranking, and years of experience. As detailed in the Methods Appendix, we did not find statistically significant differences (using a standard 95% confidence threshold) between our sample and the control group for House/Senate employment, political party, or majority/minority party status.<sup>64</sup> The committee assignments of the survey group were also reflective of the control group, except that the survey population had a greater share of Legislative Counsels than

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62. *Cf.* Nourse & Schacter, *supra* note 10, at 581-82 (making the same assumption for staff of the Senate Judiciary Committee). The counsel title often connotes seniority as well as a law degree.

63. As detailed in the Methods Appendix, the true population of counsels is likely less than 650. As also elaborated there, because of the difficulty in determining the precise characteristics of the true population of legislative drafters, we computed the few statistical analyses that we report in two ways: first, using both a “super population” assumption—treating the actual population as if it were drawn from an infinitely-sized super population—and second, treating the actual population of counsels as being with a size of 650. Otherwise, we simply report only the raw data. Unless noted, the results were the same using both populations. *See Methods Appendix, supra* note 2.

64. As detailed in the Methods Appendix, we obtained most of the data from Legistorm as of the fourth quarter of 2011 (when the survey was conducted), and supplemented it with additional (primarily educational) information from Westlaw. *See id.*

the control group,<sup>65</sup> as well as a greater share of members of some of the larger committees, although those differences were not significant. We did find statistically significant differences between the control and survey groups on the basis of age (based on college graduation date), experience (based on law school graduation date), and law school ranking, with the survey group consisting of older counsel as well as those who went to higher ranked schools. These findings, however, are limited due to difficulties with data collection for the age, experience, and law school information.<sup>66</sup>

Out of an abundance of caution, moreover, we have chosen to report our findings in a descriptive manner mostly using only the raw data rather than engaging in more sophisticated hypothesis testing to explore whether there were statistically significant drivers of certain answers. Even with our study's limitations, for many questions, our results were sufficiently lopsided at least to suggest that most counsels would be likely to respond in the same manner. For example, forty-six of our questions had more than 70% of respondents agreeing on a particular answer choice, and twenty-five had more than 90%.<sup>67</sup>

The fact that we limited the survey mostly to counsels is both suggestive and limiting, depending on the question at issue. For example, whereas legal rules unknown to our counsel respondents are unlikely to be known to other noncounsel drafters, it is difficult to draw inferences about the noncounsel population concerning those rules that our respondents did know. We address matters of this nature, where relevant, in the context of the specific findings discussed in the Parts that follow.

It is also difficult to draw inferences about the knowledge of the elected members of Congress themselves from our data, although we doubt that members know Latin canons of construction any better than do our counsel respondents. Our decision not to interview members was both pragmatic—we doubted that many would agree to be interviewed absent a personal connection—and theoretical. Members do not draft statutory text, but most interpretive doctrine is based on assumptions about the legislative drafting process. Moreover, judges rarely acknowledge the role of staff, except in conjunction with concerns

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65. We were not surprised by this. Given how understudied the role of Legislative Counsel has been, we aggressively pursued interviews with those counsels by approaching the heads of their offices. *See id.*

66. We were not able to obtain educational information for nearly half of the control and survey groups, with a greater share of missing data from the control group than from the survey group. Moreover, those working in the Offices of Legislative Counsel often do not have any educational information available on Legistorm, so the analysis excluded most of the Legislative Counsels.

67. These figures exclude Questions 1 to 10 and 82, which were all demographic questions, and Questions 78 and 83, which asked respondents what they would change if they could about the process and whether there was anything they wished to add. These figures also combine “never” and “rarely” responses and, separately, “always” and “often” responses when those options were offered.

about “sneaky” staffers unaccountable to members, but this accountability concern has never been explored empirically. Our decision to focus on counsels thus also highlights the question of which interpretive community within Congress (if any) is the relevant community for courts to focus on in fashioning interpretive doctrine.

To our knowledge, this is the most extensive survey of this nature ever conducted.<sup>68</sup> The survey questions and additional details about our methodology are included in the Article’s accompanying Methods Appendix.

## II. CONGRESS AND THE CANONS

Canons, as this Article uses the term, are simply the interpretive principles and sources that judges consult when resolving questions about statutory ambiguity. The canons are deployed in virtually every statutory interpretation case, and there are hundreds of them, but they do not all seem to be regarded in the same way. The canons that courts use to decide when to defer to administrative agencies’ statutory interpretations, for instance—such as the *Chevron* deference rule—almost always are referred to as “doctrines” by litigants and administrative law scholars, whereas textual presumptions like the *expressio unius* rule (the inclusion of one statutory term implies the intentional exclusion of another) sometimes are referred to as mere “guidelines.” But both types of rules, plus other interpretive tools like legislative history,<sup>69</sup> are relied upon by courts to resolve statutory ambiguities, which is why legislation scholars conceptualize all of these tools as canons of interpretation.<sup>70</sup>

That said, and despite their doctrinal centrality, the canons remain undertheorized. The main canons can roughly be divided into three categories: (1) the “textual canons,” which are default rules about how text is drafted, such as *expressio unius*; (2) the “substantive canons,” which are policy-based presumptions, like the rule of lenity or *Chevron* deference; and (3) the “extrinsic

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68. For classic studies of Congress as an institution—rather than about the use of legal doctrine in the drafting process, see FENNO, *supra* note 47, app. A at 292 (conducting 280 interviews with committee members, thirty-seven with committee staff, fifty-four with executive officials, thirteen with clientele group officials, and twelve with House leaders from 1959 to 1968, and finding that committee decisions and the decisionmaking process differed depending on the member goals and environmental constraints of each committee during this period); and RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 249 (1978) (conducting a qualitative study of how members of Congress perceived their constituencies by travelling with members of Congress in their districts using the “participant observation” method from 1970 to 1977).

69. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 971-1066 (4th ed. 2007) (describing legislative history as an “extrinsic canon”).

70. See Gluck, *supra* note 45, at 1817-18 (illustrating that the administrative law doctrines are canons); Raso & Eskridge, *supra* note 50, at 1751-66, 1794-1815 (same).



canons,” which are outside sources, such as legislative history. Commentators have offered multiple justifications for each type of canon and, with each justification, a different take on the courts-Congress relationship.

Some justifications turn expressly on congressional awareness and use of the canons. For example, some canons have been justified as background presumptions in whose shadow Congress drafts;<sup>71</sup> as rules that teach Congress how to draft better;<sup>72</sup> as rules that force legislative deliberation; or as rules with such established common law pedigrees that it is assumed everyone knows them.<sup>73</sup> Others turn on an understanding of how Congress legislates, even if Congress need not be aware of them. Judges and scholars argue, for instance, that the textual canons reflect how ordinary people use language;<sup>74</sup> or how Congress signals intent to delegate to agencies;<sup>75</sup> or that legislative history reflects congressional intent.<sup>76</sup> All of these justifications turn on empirical knowledge about Congress that has been conspicuously absent and that, for many canons, our study calls into question.

Some justifications are less tethered to congressional practice. Some are institutional—for instance, that the canons further the judicial values of coherence and consistency;<sup>77</sup> that they are the easiest rules for judges to apply and so serve a judicial coordination function;<sup>78</sup> or that they transfer interpretive authority to more competent institutions.<sup>79</sup> Other justifications are normative—

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71. John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1864-65 (2004); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 801-02.

72. See William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1143 (1992).

73. SCALIA, *supra* note 17, at 29.

74. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1203 (2010); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005).

75. See Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 559-66 (2009); Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1283-84 (2008); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 277 (2011); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1449-50 (2011).

76. Breyer, *supra* note 18, at 847-63.

77. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943 (1992); Tyler, *supra* note 45, at 1393.

78. See Eskridge & Frickey, *supra* note 45, at 66-67; John F. Manning, *Legal Realism and the Canons’ Revival*, 5 GREEN BAG 2d 283, 294 (2002); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095, 1118-22 (1987) (describing *Chevron* as a judicial coordinating rule).

79. Stephenson & Pogoriler, *supra* note 75, at 1456; Sunstein & Vermeule, *supra* note 24, at 926-27.

for example, that the canons make under-the-radar constitutional law<sup>80</sup> or advance underenforced (judicial or societal) policy preferences.<sup>81</sup> These types of justifications raise fewer questions about the reality of how Congress legislates but more questions about the judicial power to overlay Congress's work product with these rules. They also raise the question whether applying the canons for these reasons is really consistent with the faithful-agent paradigm that most practicing judges claim to espouse.

#### A. *Overview of the Findings: A Spectrum of Canon Knowledge and Use*

Our survey asked fifty-five questions about the textual and substantive canons,<sup>82</sup> thirty-seven about legislative history,<sup>83</sup> and forty-five more about the administrative law doctrines used by courts to resolve statutory ambiguity.<sup>84</sup> The variety of questions was designed to elicit information not only about whether the canons reflect how legislation is drafted, but also about whether anything resembling a feedback loop exists between the courts and Congress with respect to how the canons are utilized on both sides. We also surmised that there might be canons and doctrines whose assumptions drafters utilize without knowing their formal (often Latin or case-derived) names or without even realizing that they are rules that courts apply.<sup>85</sup> As a result, we inquired about almost all of the canons in several ways, typically first asking about the concept in layman's terms,<sup>86</sup> before inquiring about the canons by name or about their role.

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80. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

81. Barrett, *supra* note 22, at 110-11.

82. For these purposes, we count only those questions directly addressing a particular canon. There were twenty-four separate questions with zero to seven subparts each. But many additional questions also implicated these rules (for example, our question about whether omnibus legislation is as likely to be internally consistent as single-subject legislation).

83. Specifically, ten questions with zero to ten subparts each.

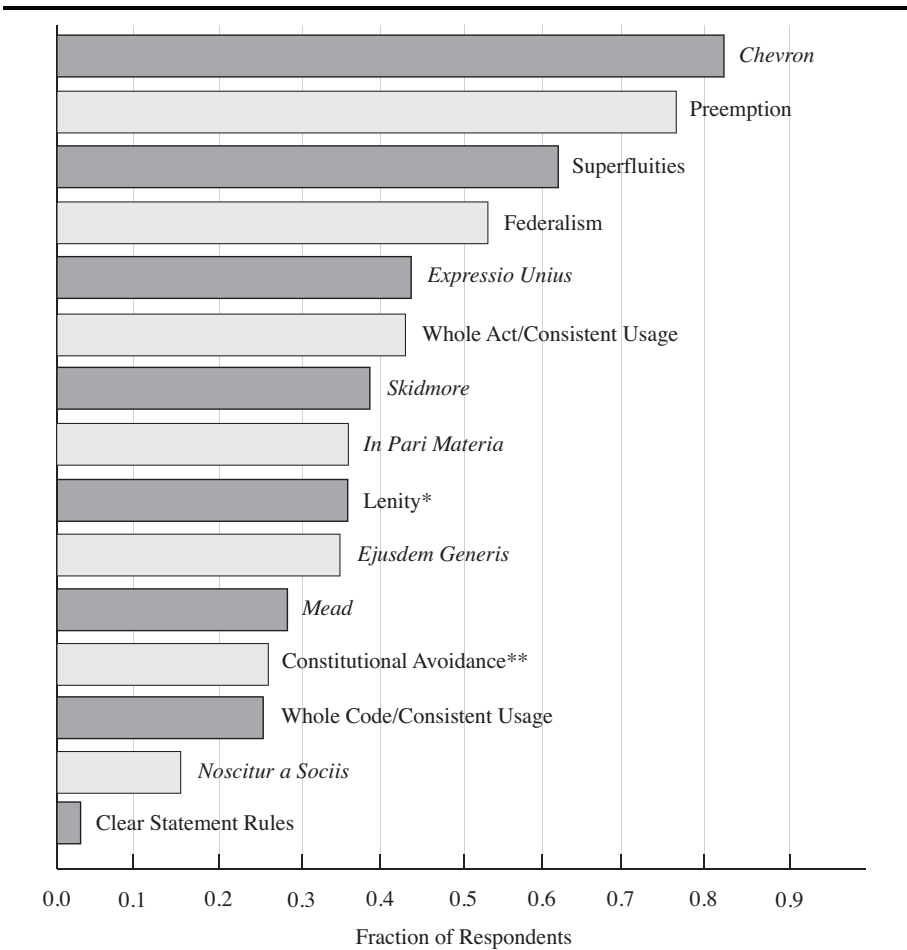
84. Specifically, eighteen questions with zero to nine subparts each. For this purpose, we double-count Q15 as both as a "federalism canon" question and an "administrative law doctrine" question, as that question asks whether drafters expect federal agencies to resolve ambiguities relating to preemption of state law.

85. It is not clear whether the Nourse and Schacter study inquired about the canons by formal or informal name or whether they inquired into any specific canons. The article states only that "respondents volunteered several interpretive principles: the rule of lenity, the avoidance of constitutional questions, and the *Chevron* doctrine, for example," Nourse & Schacter, *supra* note 10, at 601, and they did not reproduce their questions or the responses.

86. The only canons for which we did not do this were the rule of lenity and *Skidmore*. In the interests of time, we proceeded directly to inquiring about those canons by name. With respect to *Chevron* and *Mead*, the survey had separate sections concerning the deference doctrines by name and by concept, and, because we scrambled the survey sections to test

The following Figures provide a bird’s-eye summary of the key findings with respect to our respondents’ familiarity with the canons and how those rules hold up to our respondents’ descriptions of their actual drafting practices:

FIGURE 1  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Legislative Drafters Know the Canons of Statutory Interpretation by Name?



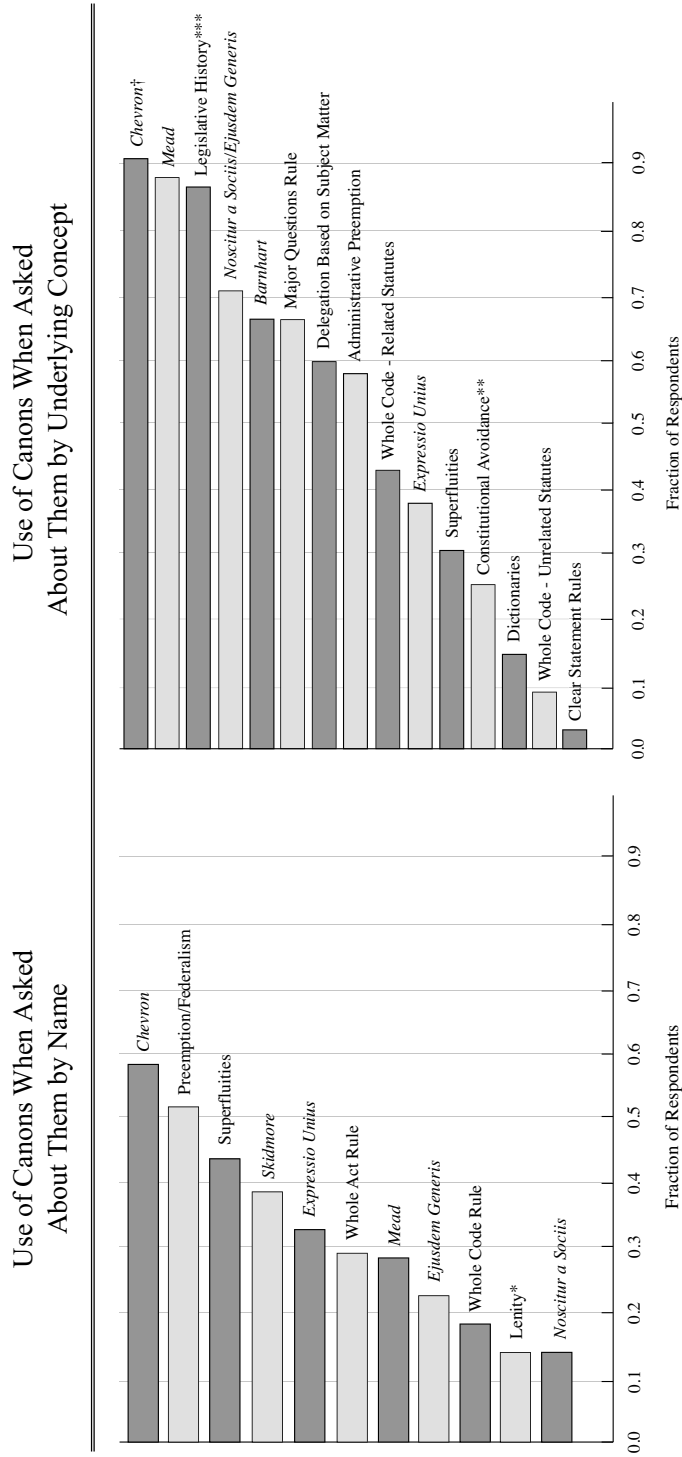
Sources: Q17; Q20; Q30; Q32a; Q35 (comment code); Q45a-g.

\* Out of the 65 respondents who participated in drafting criminal legislation.

\*\* Out of the 67 respondents asked.

whether question order affected the results, some respondents were asked about the deference doctrines by name first, while others were asked about them first by concept.

FIGURE 2  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Legislative Drafters Use the Canons of Statutory Interpretation?



Sources: Q15; Q18; Q21; Q24; Q30; Q32a; Q35 (comment code); Q41-Q43; Q44c-e; Q46a-g; Q50f; Q51; Q52; Q55c-e; Q59.

These charts compare respondents' use of the canons when asked about them by name and by underlying concept. The rule of lenity and *Skidmore* were asked about only by name. Federalism, preemption, and the whole act rule were asked about by concept and by name, but this Figure displays only the results for name, given the number of qualifying comments offered when asked by concept about those rules. *Barnhart*, major questions, delegation by subject matter, and administrative preemption were asked about only by concept.

\* Out of the 65 respondents who had participated in drafting criminal legislation.

\*\* Out of the 67 respondents asked.

\*\*\* Fraction of respondents who answered "Yes" to the question, "In general, do you believe legislative history is a useful tool for statutory drafters?" 92% also said legislative history was useful for courts.

† Fraction of respondents reporting that desire for agency to fill gaps results in ambiguities in legislation. With respect to some other assumptions underlying *Chevron*, 93% reported that the technical or complex nature of the issue, 99% reported the need for consensus, and 77% reported lack of knowledge about the best answer results in ambiguities.

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Our respondents displayed a much higher degree of familiarity with some of the canons and utilized many more of the concepts underlying them than we had expected or than the Nourse and Schacter study suggested. But not all of the canons were familiar to our respondents in the same way or used by them to the same degree. Nor did evidence for, or the prospect of, judicial-legislative dialogue seem the same for all of the canons.

We detail these findings in the following pages. This Part focuses on the textual and substantive canons, while the Parts that follow focus on legislative history and the administrative law canons, respectively. We divide our presentation in this way reluctantly, for convenience, and not because our respondents thought of the canons as belonging to separate categories. Indeed, one central finding of our study is that drafters treat text, legislative history, and agency implementation as integrated parts of a single process. Drafters do not think about statutory text without legislative history, and both text and history are drafted with agency implementation in mind and often with agencies at the table.

This Part also introduces three major institutional themes that emerged from our respondents' comments: the importance of (1) *committee jurisdiction*; (2) the *legislative process*; and (3) *inside information* to understanding how statutes are interpreted on the inside. These themes are major players in the companion Article, in which we detail central influences on the drafting process to which courts pay insufficient attention. Here, and in the Parts that fol-

low, we merely identify these influences where relevant to our respondents' views of whether or how the canons influence or reflect the drafting process.

### B. *Textual Canons: More Familiarity by Concept than by Name*

We asked first by concept and then by name about the six textual canons most commonly deployed by courts and scholars:<sup>87</sup>

- *Noscitur a sociis* (construe ambiguous terms in a list in reference to other terms on the list)
- *Ejusdem generis* (construe general, often catch-all, terms in a list in reference to other, more specific, terms in a list)
- *Expressio/Inclusio unius est exclusio alterius* (the inclusion of specific terms or exceptions indicates an intent to exclude terms or exceptions not included)
- The rule against superfluities (construe statutes to avoid redundancy; when there are two overlapping terms, construe to give an independent meaning to each)
- The whole act rule (statutory terms are presumed to have a consistent meaning throughout a statute)
- The whole code rule (statutory terms are presumed to have a consistent meaning throughout the U.S. Code)

We also inquired directly into the use of dictionaries (dictionaries should be consulted to determine the ordinary or plain meaning of statutory terms) and the *in pari materia* rule (similar statutory provisions should be interpreted similarly).

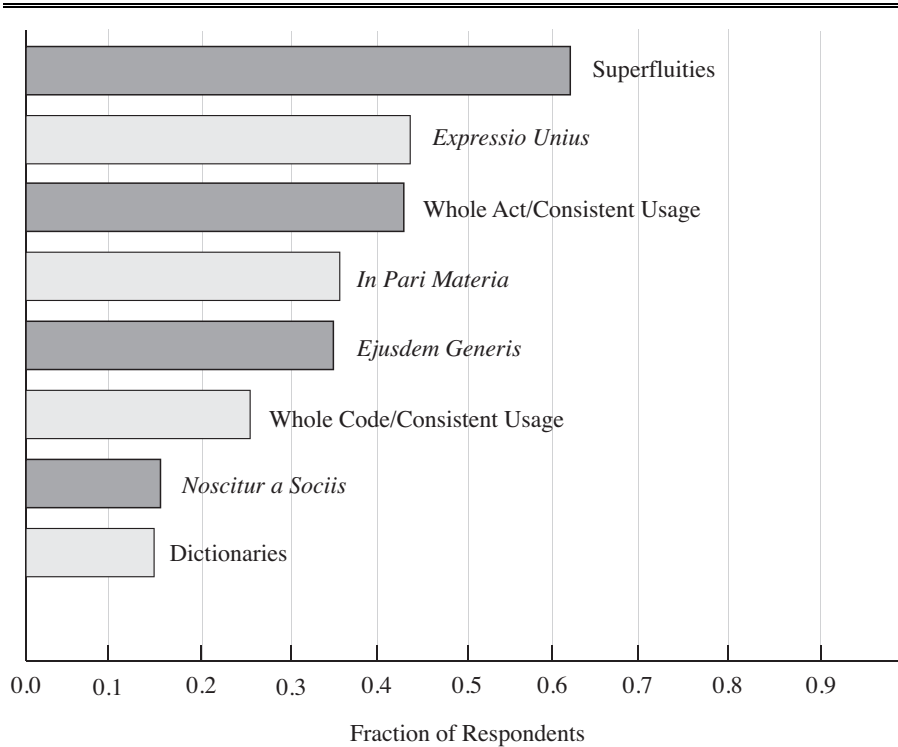
As the Figures below reveal, our respondents displayed a high degree of familiarity with the concepts underlying the textual canons, but much less familiarity with their formal names. Our respondents also appeared to regularly use several of these canons in the drafting process. But, of particular note, the concepts that our respondents indicated they used most often—for example, the concept underlying the *expressio unius* canon—are among the least consistently utilized textual canons by the courts, and they have come under criticism (even from textualist judges) about the extent to which they reflect drafting reality.<sup>88</sup> In contrast, the canons most commonly employed by courts, including the rule against superfluities, the whole act rule, and the use of dictionaries, appear to be used the least often by our drafters—despite our respondents' awareness that the courts use them—due to a host of political or institutional factors that courts rarely take into account.

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87. Q45; Q46; Q47.

88. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990); Sunstein, *supra* note 29, at 455.

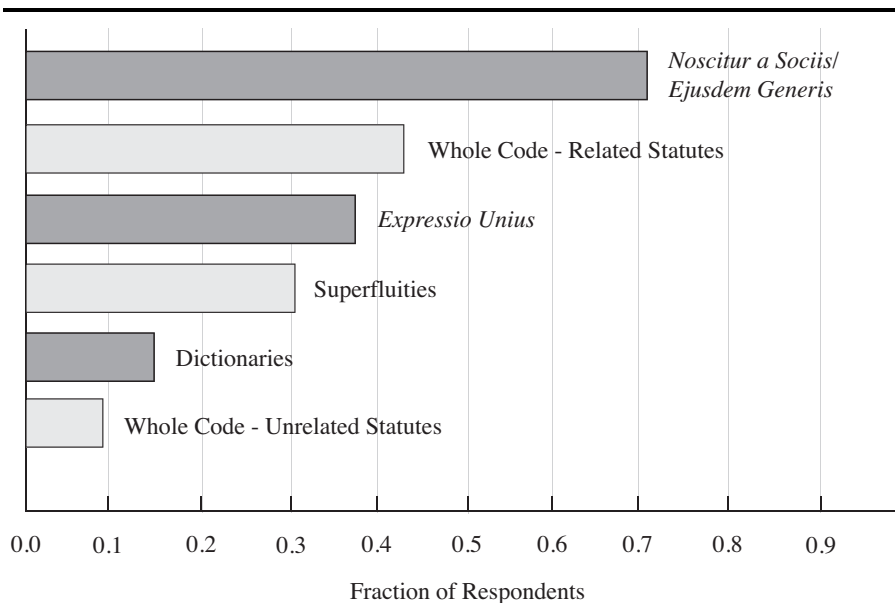
FIGURE 3  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Legislative Drafters Know the Textual Canons of Statutory Interpretation  
 by Name?



Sources: Q44e; Q45a-g.

With the exception of dictionaries, this chart reports respondents' familiarity with the textual canons when asked about them by name. The figure for dictionaries reflects the fraction of respondents who answered that dictionaries are "always" or "often" used in drafting.

FIGURE 4  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Legislative Drafters Use the Assumptions Underlying the Textual Canons?



Sources: Q41-Q43 (including comments for Q42); Q44c-e.

This chart reports respondents' use of the textual canons when asked about them by concept or underlying assumption. Results for the whole act rule are not reported. Although most respondents knew that rule, most qualified their use of it in the comments.

### 1. *Concepts in use: expressio, noscitur, and ejusdem*

Approximately 33% of our respondents told us that the assumption underlying the *expressio unius* canon—that the inclusion of specific terms signifies the exclusion of terms not mentioned—always or often applies.<sup>89</sup> Five percent more agreed that the default rule is always exclusivity unless language indicates otherwise, and most of the remaining respondents likewise validated the assumption by explaining that they “signaled” whether they wished a list to be something other than exclusive, usually through the use of the word “includ-

89. Q42.



ing” or a catch-all term. Only 10% of respondents indicated that the presumption typically goes in the other direction, toward inclusivity.<sup>90</sup>

*Expressio* was also one of the most recognized textual canons by name (along with the rule against superfluities). But when asked about the rule by name, most of our respondents told us that they did not employ it (several respondents made statements such as “we don’t know any Latin”), even though, when asked about the concept, they already had substantiated their use of the assumptions underlying it. A number of respondents (18%) got at this disconnect by describing the ideas embraced by the textual canons as “intuitive.” As one stated: “We consider them not expressly but intuitively: how does this legislation interact with existing code? Is it inclusive, exclusive, are like things treated alike—those values are thought about here.”<sup>91</sup>

With respect to the general concept underlying both the *noscitur* and *ejusdem* rules, 71% of respondents (ninety-seven) said that terms in a statutory list always or often relate to one another, and only two respondents said they rarely or never did.<sup>92</sup> The vast majority of respondents, however, did not know those rules when asked by name (85% did not know *noscitur* and 65% did not know *ejusdem*<sup>93</sup>).

## 2. *Canons known, but rejected: superfluities, consistent usage, and dictionaries*

Our respondents also were quite familiar with the concepts underlying the rule against superfluities (statutory words are intended to have independent meanings and are not intended to overlap with other terms) and the presumption of consistent usage, also known as the whole act or whole code rule (the presumption that terms are used consistently in multiple places in a single act or across the U.S. Code). They were also aware of the Court’s frequent use of

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90. *Id.* (stating that the inclusion of specific terms never or rarely signifies the exclusion of terms not mentioned). Thirteen percent of respondents declined to pick any answer choice. Of that number, all but two noted that drafters are often sloppy, that “lists are dangerous,” or that drafters sometimes “forget” to think about the implications of making exceptions in parts of the statute but not others. The remaining two offered comments stating that the presumption was exclusive unless there were words to the contrary, so they have been counted above.

91. Q46.

92. Q41. Twenty-two respondents answered sometimes, and sixteen answered “other,” with the majority of those who answered other explaining that they did not know or did not understand the question. We recognize that our formulation of the concept underlying *noscitur* and *ejusdem* is somewhat broader than the actual rule. We were unable to be as precise as we would have liked in this question. The alternative, to give a more specific version of the rule, was difficult to do without leading. When we piloted the idea of giving respondents an example of statutory language raising the presumptions effectuated by these canons, our test audience told us that it felt like a “law school exam” and was unduly complex.

93. Q45a; Q45b.

dictionaries in statutory interpretation. For each of these canons, however, respondents' awareness did not translate to routine use in the drafting process. Instead, we learned of institutional barriers to our drafters' frequent application of these rules.

a. *Superfluities: redundancy to satisfy political stakeholders*

For instance, even though 62% of our respondents knew the rule against superfluities by name, 18% of respondents told us it rarely applies, and 45% more told us it only sometimes does. Eighteen percent also explained the relative weakness of this rule's application by reference to two recurring reasons, one practical and one political. From a practical perspective, our respondents focused on the need to ensure that the statute covers the intended terrain. They told us that drafters intentionally err on the side of redundancy to "capture the universe" or "because you just want to be sure you hit it."<sup>94</sup>

These respondents also pointed out that the *political interests* of the audience often demand redundancy. They told us, for example, that "sometimes politically for compromise they must include certain words in the statute—that senator, that constituent, that lobbyist wants to see that word"; similarly, they said that "sometimes the lists are in there to satisfy groups, certain phrases are needed to satisfy political interests and they might overlap" or that "sometimes you have it in there because someone had to see their phrase in the bill to get it passed."<sup>95</sup> One example provided was a statute drafted to cover "medical service providers" that had to be amended to include a specific (and redundant) reference to "hospitals" to satisfy stakeholders.<sup>96</sup>

We were not surprised to see pragmatic considerations trumping application of the rule against superfluities. Common sense tells us that, despite the popularity of this rule with judges,<sup>97</sup> there is likely to be redundancy, especially in exceedingly long statutes. (We have seen no evidence, however, that judges take the length of statutes into account when applying the rule.) But what respondents told us was different from that common-sense assumption: namely,

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94. Q43.

95. *Id.*

96. *Id.* Using the rule against superfluities, many courts would likely interpret such an intentionally redundant statutory provision to mean that "medical service provider" does not include a "hospital" (or else the term hospital would be redundant). Thus, if another section of the same statute referred only to "medical service providers," courts would interpret hospitals to be excluded, even though according to our respondents, that would likely be the opposite of the intended result—to ensure stakeholders that hospitals were certainly included in the first place.

97. See Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 243 & n.100 (2010).

that even in short statutes—indeed, even within single sections of statutes—that terms are often *purposefully redundant to satisfy audiences other than courts*.

This is an argument that has been made in other contexts. Scholars have argued that the audience for legislative language or legislative history is much broader than judges, or even agencies, and that these statutory materials are sometimes expressly directed at noninterpreters, such as lobbyists and other stakeholders.<sup>98</sup> Whether this “audience” issue should have an effect on how courts interpret statutes is a different matter—after all, how will courts be able to discern when drafters are talking to them as opposed to other audiences? A fictitious interpretive rule may be required precisely *because* investigating the intended audience would be too difficult. But that has not been the main judicial justification for the rule against superfluities.

Our findings certainly call into question what *has* been the rule’s primary justification: namely that, because it reflects how Congress drafts and also because Congress is aware of it, the rule helps faithful-agent judges effectuate congressional intent.<sup>99</sup> We note also that, in several recent cases, the Court has divided over application of the rule—with the majority relying on the rule to decide the case over the objection of dissenters who have argued, like some of our respondents, that Congress is often intentionally redundant to be certain that it has made its point.<sup>100</sup> We have seen no case, however, in which the Court acknowledged the political considerations, like satisfying stakeholders, that some of our respondents also mentioned. Our findings suggest that those

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98. See Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 972 (2007); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1142 (2011); cf. Nourse & Schacter, *supra* note 10, at 596 (noting that drafters use deliberate ambiguity to reach consensus).

99. See *Berryman v. Bd. of Trustees of Whitman Coll.*, 222 U.S. 334, 349 (1912) (calling construction in contravention of the rule “repugnant to the plain intent of the act, as manifested from its language”); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 100-01 (2006); see also SCALIA & GARNER, *supra* note 13, at 179 (expressly rejecting arguments that the rule does not “match political reality” and instead arguing that “the surplusage canon is well known: Statutes *should* be carefully drafted, and encouraging courts to ignore sloppily inserted words results in legislative free-riding and increasingly slipshod drafting. . . . [I]f the legislators themselves are not mindful of ferreting out words and phrases that contribute nothing to meaning, they ought to hire eagle-eyed editors who are”); cf. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute.” (internal quotation marks omitted)).

100. See *Corley v. United States*, 556 U.S. 303, 314 (2009) (calling superfluities “one of the most basic interpretive canons”); *id.* at 325 (Alito, J., dissenting) (“Congress could sensibly have seen some practical value in the redundancy” (internal quotation marks omitted)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001) (rejecting argument that would make a provision superfluous); *id.* at 140 (Souter, J., dissenting) (arguing that Congress used superfluous language in “*ex abundanti cautela*, abundance of caution”).

considerations likewise may mean that judicial application of the rule does precisely the opposite of effectuating drafter intent.<sup>101</sup>

b. *Committee jurisdiction and “unorthodox lawmaking”<sup>102</sup> as barriers to the whole act and whole code rules*

The whole act and whole code rules seem to fall prey to even more pervasive institutional barriers. Although more than 93% of our respondents affirmed that the “goal” is for statutory terms to have consistent meanings throughout,<sup>103</sup> our respondents emphasized time and again the significant organizational barriers that the committee system, bundled legislative deals, and lengthy, multidrafter statutes pose to the realistic operation of those rules.

Our respondents told us that congressional committees are “islands” that limit communication between committees drafting different parts of the same statutes and that, because of the increasing tendency to legislate through omnibus or otherwise “unorthodox” legislative vehicles, most major statutes are now conglomerations of multiple committees’ separate work. Later in the survey, in response to a different question, a large majority of our respondents (74%) said that omnibus bills are less likely to be internally consistent than single-subject bills.<sup>104</sup>

For the same reasons, our respondents also vigorously disputed that the first cousin of the whole act rule—the “whole code rule,” under which courts construe terms *across* different statutes consistently—reflects how Congress drafts or even how it *tries* to draft. Specifically, only 9% of respondents told us that drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter.<sup>105</sup>

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101. Nourse recently used drafting reality to undermine the rule against superfluities in another way. See Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 130 (2012) (arguing that the difficulty of attaining cloture in the Senate leads senators to acquiesce to postcloture amendments containing redundant language because “proponents will want to see the already-filibustered bill move forward”). This argument does not undermine our findings and was not mentioned by our respondents, but it may add another reason to question the link between this rule and the legislative process.

102. See generally SINCLAIR, *supra* note 48.

103. Q44a. That number rose to about 96% when we inquired whether a term used multiple times in the same section (as opposed to an entire act) is intended to have a consistent meaning. Q44b.

104. *Id.* We use the term “omnibus” to refer to bundled statutes that are not appropriations statutes. Appropriations statutes are drafted by different subcommittees of the same committee (Appropriations) and, as we discuss, were singled out by our respondents to be of a different character.

105. Q44d; Q71.

This presumption of consistent usage, we would note, is widely accepted in the federal courts. Indeed, leading commentators have called it one of the most important and consistently applied textual default rules,<sup>106</sup> and it has been employed by textualists and purposivists alike. In the October 2011 Term of the Supreme Court alone, the whole act rule was used in at least three cases,<sup>107</sup> and the leading case for the principle has been cited in at least 118 federal cases since 1995.<sup>108</sup> To our knowledge, however, courts have never considered the role that committee jurisdiction plays when applying the rule, and courts have rarely focused on the type of statutory vehicle.<sup>109</sup>

We also note that, given the institutional factors that our respondents identified, application of the consistent-usage presumption is unlikely to exert any positive influence on the drafting process. This suggestion runs contrary to popular arguments that a strict textual approach may incentivize Congress to draft more carefully. Justice Scalia's new book offers a typical example of such an argument in support of the consistent-usage rule:

The canons . . . promote better drafting. When it is widely understood in the legal community that, for example, a word used repeatedly in a document will be taken to have the same meaning throughout . . . you can expect those who prepare legal documents competently to draft accordingly.<sup>110</sup>

Such arguments, however, depend on the absence of other barriers to such "better" drafting. Almost all of our respondents told us that consistent term usage was the "goal" or what "should be," but they still told us that the rule was unlikely to hold because of the way that Congress is organized.

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106. See SCALIA & GARNER, *supra* note 13, at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."); see also ESKRIDGE ET AL., *supra* note 69, at 866.

107. See *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2004-05 (2012); *Hall v. United States*, 132 S. Ct. 1882, 1891 (2012); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012).

108. See *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) (numbers based on Westlaw key note search).

109. Based on a search of the Westlaw Supreme Court database for the words "committee" and "jurisdiction" in the same sentence, no Supreme Court case over the past thirty years appears to have referenced the issue of committee jurisdiction as relevant to an interpretive question. Likewise, our search of the Westlaw database revealed little evidence that the Court treats nonappropriations omnibus bills differently from ordinary single-subject legislation, although it occasionally recognizes the difficulty of imputing legislative omniscience in the context of appropriations. See, e.g., *Salazar v. Buono*, 130 S. Ct. 1803, 1840 (2010) (Stevens, J., dissenting) (chiding the majority for looking for evidence "buried in a defense appropriations bill" and contrasting appropriations bills to major statutes involving "years of careful study," and citing the omnibus Bipartisan Campaign Finance Reform Act as such an example (internal quotation marks omitted)).

110. SCALIA & GARNER, *supra* note 13, at 51. But Scalia and Garner are realistically cautious about the rule's applicability across unrelated statutes. *Id.* at 172-73.

c. “No one uses a freaking dictionary”

More than 50% of our respondents said that dictionaries are never or rarely used when drafting.<sup>111</sup> This finding stands in stark juxtaposition with the frequent and increasing use of dictionaries by the Supreme Court in statutory interpretation cases.<sup>112</sup> Although the Court has always looked to dictionaries in some statutory cases, scholars have documented that the Court’s use of this interpretive tool recently has risen dramatically: the Court used dictionaries in 225 opinions from 2000 to 2010, compared to just sixteen opinions in the 1960s.<sup>113</sup>

Our respondents were aware of this judicial trend, but told us that it nevertheless did not affect their practice. Several specifically referenced Justice Scalia—acknowledging that the Court frequently uses dictionaries but noting that they remain mostly irrelevant to the drafting process. As one respondent put it (while laughing): “Scalia is a bright guy, but no one uses a freaking dictionary.”<sup>114</sup> Another noted more delicately: “This question presumes that legislative staff have dictionaries. I have tried to get an OED but people over at finance say we aren’t spending money to buy you a dictionary. And no *Black’s Law Dictionary* either.”<sup>115</sup>

The Court’s rationale for dictionary consultation, however, may assume that Congress does use dictionaries or at least would welcome their use by judges. Individual Justices have stated that “[t]here is no cause to conclude that Congress [is] unaware of the ordinary definition” of words that are not otherwise defined in the statute,<sup>116</sup> a statement that implies that dictionaries are either a proxy for the “ordinary meaning” that the Court thinks that Congress intends or that the public understands, or that they are sources with which the Court presumes that Congress is familiar. Only the former explanation—that dictionaries accurately approximate ordinary meaning—even plausibly comports with our respondents’ experiences, but that explanation likewise depends on other empirical evidence that is shaky at best and that faithful-agent theorists

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111. Q44e. Only 15% said dictionaries were always or often used.

112. Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 14, 2011, at A11, available at <http://www.nytimes.com/2011/06/14/us/14bar.html>.

113. *Id.* (citing Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 85 (2010)).

114. Q44e.

115. *Id.*

116. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 494 (2006) (Thomas, J., dissenting). For other examples, see *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012); and *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011).

have done little work to confirm.<sup>117</sup> It also raises the question of precisely who is the audience that the Court is after—Congress or the public?

Given the accessibility of dictionaries on the Internet, moreover, it is implausible that the only reason our respondents do not consult dictionaries is their unavailability in print. Instead, our respondents simply seem to prefer other methods of defining terms. Mentioned far more often than dictionaries, for instance, were the definition sections that drafters themselves write into statutes. We did not inquire about definition sections directly; their importance was volunteered seventy times by forty-six different respondents in response to numerous different questions throughout the survey. However, as James Brudney and Lawrence Baum have recently pointed out, the Court at times has preferred dictionary definitions as evidence of “ordinary meaning” over those definitions drafted into the statutes themselves.<sup>118</sup> Likewise, dictionaries remain a far less controversial interpretive tool in the courts than does legislative history, even though, as elaborated in the next Part, our respondents also emphasized the utility of legislative history far more than dictionaries in resolving statutory ambiguities.

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With respect to all of the textual canons discussed, the sophistication of our sample population seems informative. Regarding the three rejected canons, it is unlikely that nonlawyer drafters would place a greater emphasis than did our respondents on nonsurplusage, word use consistency, or dictionary definitions, or be more eager or able to overcome institutional obstacles to the application of those concepts. It also seems unlikely that nonlawyer drafters would be more familiar with *expressio, noscitur*, or *ejusdem* by name than were our respondents. Less predictable, however, is whether nonlawyer drafters would be as fluent in the concepts underlying those Latin rules.

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117. Commentators have long observed that dictionaries are conservative or lag behind the times when it comes to use of ordinary speech. See Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 186-87 (2010); Gertrude Block, *The Punctuated Lawyer*, FED. LAW., July 1996, at 40, 40. Others have focused on the problem of using dictionary definitions out of context. See, e.g., Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary when Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 404-06 (2003); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 73-74 (1994).

118. See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras* 71-72 (Fordham Law Sch. Legal Studies, Working Paper No. 2195644, 2013), available at <http://ssrn.com/abstract=2195644>; see also *Gustafson v. Alloyd Co.*, 513 U.S. 561, 585 (1995) (Thomas, J., dissenting) (chiding the majority for not deferring to a statutory definition); *id.* at 597 (Ginsburg, J. dissenting) (same).

It is a different question what, if anything, these findings tell us about the members of Congress themselves. The majority of respondents described their members' involvement as taking place at the more abstract level of policy rather than at the granular level of text. The Court, however, makes no such distinctions and, in fact, rarely acknowledges that staff, not members, are the primary drafters of enacted text (in strong contrast to judicial discussions of legislative history, in which the role of staff is often raised as a reason to disregard it). Moreover, whereas the Court seems almost entirely focused on members, the Court approaches statutory interpretation at a "close reading" level that seems quite different from the high level of abstraction with which elected officials actually seem to engage with statutory questions. The result is something of a doctrinal mismatch: a Supreme Court truly interested in crafting doctrines to reflect elected officials' approach to the drafting process would likely be a far less textual Court than ours.

### C. *Substantive Canons*

There are more than 100 substantive canons, and they run the range from transsubstantive policy presumptions (e.g., ambiguous federal statutes will not be construed to intrude on traditional state functions); to subject-specific rules (e.g., ambiguous bankruptcy statutes shall be construed in favor of the debtor); to the dozen or so presumptions that concern delegation of interpretive authority to administrative agencies.<sup>119</sup> These canons are infamously conflicting, overlapping, and manipulable,<sup>120</sup> and have been described as everything from "judicial lawmaking" to "democracy protective" to "constitutional law."<sup>121</sup> We inquired about four of the most commonly deployed categories of substantive canons: (1) canons that advance federalism values, including clear statement rules; (2) the rule of lenity; (3) the canon of constitutional avoidance; and (4) the administrative law doctrines related to interpretation. As Figure 5 reveals, our respondents' awareness of the canons by name and their use of the concepts underlying them ran the range from high awareness and use of *Chevron* and the presumption against preemption to almost no awareness or use of clear statement rules. We also learned that, even when our respondents do draft in the shadow of the substantive canons, they do not always think about the canons in the same way that courts do.

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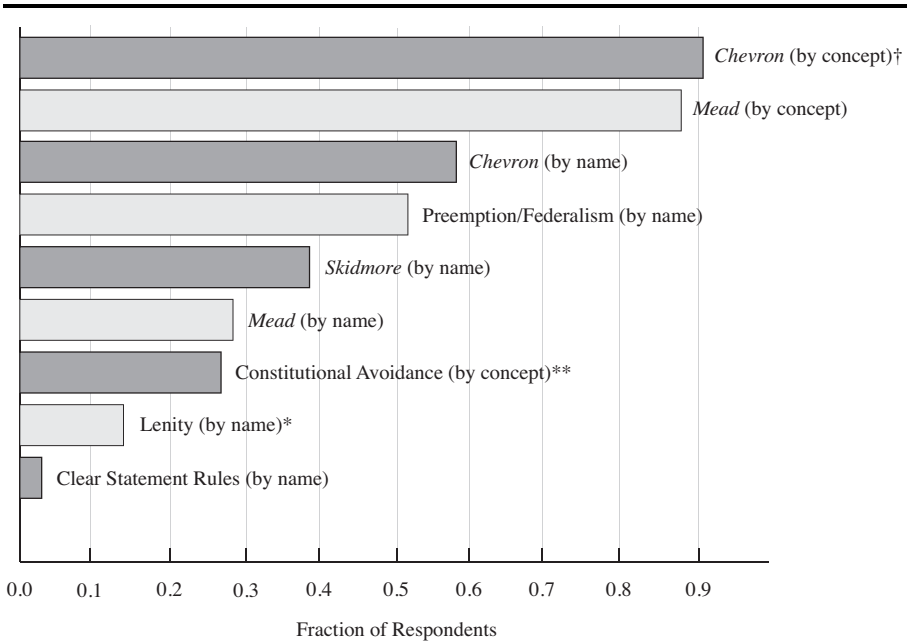
119. See Eskridge & Baer, *supra* note 50, at 1098-1120 (counting at least twelve different deference doctrines).

120. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (arguing that for every canon there is a countercanon).

121. See Eskridge & Frickey, *supra* note 80, at 630-36.



FIGURE 5  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Legislative Drafters Use the Substantive Canons  
 or Their Underlying Assumptions?



Sources: Q18; Q20; Q30; Q32a; Q35 (comment code); Q50f; Q51.

This chart reports respondents' use of the substantive canons when asked about them by name or underlying assumption. With respect to clear statement rules, we report the number of respondents who could name one.

\* Out of the 65 respondents who had participated in drafting criminal legislation.

\*\* Out of the 67 respondents asked.

† Fraction of respondents reporting that desire for agency to fill gaps results in ambiguities in legislation. With respect to some other assumptions underlying *Chevron*, 93% reported that the technical or complex nature of the issue, 99% reported the need for consensus, and 77% reported lack of knowledge about the best answer results in ambiguities.

This Subpart relays our findings with respect to all of these canons except for the administrative law rules, which we defer to their own separate discussion in Part IV.

1. *Federalism, preemption, and clear statement rules*

There are three basic iterations of the federalism-enforcing canons, and we inquired about all of them. Two function as presumptions: the eponymous “federalism canon,” which counsels courts to interpret ambiguous federal statutes so as not to intrude on traditional state functions, and the “presumption against preemption,” the default principle that courts should not interpret ambiguous federal statutes to preempt state law. The third class of principles are the so-called “clear statement rules,” which are the “super-strong”<sup>122</sup> presumptions that the Supreme Court has articulated to enforce norms across a range of situations that typically implicate federalism, from the abrogation of sovereign immunity<sup>123</sup> to Congress’s ability to impose conditions on federal grant money to the states.<sup>124</sup> Clear statement rules require drafters to use what are effectively “magic words” to achieve the result that runs contrary to the constitutional default rule—such as the rule requiring “unmistakably clear” language that Congress intends to abrogate the states’ immunity from suits before a statute will be so construed.<sup>125</sup>

a. *A partial courts-Congress feedback loop for federalism and preemption*

Unlike in the case of the textual canons, most of our respondents said that they both knew of the federalism and preemption presumptions by name and that they also drafted with those rules in mind. Approximately 80% of our respondents told us that they were familiar with one of these rules by name and approximately 50% said they were familiar with both.<sup>126</sup> Of our respondents who were familiar with at least one of these presumptions, 65% said that at least one played a role when drafting.

These findings offer the first evidence that some kind of courts-Congress interpretive feedback loop does exist, at least with respect to certain interpretive rules. Knowing that the courts consider these federalism presumptions, many of our respondents told us, has an effect both on the *substance* of statutes and on how that substance is *expressed*. At the same time, however, our respondents

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122. *See id.* at 597.

123. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

124. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court has also articulated clear statement rules in other contexts, such as nonretroactivity of statutes. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 411-12 (2010).

125. *Atascadero*, 473 U.S. at 242.

126. *See* Q17. Of those who were familiar with only one canon, 90% were familiar only with the presumption against preemption and 10% only with the federalism canon.

did not understand these canons to function as interpretive “tiebreakers” in the same way that courts do.

Specifically, 14% of our respondents told us that the canons serve to tee up debate about the issue when conceptualizing a statutory scheme. The following comments were typical: “The presumptions help to highlight and remind us of the importance of the question whether this is the right role for the federal government,” and “It gives us sensitivity to the issue when we legislate concerning the states.”<sup>127</sup> These comments are consistent with academic and judicial arguments that canons such as these may have a salutary, deliberation-forcing effect on the legislative process.<sup>128</sup>

Another 19% (or 24% of those who knew at least one of these canons) told us that knowledge of these canons encouraged more specificity once pen was put to paper. As some put it: “If we are making a provision we think will preempt, it’s part of the deliberation: it’s a reminder to everyone to make sure we are clear,” and “No one refers to them by name but they come up in discussion, through about how specific you want to be and how the clause will be interpreted.”<sup>129</sup> These explanations are consistent with a different, more directly dialogical, kind of justification that has been offered for these canons: namely, that they teach Congress how better to communicate in general, and how specifically to telegraph its intentions to the courts. They also are consistent with a democracy-based justification; they make it more likely that important decisions will be made by elected officials rather than by courts.

At the same time, there was an important disconnect between common judicial understandings of these canons and the way that our respondents told us they understood them. Courts use these canons as “thumb-on-the-scales”<sup>130</sup> presumptions that tip interpretation of ambiguous statutory language in one direction, and courts assume that Congress knows the direction in which the scales will be tipped. Our respondents’ answers, however, did not substantiate that assumption.

Our respondents told us that the canons serve as reminders of the importance of resolving the issue, but do not create expectations about how any ambiguities that remain in the text will later be resolved—that is, after the reminders are ignored for political reasons, lack of time, and so on. The majority of respondents (60%) told us that these presumptions *did not necessarily cut in a particular direction*. Instead, most respondents said that they expected feder-

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127. Q18.

128. See Eskridge & Frickey, *supra* note 80, at 631; Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679, 685-86 (1999) (noting that a goal of the federalism canon is “to force Congress to pay close and sustained attention to the issue and to deliberate fully before acting”); Vermeule, *supra* note 23, at 564.

129. Q18.

130. Scalia, *supra* note 17, at 29.

alism-related ambiguities to be resolved based on a variety of factors, including the particular court and area of law being interpreted.<sup>131</sup> Similarly, in response to other questions in the survey, we received thirty additional comments (from twenty-two different respondents) emphasizing that canons serve as “frameworks” that “focu[s] attention on certain issues that wouldn’t be there if you were drafting from scratch” rather than as “dispositive rules.”

Indeed, only 6% of our respondents said that ambiguities in federal statutes relating to preemption would be construed by courts in favor of the reach of state law.<sup>132</sup> But that is *exactly* the way the presumption usually functions in the federal courts.<sup>133</sup> And 12% predicted that the presumption would run in the *opposite* direction, with courts favoring the reach of federal law.<sup>134</sup>

The federal-law-oriented perspective of our respondents perhaps should have been unsurprising, given our respondents’ vantage point and mission. The federal statute is their work product and, when ambiguous, these respondents expect their work product, not state law, to control.<sup>135</sup> The contrast with the Court’s assumption—that the federalism canons reflect “an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere”<sup>136</sup>—is evident. In this sense, the courts-Congress feedback loop with respect to the federalism canons that we have identified appears to be only a partial one.<sup>137</sup>

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131. Q14. Sixteen of these respondents also commented that drafters tend to anticipate that courts will rule on preemption in accordance with the drafters’ own federalism views. *Id.*

132. *See id.*

133. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452 (1991); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

134. Q14.

135. An interesting question beyond the scope of this Article is whether the federally oriented vantage point of congressional staffers undermines longstanding arguments that the states’ representation in Congress ensures that state interests are represented in the statute-making process. *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

136. *Gregory*, 501 U.S. at 461.

137. More than 72% of our respondents told us that we were asking the right questions about how federalism comes into play in the drafting process. Q19. In their qualitative comments, 9% of respondents emphasized that the importance of federalism depends on the subject matter being considered. Nine percent (including two respondents who also mentioned subject area) emphasized that federalism plays a much larger role in the statute-making process than merely serving as a factor in drafting, either as a central political issue or as an overarching question about the philosophy of government.

b. *The irrelevance of clear statement rules*

Evidence of a feedback loop for clear statement rules, on the other hand, was almost entirely absent. These findings are problematic for clear statement rules on most normative justifications for them because clear statement rules—regardless of what purpose they serve—depend on the idea that the “rules” about those magic words that drafters must use are actually being transmitted to Congress.<sup>138</sup> They also are usually described as “super-strong” interpretation rules: canons that are more important and more consistently applied than ordinary presumptions like preemption.<sup>139</sup>

None of these assumptions was validated by our respondents. Even as most of our respondents told us that they would be more attuned to the courts’ interpretive practices if the courts were more consistent,<sup>140</sup> only about 30% of respondents said they could name any clear statement rule that they thought was important in the drafting process (of any sort, not just federalism related) and, when asked to list such rules, of that number only six respondents (4% of 137) named a rule that actually was a clear statement rule.<sup>141</sup> Only 22% of our respondents thought that clear statement rules were relied upon more than other canons.<sup>142</sup>

These findings also lend support to some of the pragmatic criticisms that have been levied against the use of clear statement rules. Scholars have complained that these magic words requirements are unnecessary to enforce presumptions already effectuated by the ordinary canons; that there are too many such rules; and that the variety of rules makes it difficult for drafters to predict

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138. Cf. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 36-39 (2008) (arguing that “clear statement rules . . . foster deliberation and careful consideration on constitutionally sensitive topics” and that “legislators or interest groups will not be able to sneak something by a majority of the enacting coalition”).

139. Eskridge & Frickey, *supra* note 80, at 597, 611-12.

140. Eighty-one percent of respondents said it would make a difference to their drafting practices if courts were more consistent about the canons they applied. Q67.

141. Most rules that our respondents named were not what judges and scholars would classify as clear statement rules. For example, receiving multiple mentions as clear statement rules were *Chevron*, the rule of lenity, the presumption in favor of severability, and the textual canons “the specific controls the general” and *expressio unius*. The only actual clear statement rules mentioned—the abrogation of sovereign immunity, federalism, and the creation of private rights of action—were noted by just six respondents (one mentioned two, the other five each mentioned one). Q34; Q35. Before asking respondents to name specific clear statement rules, we asked whether they were familiar with interpretive rules to the effect that ambiguities in statutes will be construed in a particular way absent a clear statement to the contrary. Sixty-seven percent said they were, *see* Q34, but, as mentioned, few could name any.

142. Q36.

the courts' interpretive path.<sup>143</sup> Indeed, our respondents did not seem to know, use, or understand the broad landscape of clear statement rules, but did display much familiarity with the ordinary federalism presumptions.

## 2. *Lenity unknown by name*

We were surprised by our respondents' lack of familiarity with the "rule of lenity" by name. Lenity is one of the oldest interpretive rules; it provides that ambiguous criminal statutes are to be construed in favor of criminal defendants. The Court often uses it as a tiebreaker when statutes are ambiguous, and some Justices will turn to it to resolve a case before, or instead of, legislative history.<sup>144</sup> The rule is often justified precisely by virtue of its assumed familiarity based on its centuries-old pedigree<sup>145</sup>—most recently by Justice Scalia, who argued in his new book that "rules like these, so deeply ingrained, must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text."<sup>146</sup> Even those who generally oppose application of the substantive canons on the ground that they improperly advance judicial policy preferences often create an exception for lenity on this basis: because it is assumed that all drafters know and draft in accordance with the rule, its application has been viewed as consistent with faithful agency.

Our findings may challenge this assumption. Of the sixty-five respondents in our survey who had participated in drafting criminal legislation, only 35% were familiar with the rule of lenity by name.<sup>147</sup> The nature of our sample seems informative here, as it is unlikely that the broader drafting population would possess more knowledge of this canon by name than did our counsel population. We recognize, however, that our findings do not address whether

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143. Cf. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 61 (2007) (noting that "numerous commentators" have noted that the Court has found "an intent to preempt even without anything remotely like 'clear and manifest' evidence of such intent").

144. See, e.g., *United States v. Hayes*, 555 U.S. 415, 436-37 (2009) (Roberts, C.J., dissenting) (arguing that the majority should have turned to the rule of lenity, not legislative history, to resolve the case).

145. See SCALIA & GARNER, *supra* note 13, at 31; Barrett, *supra* note 22, at 128-29 (outlining the history of the rule of lenity); see also *id.* at 128 (arguing that some substantive canons' "long pedigree makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power").

146. SCALIA & GARNER, *supra* note 13, at 31.

147. Q30-Q31 (including three people who said "other" but whose comments—for example, "It only applies in cases of ambiguity"—revealed knowledge of the rule).

respondents know the rule by concept, as we did not inquire about lenity in that manner.<sup>148</sup>

Also worth noting is that, of the twenty-three respondents who knew of the rule by name, fifteen worked on the House or Senate Judiciary Committees—the committees generally charged with jurisdiction over criminal law. This result may lend some support to the idea that canon knowledge is *subject-area* specific, and thus perhaps *congressional-committee* specific. Judiciary staff might be more familiar with lenity because the Judiciary Committee works on criminal law bills more frequently than other committees. Or Judiciary staff may be a more expert set of drafters altogether.<sup>149</sup> In the companion Article, we elaborate on such intercommittee differences and their potential implications for doctrine. For present purposes, suffice it to say that the accuracy of judicial assumptions about canon awareness and use may depend on what kind of staffer is doing the drafting. Whether courts would be capable of making those distinctions, and doing so without excessive cost, is a separate question, and one that we also address in the companion Article.

We note that we would not have been surprised had our respondents told us that they *disagreed* with the rule of lenity, or that they did not draft in accordance with it. Many state legislatures have passed laws attempting to abrogate judicial application of the rule,<sup>150</sup> and its underlying presumption is at odds with elected officials' predisposition to appear "tough on crime." What was surprising was that, given how often the rule's widespread knowledge has been assumed by courts, most of our respondents had never heard of it, at least not by name.

### 3. *Constitutional avoidance unknown but assumed*

Lastly, our respondents were not familiar with the canon of constitutional avoidance, the oft-applied presumption that courts will construe ambiguous statutes to avoid constitutional issues. We asked several questions aimed at this rule. We initially asked whether staffers had any assumptions about judicial presumptions involving construction of statutes that raised constitutional ques-

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148. To keep the survey under sixty minutes in duration, we unfortunately eliminated our question about lenity by concept because we did not expect that the lenity would be unknown by name to so many of our respondents.

149. As discussed in the companion Article, our data are mixed on this point. We did not find a statistically significant difference between Judiciary and non-Judiciary staff with respect to awareness or use of many of the canons studied. *See* Bressman & Gluck, *supra* note 8.

150. *See* Elhauge, *Preference-Eliciting*, *supra* note 24, at 2203. Some courts have ignored these legislative prohibitions, presumably based on the conclusion that the rule implements constitutionally derived principles (due process and notice) that legislatures cannot override. *See* Gluck, *supra* note 45, at 1824-25.

tions. Forty-four percent of our respondents reported a judicial presumption in favor of upholding federal statutes (what many respondents called something on the order of “congressional deference”<sup>151</sup>)—a federal-law-oriented position that seems similar to the assumption of those respondents who told us that ambiguous federal statutes are to be construed in favor of the reach of federal law rather than in favor of state law. Another 45% responded to this question with “it depends,” with some respondents in that category explaining that their assumptions about judicial presumptions related to constitutionality depend on the subject, the court, or the drafter.<sup>152</sup> But none mentioned the idea that courts might avoid the constitutional question altogether. To reach that question more directly, after completing approximately half of our interviews, we added a question explicitly referring to the avoidance rule. Of the sixty-seven counsels asked that question, only 25% had heard of the rule.<sup>153</sup>

At the same time, that canon may nevertheless rest on accurate assumptions about congressional intent, at least with respect to our respondents. For example, although most of our respondents did not know the canon by name, 69% of the 137 said that their expectations about how the courts would rule on the constitutionality of statutes played a significant role in the drafting process.<sup>154</sup> A number (18%) emphasized that it was their “job” to make sure that their statutes are upheld (an emphasis that may not be replicated among noncounsel staffers, who may have different conceptions of their “jobs”). Thirteen percent (including four respondents counted toward the 18% who emphasized their “job”) said that they examine prior case law or try to create a clear record for courts in anticipation of judicial ruling.<sup>155</sup> As such, it was clear that our respondents do at times focus rather closely on courts, particularly when dealing with constitutional issues. To the extent that the avoidance canon rests on the presumption that Congress tries to legislate within constitutional bounds,<sup>156</sup> our respondents’ answers were consistent with it.

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151. Q32.

152. *Id.* The remaining respondents said “don’t know” (fifteen respondents) or that they assumed courts would “strike down” ambiguous statutes (one respondent). *Id.*

153. Q32a. One additional respondent said “sometimes we think courts will avoid the question.”

154. Q33.

155. *Id.*

156. *See, e.g.,* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (“Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”).



D. *Do the Data Matter? Linking the Findings with the Normative Justifications for the Canons*

Our findings give rise to a helpful typology that brings to the fore some of the normative implications of our study. There were some canons that our respondents both knew that courts used and deployed for precisely that reason. We call these *feedback canons*. Other canons seem to be accurate judicial approximations of the way that our respondents draft, but were not known to our respondents as legal rules that courts employ—their use by our respondents is not the result of any courts-to-Congress feedback loop. We call these *approximation canons*. Third, there were some canons that we call *rejected canons*: these are canons that our respondents knew that courts used, but whose deployment in the legislative drafting process nevertheless is often trumped by institutional and political factors. Finally, we saw *disconnected canons* (or, more playfully, “loose” canons)—canons of which our respondents were unaware and whose underlying presumptions do not seem consistent with the realities of the drafting process.

The following Table summarizes our findings along these axes of canon awareness and the use of their underlying concepts:

TABLE 2  
Empirical Survey of 137 Congressional Staffers 2011-2012:  
Typology of Canon Awareness and Use

	Awareness	No Awareness
Use	<b>Feedback Canons</b> <ul style="list-style-type: none"> <li>• federalism</li> <li>• preemption</li> </ul>	<b>Approximation Canons</b> <ul style="list-style-type: none"> <li>• <i>expressio unius</i></li> <li>• <i>noscitur a sociis</i></li> <li>• <i>ejusdem generis</i></li> <li>• constitutional avoidance</li> </ul>
Non-Use	<b>Rejected Canons</b> <ul style="list-style-type: none"> <li>• whole act / whole code presumptions of consistent usage</li> <li>• superfluities</li> <li>• dictionaries</li> </ul>	<b>Disconnected (“Loose”) Canons</b> <ul style="list-style-type: none"> <li>• clear statement rules</li> <li>• perhaps lenity</li> </ul>

Disaggregating the canons in this manner tees up some interesting questions. Most obviously, what model of the judicial role in statutory interpretation justifies continuing use of the canons that Congress has rejected or that our study suggests are disconnected from congressional practice? The answer may differ with respect to different canons. For example, canons that enforce consti-

tutional law may more easily find independent justification than incorrect assumptions about how statutory language is put together, even if our drafters do not know or use either type of rule. With respect to other canons—particularly those that appear “neutral,” such as textual canons and dictionaries—de-linking the canons from legislative practice may require judges to more explicitly acknowledge those rules as *judicial* tools—and ones that may shape statutory language in ways never intended by Congress.

Furthermore, as a matter of theory, the notion that there are some canons that courts and drafters utilize because of a courts-Congress feedback loop has different implications from the notion that some canons merely approximate what Congress does, but are rules of which drafters need not be aware. A version of faithful agency that contends that judges should apply rules that aim to *affect* how Congress drafts is arguably not the same as one that contends that judges should apply rules that merely *reflect* how Congress drafts. The former rests not only on a vision of the courts and Congress in dialogue, but also on an understanding that it is the proper role of courts to intervene in the legislative process.<sup>157</sup> The latter, reflective, view is more reactive, relies less on interbranch dialogue, and does not necessarily posit a role for interpretive doctrine in shaping how statutes look.

Neither view, moreover, is the same as a faithful-agent approach that essentially eschews Congress and instead views courts as faithful agents of the *public*. Courts seeking to interpret statutes in ways that would be predictable to the public might have reasons for creating judicial doctrines that rely on sources like dictionaries, or for interpreting the same term consistently throughout the U.S. Code, even if congressional insiders never would. Although most theorists have couched the faithful-agent paradigm only in terms of the courts-Congress relationship, a few have advanced versions of this public-as-principal view.

Here, however, other types of questions arise, most notably, who the “public” is under this view of the faithful-agent paradigm. William Eskridge has implied that ordinary people are the relevant “public.” The textualists, as Nourse has noted, have been more ambiguous and inconsistent,<sup>158</sup> even as they agree that they are less interested in what congressional drafters actually think and instead are interested in “objective” intent. John Manning argues that the courts’ audience is the “relevant linguistic community”—a community he views as lawyers, whose “established background conventions” textualism

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157. Cf. SCALIA & GARNER, *supra* note 13, at xxvii (arguing that their interpretive approach will “discourage legislative free-riding, whereby legal drafters idly assume that judges will save them from their blunders”).

158. Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1003-05 (2011).

aims to capture.<sup>159</sup> Justice Scalia sometimes emphasizes ordinary public meaning, at other times explicitly grounds canon application in how he believes the ordinary legislative drafter uses language, and sometimes does both.<sup>160</sup> Obviously, the kinds of interpretive presumptions that lawyers might be expected to know are different from those that might be expected to approximate public understanding.

None of these distinctions is typically probed in discussions of faithful agency or the individual canons' legitimacy. Faithful-agent theory also has remained surprisingly vague on the normative justifications for the substantive canons in particular. Only a few scholars have addressed whether judges who apply those external policy norms do so *within* their role as faithful agents or as part of (perhaps justified) departures from that role.<sup>161</sup>

Our typology focuses on drafter awareness and use of the canons not because this is the only way that their utility or legitimacy might be assessed. There are arguments for some of these rules that are less connected to congressional practice—most notably rule of law arguments that the canons help judges coordinate systemic behavior or cohere the U.S. Code. Those arguments raise other questions, which we explore at the end of this Part. But judges rarely justify their use of canons as entirely unrelated to congressional practice—no doubt because such justifications are difficult to reconcile with the faithful-agent paradigm that modern judges find so attractive and the related desire not to appear “activist.” Nor, in the alternative, do judges really seem to follow through with rule of law approaches: federal courts are notoriously inconsistent in their application of the canons, a fact that undermines the efficacy of any canons ostensibly targeted to provide coherence, notice, or consistency.

Regardless, the public justifications that judges *do* use—those that typically turn on canon awareness or use—have an important expressive purpose. Judges use them to legitimize their interpretive choices and, by extension, the

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159. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 155 (emphasis omitted).

160. *Compare, e.g.,* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (“The meaning of terms . . . ought to be determined . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it) . . .”), with SCALIA, *supra* note 17, at 17 (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”).

161. See Barrett, *supra* note 22, at 181 (arguing that the “judicial power to safeguard the Constitution” using constitutionally inspired substantive canons “can be understood to qualify the [faithful-agent] duty that otherwise flows from the principle of legislative supremacy”); Merrill, *supra* note 22, at 1597 (contending that no coherent account exists to justify textualists’ use of rules external to the text under a faithful-agent model and that no interpreters are purely faithful agents).

judicial power to make those choices.<sup>162</sup> This makes investigation of these justifications essential, even if one disagrees that the canons should be legitimated on those grounds in the first place.

1. *Textual rules as approximation canons and rejected canons*

The textual canons are most commonly justified on three (potentially conflicting) grounds—namely, that (1) the canons are background rules of which drafters are aware; (2) they are presumptions that courts should apply because even if they do not actually reflect how Congress legislates, they teach Congress how to legislate better; and (3) they reflect how ordinary people use language. None of the textual canons that we studied can be sustained under all three justifications.

We note at the outset that, to the extent that our findings call into question those justifications based on a link to Congress, the “ordinary people” justification for these rules, described above, takes on more salience. But if some textual canons must find their justification independent of connection to even generalized congressional practice, the proper audience must be defined. Is it lawyers, as Manning contends (putting aside the fact that many congressional drafters are lawyers—including our respondents, who still did not know many rules),<sup>163</sup> judges, or the public?

a. *Expressio, noscitur, and ejusdem as approximation canons*

At least for our respondents, judicial deployment of the *noscitur* and *ejusdem* rules does not have an effect on the legislative process. These therefore are not feedback canons: our respondents did not know the canons by name and did not seem to know that they were presumptions that courts employed. As such, whatever dialogic or teaching function these canons may be intended to have seems largely absent.

But neither do these canons seem to be fictions. Our respondents told us that they deployed the concepts underlying them, as well as the concept underlying *expressio*, even without knowing that they are also judicial rules. Thus, of the typically proffered justifications, these canons seem best understood as accurate judicial approximations of the way that drafters put language together.

There are some potentially interesting doctrinal implications of conceptualizing these textual rules in this manner. To the extent that approximation rules aim to reflect legislative practice, then further investigation seems warranted to determine if our results are generalizable: that is, whether more drafters write

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162. Cf. Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (“Any theory of statutory interpretation is at base a theory about constitutional law.”).

163. See Manning, *supra* note 159.

statutes with these assumptions in mind. After all, the legitimacy of an approximation rule depends on how well it actually approximates.<sup>164</sup>

A related, and more provocative, implication is that Congress thereby may have the power, either directly or indirectly, to affect how approximation canons are deployed. If drafters stopped using the *expressio* presumption when drafting—whether by happenstance, informal agreement, or even perhaps by legislating a formal ban—that canon could no longer be justified under a theory that it is a reflective one. There is an ongoing debate over which branch (or branches) has the power over interpretive rules, and in the Conclusion we detail how our study advances that discussion.<sup>165</sup> Here, however, the point is to illustrate the theoretical distinctions that have been overlooked due to the tendency to lump the canons and their various justifications together. An interpretive theory that derives its normative justification from how well it reflects congressional practice may say something entirely different about which branch of government has the power to create and change interpretive rules as compared to an interpretive theory that derives its normative justification from the view that courts have a more active role to play in affecting how Congress drafts.

Moreover, on the reverse side, understanding Congress's potential to influence interpretive doctrine raises a host of new questions about whether Congress has any special obligations in terms of the practices that it adopts. Is there something like a "faithful principal" paradigm on the congressional side? What normative framework should underlie Congress's responsibilities in the interbranch interpretive dialogue? As we elaborate in the Conclusion, although scholars have long debated Congress's role as a player in constitutional interpretation, and although statutory interpretation theory contains much talk of courts-Congress dialogue, there has been almost no attention to Congress's own obligations as an interpreter in the statutory context.<sup>166</sup>

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164. Cf. THE FEDERALIST NO. 83, at 496 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The rules of legal interpretation are rules of *common sense* . . . . The true test, therefore, of a just application of them is its conformity to the source from which they are derived.").

165. Compare SCALIA & GARNER, *supra* note 13, at 245 (suggesting that legislated interpretive rules are "problematic"), with Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013) [hereinafter Gluck, *Federal Common Law*], Gluck, *supra* note 45, Linda D. Jellum, "Which Is to Be Master," *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837 (2009), and Rosenkranz, *supra* note 15 (each drawing a different line between certain canons that Congress might legislate and certain rules that would remain in the exclusive judicial domain). For a discussion of legislated interpretation rules in the states, see Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

166. See generally DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966) (arguing that Congress has an obligation to engage in constitutional interpretation); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975) (same); Robert C. Post & Reva B. Siegel, *Legis-*

b. *Superfluities, consistent usage, and dictionaries as rejected canons*

Our findings with respect to the other three textual canons tell a different story altogether. Our respondents were well aware of the rule against superfluities, the presumption of consistent usage that underlies the whole act and whole code rules, and the Court's use of dictionaries. As such the lines of communication for an interbranch interpretive feedback loop—the potential for legal doctrine to affect drafting—are open. But despite the fact that our respondents understood that judges apply these rules, they *rejected* them due to other factors, including the need to please stakeholders with redundancy, the impracticality of consistency presumptions given the fragmentation of Congress into committees and the increased use of omnibus legislation, and the simple fact that drafters prefer their own statutory definitions or legislative history to dictionaries.

As a result, for these canons, none of the publicly stated justifications for their application holds, based on the responses we received. The canons are not guidelines that our respondents follow, do not otherwise approximate how Congress drafts, and cannot be justified as drafting-teaching tools because our respondents *already* know that courts apply the rules but still disregard them.<sup>167</sup>

Under most versions of faithful-agent theory, these canons should be rejected. To be sure, an “objective intent” understanding of textualism might ask whether “ordinary people” might understand language consistently with these presumptions, even though they were rejected by congressional staffers. This could be a fruitful area of inquiry for linguists. But even textualists who espouse an objective intent approach almost always couple it with a theory of legislative supremacy.<sup>168</sup> Understanding these canons as doctrines that do *not* actually effectuate even general, “objective” congressional expectations and instead as doctrines that are judicial tools to coordinate the activities of a different linguistic community would be a very different vision of the judicial role in the courts-Congress relationship than most textualists commonly espouse. Moreover, as elaborated below, any set of justifications based on the value of “objective” shared conventions raises the question why courts nonetheless remain so inconsistent in their application of these rules.

A different question is whether anything that courts or legislators might do would facilitate these canons' more routine application, if either side wished for them to apply. An overwhelming number of our respondents told us that more predictable judicial application of the canons would change the way that draft-

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*lative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) (arguing that the Court does not and should not monopolize constitutional interpretation).

167. See Nelson, *supra* note 44, at 381-82.

168. See Manning, *supra* note 20, at 423.

ers treat them.<sup>169</sup> It thus seems possible that, if the courts applied these textual rules more consistently, their application in the drafting process might persuade drafters to at least attempt to surmount some of these institutional hurdles. We can imagine, for instance, a committee counsel explaining to a lobbyist why redundant use of the term “hospital” would do more harm than good in court.

Other obstacles would be more difficult to overcome, even if drafters or courts were inclined to try. For instance, while it seems easy enough to provide budgets for dictionaries or to encourage drafters to define contested terms, some of the Court’s most important dictionary-use cases do not rely on dictionaries for words that anyone could predict would be the subject of controversy. Among many others, the Court recently has looked to define the following terms: “any,”<sup>170</sup> “because of,”<sup>171</sup> “elect,”<sup>172</sup> “if,”<sup>173</sup> “include,”<sup>174</sup> “now,”<sup>175</sup> “otherwise,”<sup>176</sup> “per,”<sup>177</sup> “similar,”<sup>178</sup> “under,”<sup>179</sup> and “would.”<sup>180</sup> Unless one expects Congress to define or look up every word it uses, continued judicial reliance on dictionaries simply cannot be justified on the ground that Congress knows the definitions that will be used. This puts pressure on the Court either to justify that dictionaries do, in fact, provide good approximations of ordinary meaning (which experts contest); to look to dictionaries only when there is some evidence that they were actually considered in Congress (which is rare, according to our respondents); or to be more forthright about what different normative considerations are actually underlying its consultation of dictionaries. For example, dictionaries may be attractive to judges because of their “neutrality” (or appearance thereof), or they may be helpful tools to coordinate judicial behavior. These justifications, however, are rarely offered for dictionary use—and if they were, the Court would have to face much more directly than it has the frequent criticism that judges select among dictionaries inconsistently and cherry-pick among definitions to reach preferred results.<sup>181</sup>

Similarly, in the context of both the rule against superfluities and the whole act and whole code rules, one might imagine continued application of those

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169. See Q67 (“It’s a conversation between Congress and the courts.”); *id.* (“[I]f they move in a consistent direction over time it will affect how we draft.”).

170. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-21 (2008).

171. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

172. *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 415-16 (2009).

173. *Dodd v. United States*, 545 U.S. 353, 358 (2005).

174. *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001).

175. *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

176. *Begay v. United States*, 553 U.S. 137, 144 (2008).

177. *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 86, 97-98 (2007).

178. *Rousey v. Jacoway*, 544 U.S. 320, 329 (2005).

179. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-52 (2007).

180. *Knight v. Comm’r*, 552 U.S. 181, 192 (2008).

181. See generally Brudney & Baum, *supra* note 118.

canons in those limited circumstances in which one can confirm that they do approximate drafting reality. But this would require courts to delve into questions such as whether one or several committees drafted a statute, to look more closely at the form of the statute itself (e.g., is it an omnibus bill?), or to investigate the history of why certain words were added. These interventions raise important questions that go both to judicial competence and to the costs and benefits of an excessively tailored set of interpretive rules. These questions came up repeatedly in our study and we engage them in the companion Article, but for present purposes we surmise that that courts could make some of these accommodations—for example, a one-committee or non-omnibus rule for consistent usage presumptions—at relatively low cost, but not others.

2. *Substantive canons: disconnected, approximation, and feedback canons*

The substantive canons are more complex to assess because of their variety: some substantive canons have goals that seem less dependent on drafter awareness or use than others. This is the case even though almost all of these canons have been publicly justified on the ground that they are, in fact, background rules of which Congress is aware when it legislates.

a. *Different types of disconnected rules: lenity and clear statement rules*

A comparison between lenity and clear statement rules illustrates the variegated nature of the normative terrain. Both sets of rules are often justified on the ground that they are rules of which Congress is aware; recall that lenity is commonly justified based on the assumption that, due to its long history, all drafters are familiar with it, while clear statement rules explicitly depend on the transmission of the message from the Court to Congress that magic words are required in some areas for Congress to make its intentions clear. Neither type of rule was known to our respondents by name; nor were most of our respondents familiar with the concepts underlying any actual clear statement rules. It is possible that some of our respondents would have revealed familiarity with the concept underlying lenity had time permitted our pursuit of that inquiry. But our intuition is that, even if lenity is unknown by concept as well, this disconnect will seem less problematic in the context of lenity, and it is illustrative to explore why.

We suggest that the difference can be explained by virtue of the fact that, whereas drafter awareness is central to the function of clear statement rules, drafter awareness actually relates little to the purpose of the rule of lenity. In the lenity context, the awareness-based justification seems more about *legitimizing judicial discomfort* with the idea that judges have power to impose external values on the legislative process than about defending the purpose of the rule itself.



Lenity has rarely, if ever, been said to be about making Congress draft better or approximating how Congress drafts (to the contrary, legislators are often “tough on crime”<sup>182</sup>). Instead, the rule serves as a constitutional backstop and is used by courts to interpret statutes in the light of concerns about due process and notice.<sup>183</sup> Even those who have argued that lenity takes its legitimacy from its long pedigree typically offer as a second justification this judicial, quasi-constitutional, obligation.<sup>184</sup>

The case for clear statement rules in the absence of congressional awareness, on the other hand, seems particularly weak. While it is also the case that clear statement rules impose constitutionally inspired norms on the legislative process—most often federalism norms—those rules do more than provide a road map for how judges should interpret ambiguous statutes after the fact. Instead, clear statement rules explicitly aim to influence the drafting process.<sup>185</sup>

It is worth noting that clear statement rules have come under sustained attack as an improper exercise of judicial power or policymaking,<sup>186</sup> whereas lenity generally has not, even though both rules bring external values to bear on the interpretive process. Our findings suggest that better distinctions may be drawn between the way that the two rules *operate*—only clear statement rules attempt to meddle explicitly in the legislative process—and between each rule’s respective success at accomplishing its goal: clear statement rules do not seem to be doing what they are supposed to do, whereas lenity serves its goal regardless of whether drafters know about it.<sup>187</sup>

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182. *But cf.* SCALIA & GARNER, *supra* note 13, at 296 (noting that an early justification for the rule was the presumption that “a just legislature will not decree punishment without making clear what conduct incurs the punishment”).

183. *See* ESKRIDGE ET AL., *supra* note 69, at 884-88; Antonin Scalia, Essay, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582-83 (1990). Some also argue that lenity serves a nondelegation or separation of powers function, ensuring that only Congress, not the judiciary, legislates federal crimes. *See, e.g.*, John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1561 n.62 (2008).

184. *See* ESKRIDGE ET AL., *supra* note 69, at 885-86; Scalia, *supra* note 183, at 582-83.

185. To the extent that interest groups may bring judicial decisions that apply clear statement rules to Congress’s attention, such application of clear statement rules may ultimately have their desired effect regardless of whether Congress knows about them when drafting. One implication of our study may be that clear statement rules have more of an ex post effect on drafting than the ex ante effect typically assumed, if they are made known to Congress by stakeholders after cases are litigated. But this “postenactment” theory of clear statement rules still depends on a dialogue—someone on the other side must bring the judicial decision to Congress’s attention—the existence of which remains in need of empirical verification.

186. *See, e.g.*, Manning, *supra* note 124, at 425-26.

187. These questions may become more complicated to the extent one believes that Congress itself plays a role in constitutional interpretation and may reach different constitutional conclusions from the courts. *See generally* Post & Siegel, *supra* note 166 (advancing such a view).

The intriguing question is why judges and theorists have been so wedded to justifying lenity on the basis of congressional knowledge. We suspect it has to do with the pervasive discomfort that modern theorists have with acknowledging that federal judges are “making law,” or doing something apart from merely reflecting Congress’s will, when they interpret statutes.

b. *Avoidance as approximation*

The constitutional avoidance rule seems of the same order as lenity, in terms of its actual dependence on drafter awareness. This rule also serves a judicial, extralegislative purpose—its presumption that statutes are to be construed in ways to avoid constitutional questions is typically described as rooted in separation of powers, judicial minimalism, and minimizing interbranch conflict. But unlike lenity, the constitutional avoidance rule is rarely described as one that Congress is presumed to know (further evidence, we believe, that lenity might be more compellingly justified in a similar fashion). Indeed, under a faithful-agent model, one could argue that courts fulfill their duties to Congress by presuming that Congress tries to legislate within constitutional bounds regardless of whether Congress knows that courts are doing that work.<sup>188</sup>

For this reason, as a matter of normative justification, it may be of rather little moment that the constitutional avoidance rule was unknown to our respondents. Even so, and in some tension with what some academics have suggested,<sup>189</sup> the majority of our respondents indicated indirectly that they expect the courts to apply something like this presumption—a finding that suggests the possibility that the avoidance rule might actually be closer to a feedback canon than an approximation rule.

c. *Federalism, preemption, and a “due process of lawmaking” feedback loop*

Finally, of all of the canons studied, the federalism canon and the presumption against preemption (and *Chevron*, discussed in Part IV) offered the greatest evidence of a courts-Congress feedback loop for our respondents. These canons

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188. See Mashaw, *supra* note 162, at 1692. Some claim that Congress may intend precisely the opposite. See Manning, *supra* note 124, at 419 n.108 (arguing that “virtually no one (except the Supreme Court Justices)” views “the idea that Congress *intends* to stay well within the boundaries of constitutionality” as “resting upon a plausible account of what a rational legislator would intend”). We also see a parallel here to the “scrivener’s error” doctrine, which we have never seen challenged as incompatible with faithful agency even though it involves judicial rewriting of statutes: courts fulfill their duties as faithful agents when correcting obvious typos in the statute that Congress never could have intended. Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 TEX. L. REV. 339, 375 (2005).

189. See Manning, *supra* note 124, at 419 n.108.

have been justified in at least four different ways, the first three of which do depend on some kind of interbranch communication: they (1) provide background rules in whose shadow Congress legislates; (2) induce legislative deliberation about federalism issues; (3) encourage clearer drafting on federalism matters; and (4) provide a means for courts to effectuate federalism values.<sup>190</sup>

The feedback loop that our findings suggest, however, seems imperfect. Our respondents told us that their awareness of these canons leads them to think about federalism matters and also to clarify related statutory language, but does not help them predict which way courts will resolve ambiguities in federalism-related cases. This kind of feedback loop therefore does not tell a faithful-agent judge anything about how congressional drafters would prefer federalism-related ambiguities to be resolved. If anything, our respondents' answers indicate that they would expect, and prefer, any ambiguities to be resolved in favor of the reach of *federal*, not state, law—the exact opposite of the way in which judges usually apply these canons.

Our findings therefore indicate that these canons seem to have their greatest impact as *ex ante* tools—specifically, as deliberation-inducing and “drafting-teaching” devices<sup>191</sup>—rather than as rules that help to clarify intended meaning after statutes are enacted. The challenge is to understand what kind of judicial role is suggested by this model of the canons' function. Deliberation-forcing rules have been justified by others on the ground that they advance judicial minimalism and democracy.<sup>192</sup> Those rules, that argument goes, effectively remand important decisions to elected officials rather than leave them to courts. But these canons only seem to work partially in that way, at least for our respondents. The rules do seem to encourage drafters to decide these questions themselves. But at the same time, the presumptions still function to allow *courts* to decide any remaining ambiguities—and in precisely the opposite direction from the one that most of our respondents expected or desired.

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190. Theorists often assert these justifications simultaneously. For example, Scalia and Garner's statement that “[t]he presumption is based on an assumption of what Congress, in our federal system, would or should normally desire” conflates a reflective conceptualization of the canon with a proactive one. SCALIA & GARNER, *supra* note 13, at 293.

191. See Garrett, *supra* note 128, at 686 (“Because these interpretive methods are justified largely on the basis of their effects on future congressional action, their legitimacy rests on predictions about changes in congressional behavior. Scholarship providing detailed empirical studies of current congressional behavior . . . [is] virtually nonexistent.”).

192. See Sunstein, *supra* note 80, at 317; cf. Bradford R. Clark, *Process-Based Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 192 (William W. Buzbee ed., 2009) (arguing that the presumption against preemption and clear statement rules, even if they do not reflect congressional intent, help the courts enforce the political safeguards of federalism by keeping the decision in Congress's hands); Elhauge, *Preference-Eliciting*, *supra* note 24, at 2165 (calling these congressional “preference-eliciting” rules).

We also think it is worth highlighting that, although theorists have accepted without much quarrel the teaching and deliberation-forcing purposes of these canons, there has been strong resistance to what we believe is the not-unrelated concept of “due process of lawmaking”<sup>193</sup>—the idea that legal doctrine has a role in policing the process of how Congress arrives at its decisions. Courts have long eschewed any explicit embrace of that concept;<sup>194</sup> it has not generally been integrated with statutory interpretation theory;<sup>195</sup> and, of course, courts will not invalidate federal statutes on constitutional grounds for lack of evidence that federalism presumptions were considered.<sup>196</sup> But at least some of these canons do seem to facilitate judicial meddling in both the deliberative and drafting processes: our respondents told us that they changed the nature of the debates. These canons thus may offer the Court an indirect way of influencing the legislative process—through the often less heated (and less visible) context of statutory interpretation—that the Court has concluded it cannot justify as a manner of direct constitutional law.<sup>197</sup>

Finally, of course, applied on the back end by courts, the canons surely serve the function of allowing courts to bring federalism values into interpretation. This role for these canons raises the same normative questions about the faithful-agent judge’s use of external norms in interpretation that we already have discussed in the context of lenity and clear statement rules.

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193. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 199 (1976); see also Neal Devins, Essay, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. U. L. REV. 1821, 1837 (2012) (“There is no such thing as ‘due process in lawmaking,’ obligating Congress to hold hearings or anything else.”).

194. See SUSAN ROSE-ACKERMAN ET AL., “DUE PROCESS OF LAWMAKING”: UNITED STATES, SOUTH AFRICA, GERMANY, AND THE EUROPEAN UNION (forthcoming 2014).

195. For two important exceptions, see generally Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1285 (2002) (illustrating how certain canons, particularly clear statement rules, seem aimed at the process by which laws are enacted); and Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1715 (2002) (noting that canons protect underenforced norms).

196. In fact, judicial application of the presumption functions in precisely the opposite way, allowing courts to avoid any federalism-related constitutional questions by breaking ties in favor of state law.

197. Scholars have similarly argued that some statutory interpretation rules allow the courts a lower-heat method of engaging in substantive constitutional review. See Eskridge & Frickey, *supra* note 80 (arguing the Court has tried to change constitutional boundaries through its use of clear statement rules in statutory cases).

E. *Alternative “Rule of Law” Justifications: Coherence, Coordination, and “Interpretive Activism”*

We conclude this Part by exploring the somewhat more radical idea of explicitly grounding the canons in justifications that are untethered to legislative drafting. What happens when the faithful-agent or legislative-supremacy basis for a canon is undermined by the fact that the canon is found to have no link to congressional knowledge or practice? Other potential normative frameworks still might justify such rules. One possibility might be that certain canons are a form of constitutional law, but this cannot explain many of the canons, including superfluities, dictionary use, or the numerous policy-based rules (such as the canon that bankruptcy statutes are construed in favor of the debtor) that cannot be directly linked to the Constitution. Another possibility, and the one that we wish to highlight here, is that such canons derive their most powerful justification from “rule of law” norms—the idea that interpretive rules should coordinate systemic behavior or impose coherence on the corpus juris.

Justices Scalia and Breyer, as well as Elizabeth Garrett, have suggested that even fictitious canons are justifiable on the ground that it is the role of courts to impose systemic coherence on the law.<sup>198</sup> In Justice Scalia’s words: “the body of the law should make sense, and . . . it is the responsibility of courts, within the permissible meanings of the text, to make it so.”<sup>199</sup> Relatedly, some have argued that “second-best”<sup>200</sup> interpretive rules have value as systemic coordinating devices that make the work of courts, lawyers, and perhaps even legislators more predictable and uniform.<sup>201</sup>

We do not take a position here on whether a legal system should be based on values such as coherence or coordination. But we do believe that those justifications have the greatest explanatory power to rationalize the continuing ap-

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198. *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 744 (2013) (Breyer, J.) (“Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and for nonlawyers alike.”); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (“The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated . . .”); SCALIA, *supra* note 17, at 16; Garrett, *supra* note 26, at 7. See generally William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000) (elaborating on Justice Scalia’s views about the judicial obligation to impose coherence on the U.S. Code).

199. SCALIA & GARNER, *supra* note 13, at 252.

200. Schauer, *supra* note 25, at 232 (arguing for application of the plain meaning rule on these grounds).

201. See Eskridge & Frickey, *supra* note 45, at 66-67 (arguing that consistently applied interpretive rules would have efficiency and coordinating effects for judges, lawyers, and Congress); Strauss, *supra* note 78, at 1117-18, 1121 (arguing that *Chevron* is a court-organizing rule through which the Supreme Court aims to manage and make more uniform the work of lower courts).

plication of the canons whose use our study otherwise calls into question. The coherence notion, for example, makes sense of the continuing application of rules like the presumption of consistent usage, the rule against superfluities, and the use of dictionaries, despite our findings about drafter awareness and use of them. Indeed, both coherence and coordination arguably provide justification for *any* (otherwise constitutional) interpretive rule as long as the rule is applied consistently.

But we do not believe that judges are successfully applying the current interpretive regime to advance such rule of law goals. Coherence- or coordination-based justifications depend on *consistent and predictable* application of the canons—something that federal courts have infamously never been able,<sup>202</sup> and do not appear particularly eager,<sup>203</sup> to accomplish. The fact that choice of statutory interpretation methodology is not treated as a precedential legal decision,<sup>204</sup> moreover, would make practical implementation of a set of rules designed to harmonize judicial behavior exceedingly difficult. Any coordination system would also have to answer the question of just who, if anyone, it is trying to coordinate beyond judges. A system that had as its goal coordinating the work of legislative drafters might adopt different rules than one that had the goal of coordinating public behavior.

A rule of law account also raises the question of *why we have the complex and conflicting canons that we do*. One can imagine a far shorter and simpler set of interpretive rules—for example, bright-line rules directing courts to defer to agencies or committee chairs; clear rules ranking different kinds of legislative history; or dramatically reducing the number of canons and ranking them into a much clearer order, if harmonizing interpretive decisionmaking were the goal.

In our view, we can best understand these rule of law canons—even if they are not actually deployed in a “rule of law way”—in terms of their appearance of neutrality and the related desire to constrain judicial discretion. For instance, there is likely expressive or symbolic value in choosing interpretive rules that at

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202. Henry Hart, Albert Sacks, and Karl Llewellyn have gotten highways’ worth of mileage out of their observations to this effect. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Llewellyn, *supra* note 120, at 401-06.

203. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866 (2008) (explaining that courts do not treat statutory interpretation methodology as precedential). See generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (illustrating that courts do not view statutory interpretation rules to be as “law-like” as they view choice of law, contract interpretation, constitutional implementation, and other analogous rules, and exploring judicial reluctance to adopt a more consistent approach).

204. See Foster, *supra* note 203, at 1866; Gluck, *supra* note 203, at 1901.

least *seem* like they could plausibly reflect how statutes are drafted.<sup>205</sup> Such rules might telegraph a policy preference for legislative supremacy and judicial restraint, even if actually effectuating such a preference is difficult, or even if judges are actually imposing their own preferences.

Or it may be that the coordinating rules themselves advance coherence norms: the rules chosen may be designed to espouse the kinds of values—consistency and objectivity, for example—that we expect judges to espouse. Judicial recourse to dictionaries, for instance, might be best explained as the use of a source that appears neutral and that also coordinates decisionmaking, even if dictionaries are in fact poor proxies for ordinary meaning.

But we should acknowledge what is really the “active” nature of such an approach. Coordinating or coherence rules may be attractive to some theorists because of their appearances of objectivity, but our findings highlight that an interpretive approach that imposes coherence on the U.S. Code where such coherence is not within the realm of realistic legislative possibility, or which seeks to coordinate judicial but not simultaneously legislative behavior, is an approach based on a *very operative role* for legal doctrine in the interpretive process. The Court imposes “super strong stare decisis” on its interpretations of federal statutes, which means that judicial interpretations of statutory ambiguities are super precedents that change statutory meaning for a long time, if not forever.<sup>206</sup> An interpretive theory that shapes the U.S. Code in ways that Congress never would or could is not a theory based on a cabined conception of the judicial role.

Garrett has recognized this, calling a coherence-focused approach “interpretive activism.”<sup>207</sup> Henry Hart and Albert Sacks recognized decades ago that developing a coherent account of the statutory landscape sometimes is unrelated to effectuating subjective legislative intent.<sup>208</sup> The Court, however, does not seem willing to admit that what it is doing is creating and applying doctrines that actively shape statutes rather than passively reflecting congressional prac-

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205. Cf. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995) (“Policy choices do not just bring about certain immediate material consequences; they also will be understood, at times, to be important for what they reflect about various value commitments—about which values take priority over others, or how various values are best understood.”). See generally Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012) (arguing that certain appearances, even if unlinked to reality, are often necessary to inspire public confidence).

206. See Hasen, *supra* note 14, at 4 (italics and internal quotation marks omitted) (explaining, using empirical research, that congressional overrides of Supreme Court statutory interpretations are rare).

207. Garrett, *supra* note 26, at 7.

208. HART & SACKS, *supra* note 202, at 1374 (noting that it is not “the court’s function . . . to ascertain the intention of the legislature with respect to the matter in issue”); *id.* at 1380 (noting that the interpreting institution “should strive to develop a coherent and reasoned pattern of applications intelligibly related to the general purpose”).

tice. Justice Scalia, for example, has stated that reliance on the kinds of rules favored by textualists “will narrow the range of acceptable judicial decision-making and . . . will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences.”<sup>209</sup> To that end, textualists also often critique pragmatic theories like Justice Breyer’s, which aim to “interpret statutes[] in a manner that . . . will produce a workable set of laws,”<sup>210</sup> as effectuating a quasi-legislative role that is inappropriate for federal courts.<sup>211</sup> But one implication of our study is that virtually all judges are engaging in similarly active work. A preference for coherence is still a judicial policy preference if it is disconnected from drafting practice or legislative expectations.

The point of this discussion is not to imply that a rule of law approach is illegitimate. One might even argue that such an approach is constitutionally required, depending on one’s conception of the judicial role. We do not enter that debate here. Our point, rather, is both to reveal the work that these doctrines really do, and also to highlight the pervasiveness of the discomfort that modern judges have with admitting that they are doing something other than reflecting congressional practice when it comes to statutory interpretation. There is a post-*Erie*, modern judicial sensibility that has cast a negative light on anything that looks like federal judicial lawmaking. But judges arguably need to find interpretive doctrines to do their statutory work. More openly acknowledging what the courts are doing not only is likely to advance the conversation, but also may reveal that the real doctrinal divide is not over different conceptions of the judicial power but simply over which interpretive presumptions best effectuate it.

### III. LEGISLATIVE HISTORY

The other primary interpretive source that courts consider—and the one whose use is most hotly contested—is legislative history.<sup>212</sup> The battleground

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209. SCALIA & GARNER, *supra* note 13, at xxviii.

210. Breyer, *supra* note 18, at 867; *see also* BREYER, *supra* note 19, at 92.

211. SCALIA & GARNER, *supra* note 13, at xxviii (“Nontextual interpretation . . . makes ‘statesmen’ of judges . . .”).

212. After seeming to reach an equilibrium, the debate over legislative history appears to have intensified again in recent years. *See* Gluck, *supra* note 203, at 1909 n.22 (collecting cases from Justice Sotomayor’s first Term). For a few more recent examples, see *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012) (stating that the text of the statute is clear and thus that legislative history need not be relied upon); *id.* at 1711 (Breyer, J., concurring) (disagreeing that the relevant statutory text is clear and consulting legislative history); *Coleman v. Court of Appeals*, 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring in the judgment) (disagreeing with the plurality opinion’s reliance on the legislative record rather than the text alone); *Reynolds v. United States*, 132 S. Ct. 975, 986 n.\* (2012) (Scalia, J., dissenting) (arguing that the majority’s consultation of legislative history is “superfluous”); *Gonzalez v. Thaler*, 132 S. Ct. 641, 662-63 (2012) (Scalia, J., dissenting) (critiquing the Court’s



here is different from the battleground over the canons. No one doubts that drafters are aware of legislative history or that they write it. Instead, the divide is over the constitutionality and effect on the legislative process of judicial reliance on legislative history and also its reliability as evidence of statutory meaning. The realities of the drafting process have direct relevance for the accuracy of the claims made by both sides.

Our survey inquired about these matters in thirty-seven separate questions, and our findings expose gaps in both theories. For textualism, our findings call into question that theory's main critiques of this interpretive tool. Textualists have argued that legislative history should not be consulted because it is not formally enacted<sup>213</sup> and is not a reliable source of congressional intent—that no document can reflect the intent of a 535-member body, and that legislative history serves more often as the spurious attempt of the “losers” to spin statutory meaning in their favor.<sup>214</sup> Some also contend that because committees draft legislative history, reliance on it represents a dangerous and unconstitutional delegation of lawmaking authority to subdivisions of Congress—or worse, subdivisions of congressional staff (committee staff)<sup>215</sup>—who may not speak for the whole elected body. As a result, textualists look to canons (or dictionaries) before legislative history in their interpretive efforts.

Our findings suggest that many of the assumptions on which this critique relies are unfounded. Perhaps most importantly, legislative history was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority<sup>216</sup>—as the *most important* drafting and interpretive tool apart from text. Our respondents also made clear that the staff- and committee-focused concerns about delegation cannot be limited to legislative history alone, but rather also apply to statutory *text*: committees are responsible for text and legislative history alike. Nor is it the case that members of Congress—or even their staffs—are more engaged with textual drafting than with legislative

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use of legislative history); *DePierre v. United States*, 131 S. Ct. 2225, 2237-38 (2011) (Scalia, J., concurring in part and concurring in the judgment) (claiming that detours into legislative history are “needless” and “not harmless”); and *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011) (acknowledging that the legitimacy of legislative history is not accepted by all of the Justices).

213. See SCALIA, *supra* note 17, at 35.

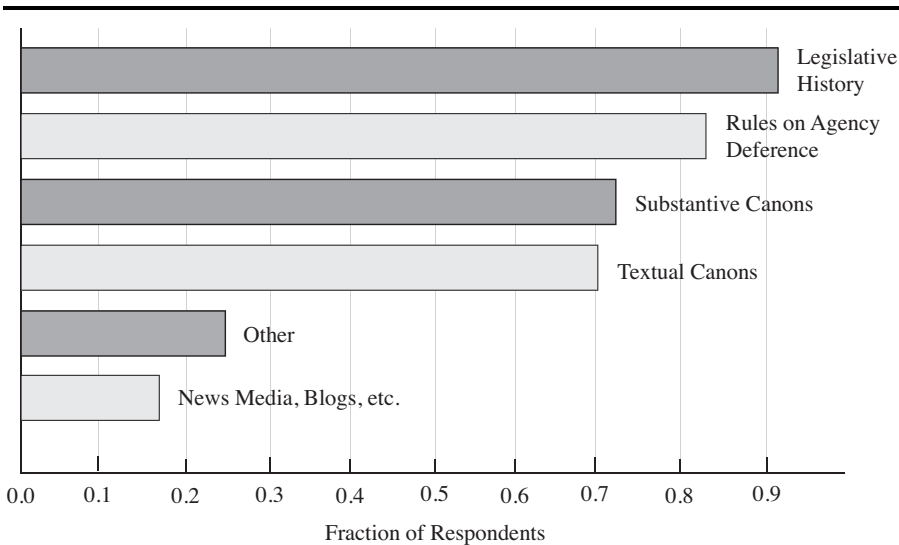
214. See, e.g., *id.* at 32-34; cf. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1860-76 (1998) (focusing on how legislative history research taxes judicial competence).

215. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698-99 (1997).

216. Q68b and Q77A. We discuss in the companion Article what might be deemed a twist on the “law-politics” divide in our findings. Although choice of interpretive methodology has been heavily politicized in courts, our respondents’ political loyalties did not appear to affect their answers to our questions. Cf. Katzmann, *supra* note 53, at 670 (“It is a bipartisan institutional perspective within Congress that courts should consider reliable legislative history and that failing to do so impugns Congress’s workways.”).

history drafting. In fact, many of our respondents said precisely the opposite: members and their staffs focus more on legislative history, while the nonpartisan professional drafters in the Offices of Legislative Counsel focus on text.

FIGURE 6  
Empirical Survey of 137 Congressional Staffers in Congress 2011-2012:  
Legislative Drafters' Perceptions of Which Interpretive Principles  
Are Most Useful to Courts Seeking to Determine Congressional Intent



Source: Q68.

Our findings also expose important weaknesses in how purposivists deploy this interpretive tool. Purposivism has paid little attention to which types of legislative history staffers themselves trust.<sup>217</sup> Our respondents were quick to distinguish—in ways that courts have not—among different types of legislative history and how they are used in different types of legislation.

Here, we note a possible limitation of our sample. It may be unsurprising that our respondents valued legislative history over other sources, given that legislative history is the committee staffer's primary work product. Although there is thus a risk that our respondents overstated their case, it seems unlikely that members would allow staff to spend as much time as they do on legislative

217. See Boudreau et al., *supra* note 98, at 974 (“[J]udges should trust only those sources that were trustworthy for the . . . legislators who passed the bill . . . . Stated differently, if legislators in their conversations ignore certain sources of information because those sources are not trustworthy, then so should judges.”).

history if it were not valued. Moreover, even the majority of our Legislative Counsel respondents—who generally do not draft legislative history and most of whom said their preference was to include details in enacted text—told us that legislative history was an important tool for legislative drafters and courts alike.<sup>218</sup>

Related to this point, we note here what we elaborate upon in the companion Article: our respondents were not purposivists. The findings we relay in this Part should not be understood as their endorsement of that theory, even though in academic circles purposivism is associated with the use of legislative history. Our respondents' emphasis on the utility of legislative history did not map onto a vision of judicial interpretation that looked like Justice Stevens's or Justice Breyer's. Rather, most of our respondents opposed the idea of purposive, forward-looking, or even pragmatic interpretation, and viewed legislative history as a tool that limited—rather than expanded—judicial discretion.

Finally, this series of questions drew out many of the same broader themes as did our questions about the other canons. In particular, the centrality of the committee system, the importance of the legislative process, and the relevance of personal factors about different drafters came to the fore. In addition, it was in this series of questions that a new theme—the *significance of the nonpartisan congressional drafters in the Offices of Legislative Counsel*—began to emerge.

#### A. *Legislative History-Specific Delegation Concerns About Staff and Committees Appear Unfounded*

A real-world look into the drafting process undermines the constitutional case against legislative history. As Nourse and Schacter's study illustrated, legislative history is not the only product of the legislative process that is drafted mostly by staff. Nourse and Schacter found that enacted text also is drafted mostly, if not entirely, by staff rather than by members.<sup>219</sup> This nondelegation-based argument, then, as Nourse and Schacter argued, seems based on a distinction without a difference. Our respondents' answers deepen that observation in several ways.

First, our findings suggest that, if anything, the staffers who draft legislative history may be tied more closely to elected members than the staffers who

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218. Sixty-eight percent of our Legislative Counsel respondents told us that legislative history was a useful tool for statutory drafters, *see* Q59, and 79% of our Legislative Counsel respondents told us that legislative history was a useful tool for courts seeking to determine what Congress intended, *see* Q68.

219. Nourse & Schacter, *supra* note 10, at 585. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 27 (5th ed. 2001) argues that senators rely more on their staffs than House members because senators are more "generalist" legislators, but our study did not elicit that distinction. *See* Q62; Q63.

draft statutory text. As we elaborate in the companion Article, our respondents repeatedly suggested (this point was volunteered more than sixty times throughout the survey) that a great deal of actual statutory language is drafted by the professional, nonpartisan drafters in the Offices of Legislative Counsel, and not by committee staff or staff who work for individual members. Ordinary staff may devise the policy concepts, or broad outlines, or “bullet points,” but the Legislative Counsels typically turn those ideas into statutory text.

Moreover, it appears to be the case that ordinary staff generally *do* draft legislative history, and not the Offices of Legislative Counsel.<sup>220</sup> This means that it is the legislative history, much more than the text, that is most likely drafted by staff who are accountable to elected members. Our respondents also emphasized that ordinary staff, and not Legislative Counsel staffers, are the subject-matter experts. These findings suggest another important disconnect that may be relevant to the debate over legislative history: legislative history appears to be drafted by staffers with more *subject-matter expertise* than the professional staffers who often draft statutory text.

Second, although it is true that legislative history is not formally voted upon by all members of Congress, some respondents told us that members 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.<sup>221</sup> To press this point, we note a little-known fact shared with us by our respondents: in a number of committees, including the Senate Finance Committee and the House Budget Committee, *statutory text is never actually voted on*. Rather, those committee members vote based on a “conceptual” document—a form of legislative history—that describes in layman’s terms what the statute is trying to do.<sup>222</sup> It is based on that conceptual document—and not on legislative language—that the committee reports out the bill to the rest of Congress. Of course, when Congress ultimately votes, it votes on the text; but as political science literature has illustrated, members of Congress often defer to the committee vote as a proxy for doing their own in-depth research.<sup>223</sup> As such, the

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220. The legislative history of appropriations legislation offers an intriguing and important exception. See *infra* note 275 and accompanying text.

221. Q83; accord James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 28 (1994) (quoting members of Congress on the “importance of committee reports to their own understanding of statutory text”).

222. Eight respondents made this point, after which we confirmed it with several of our respondents on those committees via confidential e-mails. For examples of the Finance Committee markup documents, see Search for Senate Finance Committee Markups, U.S. SENATE COMMITTEE ON FIN., <http://www.finance.senate.gov/legislation> (last visited May 2, 2013) (search for “markup”).

223. See OLESZEK, *supra* note 219, at 88 (arguing that members generally “defer[] to the committee’s decisions” because “[c]ommittee members and their staffs have a high de-

fact that at least some committees appear to rely extensively on legislative history in their own voting processes undermines the emphasis that formalists place on the ultimate vote on the text of the statute.

Third, it is evident that the other kind of nondelegation argument that has been made—raising concerns about delegations of lawmaking authority to the committees—likewise applies equally to text. Our respondents made clear that committees play a central role not only in drafting legislative history, but also in formulating statutory policy and, along with the Offices of Legislative Counsel, in drafting most statutory text.

If our findings are generalizable, then the textualists' constitutional argument boils down to a very spare formalism. Enacted text becomes the only source that courts may consider not because it is the source least likely to be delegated away from elected members, or because it is the document on which members rely when they cast their votes, or because it is a more "reliable" document—that is, protected from intervention by the "sneaky staffer." Nor do our findings comport with another functional, delegation-based argument, namely, that judicial reliance on legislative history encourages law elaboration outside of the formal, constitutionally prescribed process.<sup>224</sup> As discussed below, our findings indicate that judicial resistance to legislative history consultation is unlikely to prevent Congress's production of and reliance on it.

What seems to remain is the argument that enacted text derives its relevance for judges from the sole reason that the text is what is being voted upon by all members. Textualists tend to ground this argument in theories of accountability—that it is fair to hold members accountable for that on which they vote—but in reality, members may not be basing their votes on the text. Concerns about judicial competence may offer a better justification—a clear line may be needed because the legislative process is too messy for legal doctrine to capture—but this rationale is rarely pressed into service to carry the entire weight of textualism's defense.

We note again a particular irony of this debate. If one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the *last* theory one would construct. Our respondents emphasized that members participate in drafting only at a high level of generality and rarely at the granular level of text itself. It is a different question, and one that our study cannot shed light upon, whether members actually would want courts to interpret statutes in ways that reflect member participation. Members might prefer a text-based interpretive approach for reasons that are unconnected to the level of attention that members themselves give to statutory text.

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gree of expertise on the subjects within their jurisdiction, and a bill comes under its sharpest congressional scrutiny at the committee stage").

224. Eskridge, *supra* note 88, at 677; Manning, *supra* note 215, at 706.

B. *A Textualist Approach Is Not Likely to Diminish the Production or Importance of Legislative History Because Legislative History Plays Many Other Roles*

On a pragmatic level, textualists long have presented “textualism as the cure for what ails the legislative process.”<sup>225</sup> A main target of this “cure” has been to convince Congress to put critical legislative details in the statutory text and not in the legislative history. In Part II, we discussed some obstacles to the possibility that textual and substantive canons might have their intended effects on the legislative process. This possibility seems even more unlikely in the context of interpretive methods designed to diminish congressional reliance on legislative history.

Our respondents’ view of many of the textual and substantive canons was quite court-centric. For example, the vast majority of respondents who provided additional comments on those questions told us that the canons were useful only if Congress also used them or if courts applied them consistently.<sup>226</sup> No respondent mentioned those same concerns with respect to legislative history. Instead, they corroborated what several scholars have previously argued<sup>227</sup>: that legislative history serves a wide variety of roles in addition to guiding judicial interpretation, an observation that strongly suggests that legislative history would be utilized by drafters regardless of judicial consideration or criticism of it.<sup>228</sup>

More than 90% of our respondents confirmed the conventional judicial and scholarly assumptions that legislative history is used by drafters to explain the purpose of the statute, to indicate the meaning of particular statutory terms, and to influence judicial interpretation of statutory ambiguities and contested terms.<sup>229</sup> More than 77% of respondents also confirmed other conventional explanations, including that the purpose of legislative history is to indicate a disagreement over the meaning of terms or to shape the way courts apply the statute to unforeseeable future developments.<sup>230</sup> As the following Figure illustrates, however, in addition to courts—and often apparently more important than

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225. Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 898 (2000).

226. Q48; Q67.

227. See Katzmann, *supra* note 53, at 659-60; sources cited *supra* note 98.

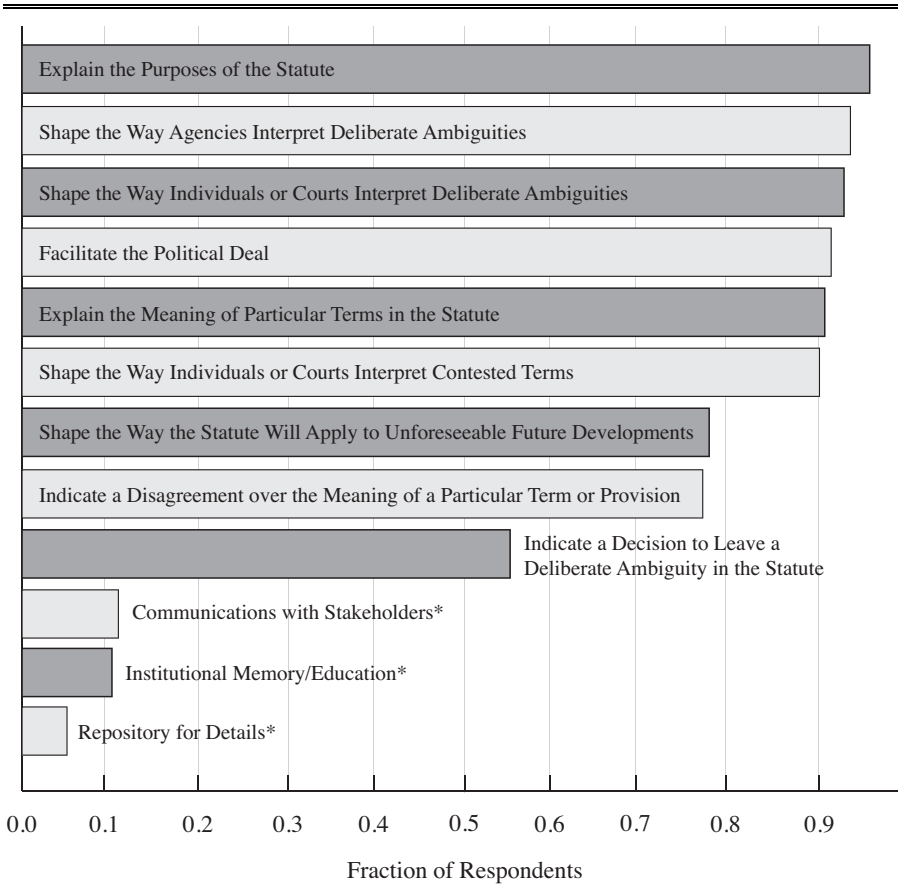
228. As in the Nourse and Schacter study, we found that many of our respondents were aware of Justice Scalia’s distaste for legislative history, but that the critique had little real-world impact on reducing the production of it, at least in part because it serves so many functions apart from influencing judicial interpretation. See Nourse & Schacter, *supra* note 10, at 607; *cf.*, e.g., Q61 (“Justice Scalia needs to recognize that not every person dealing with legislative history is a complete buffoon or an idiot.”).

229. Q60a-b, g, i.

230. Q60c, h.

courts—our respondents emphasized the many other relevant audiences for legislative history.<sup>231</sup>

FIGURE 7  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Legislative Drafters’ Perceptions of the Purposes of Legislative History



Source: Q60.

\* Comments raised by respondents.

231. *Accord* Brudney, *supra* note 221, at 55-56 (noting that committee reports are directed at members of Congress and their staffs, regulated entities, agencies, and courts).

1. *Legislative history as a tool for congressional oversight of agencies*

First and foremost, our respondents singled out *agencies* as a key audience for legislative history. Of our respondents, 94% told us that the purpose of legislative history is to shape the way that agencies interpret statutes.<sup>232</sup> Similarly, in response to another question in a different part of the survey about what, if any, strategies drafters employ to influence interpretation of statutory ambiguities after enactment, 21% told us that they use legislative history to influence agency implementation in this manner.<sup>233</sup> Indeed, our respondents often conflated what most scholars would call traditional legislative “oversight” mechanisms, such as letters to agencies, with the use of legislative history. They offered the following types of explanations: “We use everything from floor statements to letters to the agency—members know how to communicate with agencies and make their policy preferences known”; “make extensive comments on regs, have hearings, write committee reports”; or “influence the agency either with letters to the agency, a lot of legislative history when the bill is being passed, or calls to agencies.”<sup>234</sup>

2. *Legislative history as intracongressional communication*

A second important audience for legislative history is other members and staffers. This form of communication, however, seems to take many forms of differing utility. For example, 92% of respondents told us that legislative history is often used to facilitate a political deal<sup>235</sup> or to assure other members that the bill means what they want it to mean. This type of legislative history may be less reliable than others. As one respondent stated, “you have a colloquy to get a member off the fence, reassure the member it means what they think it means. People will say anything at that point and not worry about the interpretive consequences to get the vote.”<sup>236</sup>

But 10% of our respondents also volunteered that legislative history is used more sincerely by staffers and members to explain, in layman’s terms, what the bill does. There, it serves as a simplifying and educational tool. As one Senate staffer put it, “If something comes to you [from the House], first thing you do is look at the House legislative history.”<sup>237</sup> Another emphasized:

Members don’t read text. Most committee staff don’t read text. Everyone else is working off [the section-by-section] summaries [in the legislative history].

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232. Q60f.

233. Q57.

234. *Id.*

235. Q60e.

236. Q63.

237. Q59.



In a world of Justice Scalia where everyone works off text, the legislative history is really important, too. The very best members don't even read the text, they all just read summaries.<sup>238</sup>

Similarly, these respondents emphasized that legislative history plays an important *institutional memory* role when staffers amend older legislation or draft legislation similar to earlier laws, as they often do. Legislative history, we were told, is an essential way for staffers to learn about previous related legislative efforts, particularly given the high rate of turnover among congressional staff and also the relative youth and inexperience of many drafters. To quote two respondents: “[It’s] one of the things that worried me most about high turnover of staff. We need the history to know how to understand the past”;<sup>239</sup> and “If you are reauthorizing a program, it’s useful to look back at the old legislative history to get a sense of it.”<sup>240</sup>

### 3. *Legislative history as political communication with the public*

Third, 11% of our respondents volunteered that legislative history is sometimes used as a means of communicating to constituents or important interest groups.<sup>241</sup> This use of legislative history takes at least two different forms, both to include “something we couldn’t get in the statute” in order “to make key stakeholders happy,”<sup>242</sup> and also “it’s the only opportunity that members of Congress have to lobby the various interested parties external to Congress—you are setting up your reelection platform each time you make a floor speech”; “They are creating a record for themselves, it’s not just for legislation.”<sup>243</sup> This type of legislative history was viewed to be less reliable as evidence of the congressional deal or statutory meaning because it is essentially “political” or “campaign speech,” as several respondents put it.<sup>244</sup>

### 4. *Legislative history as a vehicle for details that are inappropriate for statutory text*

Fourth, 6% of our respondents volunteered that legislative history is a crucial repository for legislative details that could not—or more interestingly, should not—be included in the statutory text. Some of this story is the conven-

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238. Q83.

239. Q59.

240. *Id.*

241. Q60.

242. *Id.*

243. *Id.*

244. *Id.* These findings comport with some recent scholarship about how Congress communicates. See Boudreau et al., *supra* note 98, at 970; Nourse, *supra* note 98, at 1131-34.

tional one: the political difficulties of reaching compromise prevent the resolution of all statutory questions. But another aspect of this story seems new: namely, twenty-one different respondents (15%) volunteered multiple times throughout the survey (in response to this question and elsewhere) that there is a level of important legislation-related detail that is simply inappropriate for statutory text. In these situations, we were told, it is not the case that drafters do not *know* what details they wish to legislate, and it is not the case that politics prevents them from agreeing on those details. Nor is it always the case that drafters want the agency or courts to fill in the details.

Rather, in these situations, decisions to omit details from enacted text, our respondents told us, are motivated by a perception of what modern statutory language “should look like” and, relatedly, how much detail statutory text is supposed to have. For example, they told us that legislative history is often necessary “to clarify and signal intent in areas where legislative drafting is obtuse. Often the way you have to draft, it becomes hard to indicate the goal of the provision”;<sup>245</sup> or “what you can’t write in the statute you put into the report—things like little examples of this is what we mean”;<sup>246</sup> or “the legislative history also puts meat on the bones. You can’t be too prescriptive in legislation; it’s a storage place for things that would make legislation too bulky.”<sup>247</sup> In other words, the textualists’ ideal—a statute that contains all of the relevant deals and details—is not a goal that our respondents shared or even thought appropriate.

Understanding that at least some legislative history plays this role of including the details of which Congress is aware but does not think belong in statutory language suggests that legislative history is even more integral to the drafting process than even its proponents acknowledge. Moreover, like the other factors already discussed, our respondents emphasized this role for legislative history without mentioning or evincing any concern about how the statutes would be interpreted on the back end by courts. As in the case of our other related findings, this one does not bode well for textualists’ arguments that their approach will change drafting behavior.

### C. *Legislative History as Evidence of Congressional Intent*

The third major debate about legislative history, as noted, has been over legislative history’s reliability—both in the sense that discerning intent from

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245. Q60.

246. *Id.*

247. *Id.* This is a slightly different point from that suggested by other scholars who have previously thought about the level of detail in text versus history. See, e.g., Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1509-10 (2000) (arguing that putting clarifying language in legislative history obviates the risk that additional statutory text would create more ambiguity).

the actions of a multimember body has been argued to be impossible<sup>248</sup> and also with regard to how courts might distinguish between a dishonest staffer's or "losers'"<sup>249</sup> legislative history and legislative history that actually does reflect the political deal that was made.

These concerns find mixed support from our respondents. Legislative history was clearly the most valued interpretive tool. Of our 137 respondents, 109 (80%) said that they drafted legislative history and all but four of the remaining twenty-eight were Legislative Counsels, who do not generally draft legislative history.<sup>250</sup> Eighty-seven percent said that legislative history is a useful tool in the drafting process.<sup>251</sup> Moreover, 92% said that legislative history is a useful tool for *courts* to consider if the judge's goal is to determine legislative intent.<sup>252</sup>

We also asked our respondents to compare the utility of all of the different canons for courts seeking to determine congressional intent.<sup>253</sup> Critically, legislative history scored above both the textual and substantive canons, with roughly 70% of respondents stating that courts should use those canons when determining congressional intent, compared to 92% favoring legislative history.<sup>254</sup> (The agency deference doctrines had a higher degree of approval (83%) than the other canons.)<sup>255</sup> Our respondents emphasized that, apart from text, legislative history was the most important interpretive resource.<sup>256</sup> As one put it: "Legislative history—you have to look at it if you know how this place works."<sup>257</sup> Our respondents' answers to all of these different questions seem to undermine the kinds of conclusory arguments that critics often make about legislative history's lack of pragmatic utility.

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248. Compare, e.g., Shepsle, *supra* note 46 (arguing that it is "fruitless to attribute intent to the product of [Congress's] collective efforts"), with BREYER, *supra* note 19, at 99 ("It is not conceptually difficult, however, to attribute a purpose to a corporate body such as Congress. Corporations, companies, partnerships, . . . and legislatures engage in intentional activities . . .").

249. *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); cf. *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment) (noting "[w]hat a heady feeling it must be for a young staffer" to be able to change the meaning of a statute by inserting legislative history into the record).

250. Q58.

251. Q59.

252. Q68b.

253. *Id.*

254. Q68a-b.

255. Q68d.

256. Specifically, thirty-four respondents said either that legislative history was essential regardless of text (seventeen respondents); that it should be consulted first after text (nine respondents); or that it should be consulted after text perhaps along with other evidence (ten respondents). Two of these respondents said both that it was essential and should be consulted after text. Q77A.

257. Q68.

At the same time, our respondents were more discerning about their reliance on legislative history than many lawyers and judges seem to be. Federal courts occasionally have attempted to identify certain types of legislative history as more reliable than others, although this has not been a consistent effort.<sup>258</sup> Our respondents, however, differentiated significantly among types of legislative history based on a variety of factors, ranging from the form of legislative history at issue to the type of statute at issue, the identity of the speaker, and the timing—and many respondents differentiated among these sources in the same way.

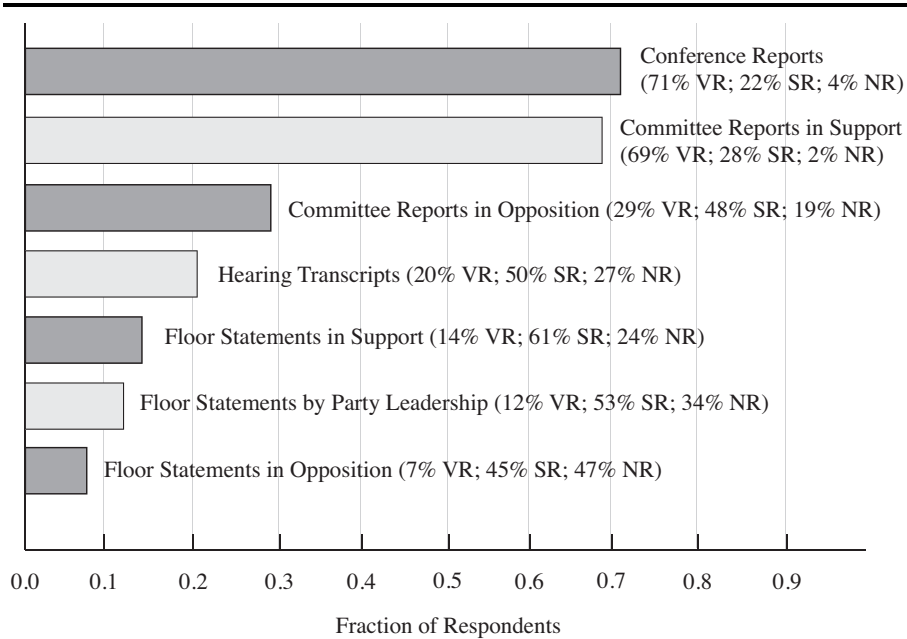
### 1. *The centrality of committee-produced legislative history*

The following Figure indicates how our respondents would rank different types of legislative history, on a scale of very reliable, somewhat reliable, or not reliable:

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258. For pronouncements on the particular reliability of sponsor statements, see *Corley v. United States*, 556 U.S. 303, 318 (2009) (“[A] sponsor’s statement to the full Senate carries considerable weight . . . .”); *Pub. Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 190 (1989) (Marshall, J., dissenting) (quoting *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976)); and *Cnty. of Washington v. Gunther*, 452 U.S. 161, 187 n.2 (1981) (Rehnquist, J., dissenting) (quoting *Algonquin SNG*, 426 U.S. at 564). *Cf.* *Bankamerica Corp. v. United States*, 462 U.S. 122, 145 (1983) (White, J., dissenting) (construing text “[i]n light of the statements of the men most familiar with the circumstances surrounding the addition” of that text). For statements about the reliability of committee and conference reports, see *Garcia v. United States*, 469 U.S. 70, 76 (1984) (remarking that “Committee Reports are ‘more authoritative’ than comments from the floor” (quoting *United States v. O’Brien*, 391 U.S. 367, 385 (1968))); *Simpson v. United States*, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting) (“The report of a joint conference committee of both Houses of Congress, for example, or the report of a Senate or a House committee, is accorded a good deal more weight than the remarks even of the sponsor of a particular portion of a bill on the floor of the chamber.”); and *United States v. UAW*, 352 U.S. 567, 585-86 (1957). For statements on the lesser reliability of opponents’ statements, see *Bryan v. United States*, 524 U.S. 184, 196 (1998); and *Shell Oil Co. v. Iowa Dep’t of Revenue*, 488 U.S. 19, 29 (1988). For statements that the Court gives little weight to subsequent legislative history, see *Barber v. Thomas*, 130 S. Ct. 2499, 2507 (2010) (“And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law.”); *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007); and *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995). *See also* Eskridge, *supra* note 88, at 636 (arguing that the Court applies a de facto hierarchy of legislative history).

FIGURE 8  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Reliability of Different Types of Legislative History



Sources: Q61a-g.

Bar charts reflect percentage of respondents answering “Very Reliable.” Percentages may not add up to 100% because of rounding and respondents indicating “Don’t know/abstain.”

VR: Percentage of respondents indicating “Very Reliable.”

SR: Percentage of respondents indicating “Somewhat Reliable.”

NR: Percentage of respondents indicating “Not Reliable.”

By far, the types of legislative history viewed as most reliable were committee reports and conference reports in support of the statute.<sup>259</sup> Fifty-nine percent of our respondents singled out both types of reports as very reliable sources for legislators to consider, and 80% mentioned at least one.<sup>260</sup> Floor statements by members opposed to the statute were viewed as least reliable.<sup>261</sup>

259. Q61d, f; Q62d, f.

260. Q61d, f. When asked whether these types of legislative history were also very reliable for courts or agencies (and not just legislators, as the previous question had inquired), those numbers were 57% (one type of report) and 77% (both types of reports), respectively.

261. Q61b; Q62b.

Our respondents were especially reluctant to endorse legislative history created outside of the committee system, by party leaders, or otherwise. Indeed, floor statements by party leadership in support of the statute were viewed as less reliable than floor statements in support by other members.<sup>262</sup>

These findings are of particular interest because they further drive home two prominent themes that we already have introduced: the relevance of committees to the drafting process and the extent to which different kinds of legislative processes affect how legislation is put together. With respect to the centrality of committees, fourteen (10%) of our respondents volunteered that floor statements by the committee chair or ranking member, or the legislation's sponsor, should be viewed as more reliable than other types of floor statements.<sup>263</sup> More generally, most respondents emphasized the reliability of the committee report over other pieces of legislative history.

It was our impression, but one that we cannot corroborate quantitatively, that the reason our respondents viewed committee and conference reports (as well as colloquies between committee chairpersons and ranking members of opposite parties, as discussed below) as particularly reliable is that they are viewed as evidence of a *shared consensus*. That is, unlike floor statements, which convey only a single member's opinion and which sometimes slip into the record unnoticed, these group-produced pieces of legislative history often convey bipartisan, multimember understandings, and disagreeing members typically will have the opportunity to respond to them. These reports also seem likely to have agencies and other members as at least part of their intended audiences—that is, they are more likely to have internal institutional and implementation-related functions. Group reports also are particularly unlikely to be focused on the reelection prospects of a single member.

There is an additional possible explanation, one relating to a potential bias among our respondents. It may be unsurprising that our respondents, as committee staff themselves, took a lesser view of legislation produced by party leaders outside of the committee process. Moreover, while political scientists have documented the concerns that our respondents raised about the lack of expertise and deliberation associated with legislation outside of committee,<sup>264</sup> scholars also have made arguments from the other side that our study did not capture. In particular, the notion that committee members use their expertise and gatekeeping power to pass legislation of interest only to a minority of members has been one argument for concentrating more power in the hands of leadership.<sup>265</sup>

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262. Q61a, c; Q62a, c.

263. Q61; Q64.

264. See generally SINCLAIR, *supra* note 48, at 266-68.

265. See generally Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85 (1987); Barry R. Weingast & William

2. *Unorthodox lawmaking's relevance: distinguishing party leader, omnibus, and appropriations legislative history*

The companion Article discusses in detail our respondents' views about how "unorthodox lawmaking"<sup>266</sup>—the development of legislation outside the committee process, often by party leadership using bundling vehicles like omnibus bills—affects the reliability of legislative history and drafting in general. For purposes of this discussion, and to paint a fuller picture of how our respondents distinguished among different types of legislative history, we summarize three of those findings.

First, our respondents characterized the statements of party leadership as nonexpert remarks by those having little to do with how the legislation was put together. They told us, for example, "they aren't on the committee, they didn't participate."<sup>267</sup> Party leaders' floor statements are relevant, we were told, "at times when it's useful to have the chair or the leadership on the floor to rally the troops but not necessarily to tell you what the statute means."<sup>268</sup>

Second, and with respect to the relevance of the legislative process, our respondents told us that statutes that do not go through committee but instead are shepherded through Congress by leadership have a different type of legislative history—lower quality and less transparent—and often less of it.<sup>269</sup>

Third, our respondents distinguished among categories of legislative history in different types of statutory vehicles. More than half of our respondents told us that legislative history plays a different role in (nonappropriations) omnibus legislation than in other kinds of statutes—specifically, that in the omnibus context, there is less legislative history, and what does exist is often "confused," typically because omnibus bills involve the "throwing together" of different bills from various committees.<sup>270</sup>

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J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 150-53 (1988).

266. See generally SINCLAIR, *supra* note 48.

267. Q61.

268. *Id.*

269. Q70.

270. Q72. Specifically, 51% said it played a different role, and an additional 7% who answered "other" or "true" offered comments to the same effect. We distinguish nonappropriations omnibus bills from appropriations bills because we inquired about them separately and also because our respondents distinguished them. Appropriations bills are typically drafted by various subcommittees of the larger Appropriations Committee, whereas other omnibus bills are often composed of many different bills, written by different committees, which are ultimately packaged together by leadership right before going to the floor—without the various committees necessarily expecting that result when they drafted the bills in the first place.

More than half of our respondents also emphasized that legislative history plays a special, and different, role in appropriations bills.<sup>271</sup> Forty-four respondents (32%) specifically explained that the purpose of the committee report in the appropriations context is essentially to *legislate*—that is, to direct where the money appropriated is going.<sup>272</sup> As such, they told us, legislative history “is much more important in appropriations than anything else: the descriptions of the projects are in the legislative history rather than in the bill.”<sup>273</sup>

Political scientists have likewise recognized the essentially legislative nature of appropriations legislative history. As Allen Schick has argued:

[The] report language is carefully crafted and sometimes is negotiated with the affected agency. The reports frequently use words such as assumes, notes, requests, expects, directs, and requires. These words are not synonymous—each has its own nuance and intent. However, even the most permissive words offer guidance that agencies do not lightly disregard.<sup>274</sup>

Indeed, one of the most striking pieces of evidence that we have of this difference is the role that Legislative Counsels play in the appropriations drafting process. Whereas almost all of the Legislative Counsels whom we interviewed told us that they do not draft legislative history—that is, they draft only the text to be enacted—the one exception, we were told, is the appropriations context. The Legislative Counsels assigned to appropriations legislation *do* draft the legislative history—a clear recognition of the text-like importance of legislative history in this unique context.<sup>275</sup>

Judges and theorists have not tended to focus on such distinctions across statutory vehicles. One important exception is Elizabeth Garrett’s argument for special rules of omnibus statutory interpretation, and our findings are consistent with many of her descriptive claims.<sup>276</sup> But the Supreme Court has not distinguished between omnibus and nonomnibus legislative history.<sup>277</sup> In those cases

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271. Q73.

272. *Id.*

273. *Id.*

274. ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 271 (3d ed. 2007).

275. Q58 (“Usually Legislative Counsel doesn’t, but appropriations is one area where there is a mark up to committee report and members offer amendments to committee reports—we help with those amendments.”).

276. Garrett, *supra* note 26, at 9-10. For further discussion of the link between Garrett’s work and our findings, see our companion Article. Bressman & Gluck, *supra* note 8.

277. A Westlaw search for “omnibus” in the Supreme Court database produced 220 cases. Apart from the occasional acknowledgement of a statute’s omnibus nature—see, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 498 (1999) (Stevens, J., concurring in the judgment) (noting that it was “not surprising” that a 750-page omnibus bill contained a scrivener’s error); *Perez v. Brownell*, 356 U.S. 44, 56 (1958) (noting that it was “not surprising” that certain provisions that “constituted but a small portion of a long omnibus nationality statute” received “little attention . . . in debate and hearings”)—the Court appears not to have distinguished between these and other types of statutes. We note a recent



in which the Court has noted that it was construing omnibus legislation, the Court still looked to legislative history for evidence and drew conclusions from its absence.<sup>278</sup>

And with respect to appropriations legislative history, the Court appears to apply precisely the opposite presumption as do congressional insiders and agencies: the Court gives particularly little credence to it.<sup>279</sup> Indeed, in one of the most famous statutory interpretation cases involving an appropriations statute, *Tennessee Valley Authority v. Hill*, the Court expressly relied on the fact that the relevant explanatory information was in the legislative history rather than in the text of the bill itself as a reason to disregard that information.<sup>280</sup>

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move that may indicate a change in this trend, although not relating to legislative history use. In the 2012 health reform decision, the joint dissent suggested a special new severability canon for omnibus legislation. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2675-76 (2012) (joint dissent).

278. *See, e.g.*, *Dixon v. United States*, 548 U.S. 1, 12-13 (2006) (construing the Omnibus Crime Control and Safe Streets Act and noting, “[t]here is no evidence in the Act’s structure or history that Congress actually considered the question”); *United States v. Gonzales*, 520 U.S. 1, 13 (1997) (Stevens, J., dissenting) (construing Omnibus Crime Control Act of 1970 and noting that if Congress had intended a particular result, “I think there would have been some mention of this important change in the legislative history”); *Lukhard v. Reed*, 481 U.S. 368, 384-85 (1987) (Powell, J., dissenting) (construing the Omnibus Budget Reconciliation Act of 1981 and noting that “neither the language . . . nor its legislative history indicates that Congress intended to change the meaning of ‘income’” (quoting Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 15, *Lukhard*, 481 U.S. 368 (No. 85-1358), 1986 WL 727449) (some internal quotation marks omitted)).

279. *See, e.g.*, *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 608 n.7 (2007) (plurality opinion) (“[A] fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, . . . indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.” (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)) (internal quotation marks omitted)); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978) (“Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . .”). A Westlaw search of the term “appropriation!” within the same sentence as any one of “legislative history,” “Senate report,” “House report,” “committee report,” “conference committee,” and “floor debate” in the Supreme Court database produced seven opinions decided since 2000, five of which were apposite. Four treated appropriations legislative history in this same manner. *See Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194 (2012); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011); *Hein*, 551 U.S. at 608 n.7; *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 644, 646 (2005). One result, *Salazar v. Buono*, 130 S. Ct. 1803, 1840 (2010) (Stevens, J., dissenting), focused on the lack of evidence of congressional deliberation in the legislative record for provisions “buried in a defense appropriations bill.”

280. 437 U.S. at 189 (“In support of [its] view, TVA points to the statements found in various House and Senate Appropriations Committees’ Reports; . . . those Reports generally reflected the attitude of the *Committees* either that the Act did not apply to Tellico or that the dam should be completed regardless of the provisions of the Act. . . . There is nothing in the

But, as recently noted by Nourse, the internal rules of both houses of Congress prohibit the inclusion of substantive legislative language in appropriations statutory text, apart from the designation of dollar amounts. Nourse's rule-based account was corroborated by our respondents' emphasis on the fact that legislative history is where the meat of the appropriating work is done. Our respondents told us repeatedly that the text in appropriations statutes plays "a different role. The bill is just a bunch of numbers."<sup>281</sup> In cases like *Tennessee Valley Authority*, there was no other place for Congress to express its intent apart from the legislative history that the Court refused to rely upon.<sup>282</sup>

3. *Other factors: staffer involvement, timing, opposition, and centrality to the bargain*

We also asked respondents about a number of other factors that courts or scholars have raised as relevant to the reliability of legislative history. These factors included:

- how many members of Congress actually read or heard the relevant legislative history;
- whether the legislative history was drafted by a staffer as opposed to drafted (or delivered orally) by a member;
- the timing of the legislative history relative to the day the legislation passed;
- whether the statement or report favored or opposed the legislation; and
- whether the statement in the legislative history was essential to the sealing of the political deal.

The following Figure indicates their responses:

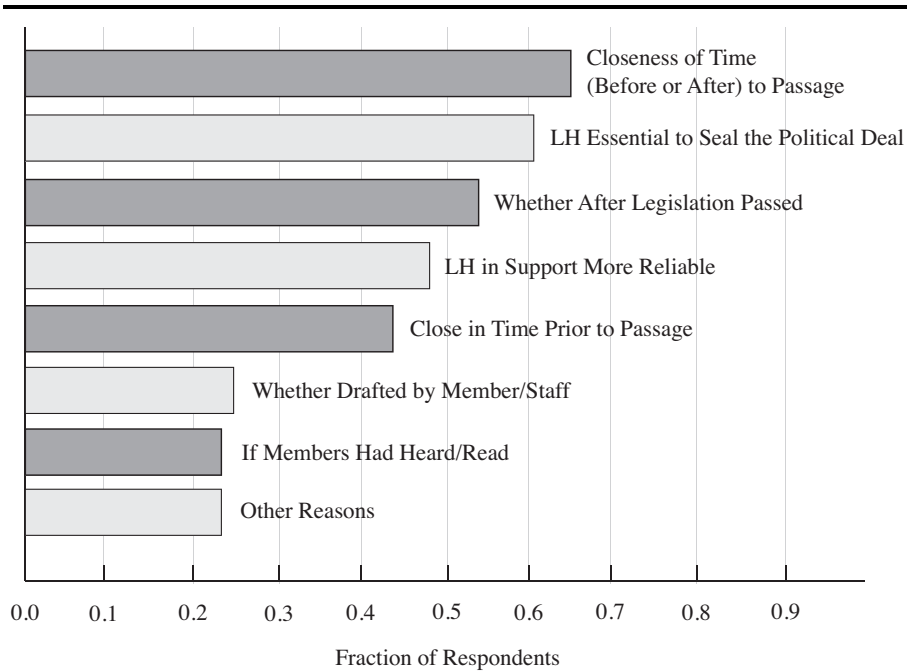
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appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act.”).

281. Q78.

282. See Nourse, *supra* note 101, at 133. Congress might have good reasons for not wanting judicial doctrine aligned with its practice (including the fact that substantive legislation is not supposed to be done through appropriations); our goal is simply to raise the question. Schick argues that Congress uses legislative history to direct agency spending in order to give agencies as much flexibility as possible with the use of those funds. SCHICK, *supra* note 274, at 271. On such a theory, Congress might not want courts to strictly enforce statements in appropriations legislative history. Thanks to Nick Parrillo for this insight.

FIGURE 9  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Legislative Drafters' Perception of Factors That Affect the  
 Reliability of Legislative History



Source: Q63a-g.

a. *Staff drafts everything but is not unaccountable*

As the Figure illustrates, more than 100 of our respondents found irrelevant how many members heard or read the legislative history or whether it was drafted by a staffer as opposed to a member.<sup>283</sup> Respondents explained their answers along these lines: “Everything staff does members approve, and everything members say is written by staff.”<sup>284</sup> The relevance of staff to the drafting process has been pointed out by others, including by Nourse and Schacter.<sup>285</sup> We pause on it here only to note how absolutely prevalent it is and to point out that congressional insiders do not share the same concerns about the “sneaky staffer” that some judges and theorists emphasize. Our respondents underscored

283. Q63a-b.

284. Q63.

285. Nourse & Schacter, *supra* note 10, at 585.

their accountability to their bosses and made comments to the effect that their jobs depend on effectuating their members' goals. As one put it, "we understand that staff is writing the report and that staff don't keep their jobs if they disagree with members."<sup>286</sup>

b. *Timing affects the reliability of legislative history*

Our respondents also emphasized that there is a window of time in which legislative history is most reliable. That window is important, they told us, because *legislation changes*: "[T]he version introduced is wildly different than the one passed because there is rarely a bill that isn't amended."<sup>287</sup> For this reason, 65% of our respondents told us that there is a period of time around passage—both before *and after* passage—during which legislative history is most reliable because it reflects the version actually passed.<sup>288</sup> Here, too, some respondents noted that, although committee reports are often the most reliable legislative history, they are not reliable when the bill has changed substantially on the floor. In that case, floor statements are more reliable.

This series of responses also implicates the debate over subsequent legislative history—legislative history that is produced after the statute has passed—which courts rarely consider.<sup>289</sup> Some of our respondents told us that subsequent legislative history can be reliable. They explained that "often it comes out after because the same people drafting the legislative history are the ones drafting the bill and they didn't have time";<sup>290</sup> other respondents stated that the legislative history that comes out subsequent to passage is more reliable "because then it's not about getting it through anymore"<sup>291</sup> (a statement that itself evinces the potential unreliability of preenactment legislative history). But these respondents also emphasized that it must be relatively close to the date of passage: "A really long delay is fishy."<sup>292</sup>

These findings seem to corroborate and perhaps extend Nourse's recent argument that legislative history should be evaluated temporally in relation to the key "textual decision" rather than in "a de facto hierarchy."<sup>293</sup> Nourse argues that legislative history should be evaluated in reverse sequential order ("one

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286. Q63.

287. *Id.*

288. *Id.* These respondents mentioned either right before passage, right after, or both as the window of time when legislative history was reliable. Forty percent of respondents mentioned that there was a window both before and after passage.

289. See ESKRIDGE ET AL., *supra* note 69, at 1040.

290. Q63.

291. *Id.*

292. *Id.*

293. Nourse, *supra* note 101, at 109-10.

should always start by looking for the last textual decisionmaking point”)<sup>294</sup> and that one should give most weight to a statement “most proximate to text.”<sup>295</sup> Nourse emphasizes committee reports, conference reports, and postcloture debates.<sup>296</sup> Our respondents raised the additional possibility that postenactment statements delivered close to the statute’s passage may be useful. They also emphasized, as Nourse does not, how increasingly frequent departures from the textbook legislative process may make discerning the critical moment more difficult than it appears.

The findings also support our observation about the *expertise-based* justification for legislative history consultation. Many of our respondents’ explanations of why subsequent legislative history can be reliable turned on the fact that such legislative history is often drafted by the policy experts who really understand the bill and in some cases drafted it themselves. The resulting legislative history may be drafted late in the process, they said, because those most expert staffers were focused on finalizing the bill. This expertise-based justification is a slightly different one from the typical argument that legislative history should be consulted because it is the source most members and staff rely upon in deciding how to vote. The expertise-based justification also turns on the identity of the legislative history *drafter*.

Our respondents were mostly divided with respect to the influence of the other factors about which we inquired, with the exception of whether the fact that the legislative history was essential to the “deal” affected its reliability. Sixty-one percent of respondents said that it did, but their explanations were split, with some saying that this factor made the legislative history more reliable, others less.<sup>297</sup> A number of respondents also commented that, even if this factor matters, it can be virtually impossible to discern the political deal within the legislative history.<sup>298</sup>

*c. Additional considerations volunteered by our respondents: personal and reputational factors, colloquies, and markups*

Our respondents also volunteered a host of other factors relevant to evaluating legislative history about which we had not inquired and that, to our knowledge, courts rarely consider. We highlight three here:

*Personal or reputational information.* As noted, throughout the survey, respondents emphasized that “inside information” that may be unknowable to courts or litigants often affects how statutory text is viewed by staff and mem-

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294. *Id.* at 98.

295. *Id.* at 110.

296. *Id.* at 98.

297. Q63f.

298. *Id.*

bers of Congress. In the context of legislative history, seventeen respondents (13%) commented that the identity, age, or experience of the staffer affects how his or her legislative history is perceived.<sup>299</sup> Some staffers or members, we were told, are known as experts in particular subject matter areas; others have reputations for being particularly trustworthy or particularly untrustworthy with respect to their use of legislative history (e.g., “Some members are notorious for inserting sneaky comments in”<sup>300</sup>). Also relevant was the staffer’s level of experience. As one respondent remarked: “You are looking for a certain indication that professionals have touched the legislative history that makes it reliable. There’s a big difference between knowing a twenty-three-year-old wrote something and a chair of an important subcommittee submitting a twenty-five-page well-researched report.”<sup>301</sup>

*The importance of colloquies and markups.* Many respondents also repeatedly mentioned two types of legislative history, neither of which we had inquired about, as especially important: colloquies (scripted on-the-floor conversations) and committee markups (the process that committees use to debate and amend proposed legislation).<sup>302</sup> Twenty-six respondents (19%) volunteered information about colloquies, and thirty-three (24%) mentioned the markup as an important stage of the legislative process, with 9% specifically mentioning it as critical legislative history.

Colloquies have not been highly regarded by courts, and are usually treated like floor statements—as legislative history of little value.<sup>303</sup> But our respondents distinguished between different types of colloquies, treating them differently from floor statements and noting that some were especially useful and reliable. In particular, they singled out “staged” colloquies between the chair and ranking member of the committee as reliably indicating the common understanding on both sides.<sup>304</sup> We note that commentators sometimes assume the opposite: namely, that they infer *unreliability* from the scripted nature of a colloquy.<sup>305</sup> But our respondents were not bothered by the staged aspect. They

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299. This figure was computed using relevant comments from Q63, plus coded comments elsewhere in the survey that referenced such factors in the context of legislative history.

300. Q63.

301. *Id.*

302. *See Markup*, U.S. SENATE, [http://www.senate.gov/reference/glossary\\_term/markup.htm](http://www.senate.gov/reference/glossary_term/markup.htm) (last visited May 2, 2013).

303. A search of Supreme Court cases shows that the Court has cited only five colloquies since 2000, and usually the Court is reluctant to rely upon them. *See, e.g.*, *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 598-99 (2004) (rejecting reliance on a colloquy despite the fact that it included the legislation’s sponsor); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 456-57 (2002) (same).

304. Q57.

305. WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 308 (2d ed. 2006) (discussing the risk that “interest groups will seek to plant friendly com-

told us, for example: “Members will orchestrate this bizarre kabuki they call a colloquy. This has been the most important avenue to get instruction to courts and agencies. It’s very reliable if it’s someone involved with the bill”;<sup>306</sup> or “colloquies are very revealing because they are things people have been struggling to work out. They have a lot of truth.”<sup>307</sup> Others described the colloquy as “a way of solving a problem: we will write it this way and do a colloquy on the floor to get to a compromise.”<sup>308</sup>

Less reliable colloquies, in our respondents’ opinions, were those colloquies inserted into the record without notice, or not including committee leadership or members on both sides of an issue or from both parties.<sup>309</sup> This distinction furthers our intuition that legislative history that is evidence of a shared consensus seems most reliable to our drafters.

With respect to markups, we were often told they were evidence of the committee’s deliberations in action. We were told, for example: “The markup is most significant: that’s where you are talking about meaning of particular words”;<sup>310</sup> or “if you want to see how legislation works, go to a markup. It’s where the rubber hits the road. Where representatives actually negotiate the details.”<sup>311</sup> The Supreme Court appears to have cited to a committee markup only seven times in its entire history,<sup>312</sup> three of which were within the last ten years. Of those three times, the markup was cited positively by the majority in each case.<sup>313</sup>

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ments in the reports and induce their legislative allies to engage in planned colloquies that reflect a slanted understanding of the statute”); William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1314 (1959); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 342 (1990).

306. Q61.

307. Q64.

308. Q59.

309. One of the few colloquies discussed at length in a Supreme Court case, the colloquy between Senators Kyl and Graham referred to in *Hamdan v. Rumsfeld*, was singled out by some respondents as an example of the unreliable type. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 580 n.10 (2006) (noting that “those statements appear to have been inserted into the Congressional Record *after* the Senate debate”).

310. Q60.

311. Q83.

312. Based on a search of Westlaw’s Supreme Court database for “markup,” “mark-up,” or “mark up.”

313. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1619 n.14 (2010); *Virginia v. Maryland*, 540 U.S. 56, 78 (2003). *But see Jerman*, 130 S. Ct. at 1627 (Scalia, J., concurring in part and concurring in the judgment) (“Is the conscientious attorney really expected to dig out such mini-nuggets of ‘congressional intent’ from floor remarks, committee hearings, committee markups, and committee reports covering many different bills over many years? When the Court addresses such far-afield legislative history merely ‘for the sake of com-

Markups are not readily available to the public, and the difficulty of accessing them may explain their limited use in litigation. This is something Congress itself could easily fix, and would be a way for Congress to incentivize outside interpreters to look to those materials that drafters themselves find most reliable.<sup>314</sup>

#### D. *Conclusion: Smarter Judicial Use of Legislative History*

If generalizable, our findings certainly do not simplify the debate over judicial use of legislative history. They may, however, alter the terrain. Certain nondelegation arguments—in particular, those concerned with the heightened role of staffers and committees in legislative history drafting—seem particularly unworthy of more energy, given that text seems susceptible to the same (if not greater) concerns. Also deserving of retirement are, again, what are effectively “due process of lawmaking” arguments<sup>315</sup>: the idea that judicial choice of statutory interpretation methodology will have a salutatory effect on the legislative process. Textualism is unlikely to have an effect on the production of legislative history or congressional, agency, or stakeholder reliance on it. In the language of the typology that we introduced in Part II, a canon that prevents consultation of legislative history would surely be a *rejected canon* by our respondents.

Faithful agency, on the other hand, does provide a helpful lens through which to view our findings. If drafters rely on certain types of legislative history but not others, faithful-agent judges need an account that explains their willingness to diverge from that practice themselves—when they either ignore legislative history altogether or fail to distinguish among different types of legislative history as drafters do. Purposivists have offered no such account for overlooking how drafters themselves view different types of legislative history. (For this reason, the purposivists’ approach to legislative history is not a perfect *approximation canon* either.)<sup>316</sup> Textualists have, indeed, offered a reason for

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pletteness,’ it encourages and indeed prescribes such wasteful over-lawyering.” (citation omitted)).

314. Judge Patricia Wald noted this problem three decades ago. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 202 (1983) (“[S]ome of the more diffused, less critical parts of the process—hearings and debates—are transcribed . . . for later use by the courts; some of the chief moments of decision—committee markups and conference committee proceedings—are not.”).

315. See *supra* note 193 and accompanying text.

316. Nourse has made a similar point about purposivists in her argument that judges should pay more attention to the internal, formalized rules of Congress. Nourse, *supra* note 101, at 87 (arguing that purposivists “are as oblivious of congressional rules as are textualists” and so do not use legislative history well or correctly).



ignoring legislative history—a constitutional argument that arguably trumps drafter practice. But our findings undermine that constitutional critique.

That leaves matters, then, in more pragmatic territory. Our findings offer the first empirical support for what many scholars like James Brudney long have argued: that the real question about legislative history is not whether it should be consulted but, rather, how to separate the useful from the misleading.<sup>317</sup> It is true that some of our respondents' insights would be extraordinarily difficult for courts to incorporate into doctrine, such as assessing legislative history based on the expertise of the member or staffer who put it together. But the oft-touted concern that judges cannot distinguish the wheat from the chaff ignores what we think is some low-hanging fruit if our findings are confirmed in the broader population. Courts rather easily might implement many of our respondents' insights related to the different types of legislative history, for example: distinguish between omnibus and appropriations legislative history; entrench the inconsistently applied doctrine that committee reports are the most reliable history; pay more attention to markups; and place more weight on scripted colloquies or other documents issued jointly by committee leaders of opposing parties.

There is a related point to raise here about the intersection of the audience for legislative history and its reliability and use by judges. Brudney has argued that the existence of many audiences for legislative history makes legislative history more reliable evidence of congressional intent because at least some of it has a "real" institutional purpose separate from attempting to influence judicial interpretation.<sup>318</sup> Our findings corroborate that, at least for our respondents, some legislative history does seem to have this "working" function. We also can see a potential counterargument: namely, that for those theories of interpretation premised on interbranch dialogue, perhaps Congress *should* try to signal (and courts should listen to) which legislative history is relevant to judicial interpretation.<sup>319</sup> Congress seems to speak to different audiences with different pieces of legislative history. Elected members are motivated by different things (reelection, delivering the goods, memorializing a hard-fought deal, influencing agencies, influencing judicial interpretation, etc.) at different times. It may be too difficult for Court-created interpretive doctrines to reflect and distinguish among these many motivations and so to discern which legislative history should be the courts' focus. Putting the onus, instead, on Congress to signal its

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317. See James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1, 58-63 (2007) (arguing that the debate over legislative history seems better focused on distinguishing among different kinds of legislative history than the "all or nothing" debate that continues in the U.S. Supreme Court).

318. Brudney, *supra* note 221, at 56.

319. *Accord* Katzmann, *supra* note 53, at 694.

audience for different pieces of legislative history is one intriguing possible response to this difficulty, but obviously raises its own set of reliability concerns.

#### IV. THE ADMINISTRATIVE LAW CANONS

Turning to the last set of findings that we present in this first Article, the Court has been prolific in creating legal doctrines that make assumptions about how Congress understands the delegation of interpretive authority to agencies and about the allocation of interpretive authority between agencies and courts. There are nearly a dozen such doctrines. The spectrum extends from *Chevron*,<sup>320</sup> which presumes that Congress intends to delegate interpretive authority to an agency whenever it leaves an ambiguity in a statute that the agency implements; to *Mead*,<sup>321</sup> which presumes that Congress does not intend to delegate interpretive authority without the authorization of relatively formal procedures (such as notice-and-comment rulemaking); to the “major questions” doctrine,<sup>322</sup> which presumes that Congress does not intend to delegate interpretive authority over major policy questions to an agency, even if it leaves a statutory ambiguity.

But the debate looks different here than it does in the context of the other canons. The relationship between the administrative law doctrines and the judicial role is clear: *Chevron* has been characterized by many as a counter-*Marbury* principle that allows agencies rather than courts to say what the law is.<sup>323</sup> The central fights have been over why courts are transferring power and whether they should. Many justifications for *Chevron* have been offered, including the principal justification that the Court gave in the case: a presumption of judicial deference is consistent with Congress’s intent to delegate interpretive authority to agencies.<sup>324</sup> That intent, the Court suggested, is grounded in consideration of agencies’ superior expertise and political accountability.<sup>325</sup> Agency expertise and political accountability have also been offered as independent justifications for *Chevron* apart from any connection to legislative intent.<sup>326</sup> Other theoretical justifications, such as the need for uniform admin-

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320. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

321. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

322. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 240-42 (2006) (discussing the application of the so-called “major questions” doctrine in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

323. See generally Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

324. See *Chevron*, 467 U.S. at 865-66.

325. See *id.*

326. See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2086-87 (1990).

istration of federal law,<sup>327</sup> and institutional justifications, such as judicial administrability, also have been offered.<sup>328</sup> Criticisms abound, including those based on legislative intent and separation of powers.<sup>329</sup> Here, too, there are varied theories of whether or how *Chevron* promotes faithful agency.<sup>330</sup> At the same time, there is consensus on one point: few believe that Congress actually intends to delegate whenever it leaves a statutory ambiguity; indeed, nearly everyone agrees that the Court's primary justification for *Chevron* is a fiction.<sup>331</sup> And yet, that assumption has never been investigated empirically.

Claims about drafting reality figure even more explicitly in the context of the other administrative law doctrines that the Court has devised to qualify *Chevron*'s broad presumption. *Mead* and the major questions doctrine have been described as "*Marbury*'s revenge," an effort to reclaim some of the judicial power that *Chevron* shifted to agencies.<sup>332</sup> Opponents of these doctrines view them and some others that we have studied as judicial power grabs that not only lack foundation in congressional intent, but impose a level of doctrinal complexity that courts cannot absorb. Those who like the doctrines tend to emphasize that they are efforts by the Court to tailor deference to the variety of ways in which Congress actually delegates.<sup>333</sup> Our study has obvious relevance for these questions.

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327. See Strauss, *supra* note 78, at 1121.

328. See, e.g., United States v. Mead Corp., 533 U.S. 218, 239-61 (2001) (Scalia, J., dissenting); VERMEULE, *supra* note 24, at 183-229.

329. See, e.g., John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 197-98 (1998) (criticizing the *Chevron* doctrine as violating the Administrative Procedure Act because it allows agencies de facto rulemaking power); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989) (critiquing *Chevron* for violating separation of powers principles).

330. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (arguing that courts act as faithful agents even when they overturn agency interpretations if doing so is based on legislative, not judicial, commands); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) (suggesting that courts act as faithful agents when they avoid political processes and defer to those connected to political processes); Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 353 (1994) (noting that courts act as faithful agents of the legislature when they seek to determine the meaning of a statute, but as faithful agents of agencies when the statute is ambiguous); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 827-28 (2011) (arguing that courts act as faithful agents only if they are following legislative intent to delegate).

331. See Lisa Schultz Bressman, Essay, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2025-34 (2011) (reviewing the academic literature and demonstrating consensus).

332. Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2602-10 (2006).

333. See, e.g., BREYER, *supra* note 19, at 118-19.

There is also the possibility that, even if the doctrines at the start were not accurate reflections of how Congress drafts, they now reflect background rules of which drafters are aware and against which they legislate. To our knowledge, no one has asked whether the Court's delegation doctrines have any such effect on the way that Congress thinks about delegation.

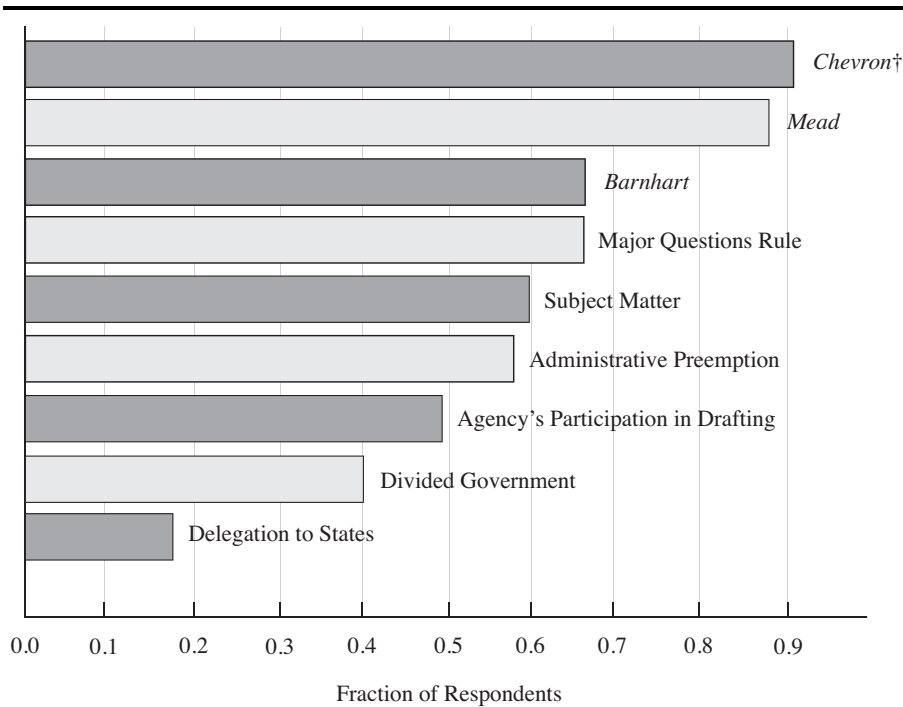
With these questions in mind, we asked our respondents forty-five questions about the doctrines and assumptions concerning the delegation of interpretive authority.<sup>334</sup> We inquired by name about the three central doctrines: *Chevron*; *Skidmore*—the lesser level of judicial deference that applies when agency interpretations only have the “power to persuade,” but not the power to control statutory meaning;<sup>335</sup> and *Mead*. In addition, we inquired by concept into *Chevron*, *Mead*, and eight other doctrinal assumptions about factors relevant to delegation: the longstanding nature of the agency interpretation; the participation of the agency in drafting; the economic, political, or policy importance of the question; the subject matter of the statute; the number of agencies involved; and the existence of divided government. The following Figure summarizes our findings:

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334. Specifically, we asked eighteen questions with zero to nine subparts each; we double-counted Q15, as discussed in note 84, above.

335. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

FIGURE 10  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Do Drafters Use the Assumptions Underlying Administrative Law Doctrines?



Sources: Q15; Q23; Q24; Q50f; Q51-Q54; Q55b-e; Q56.

† Fraction of respondents reporting that desire for agency to fill gaps results in ambiguities in legislation. With respect to some other assumptions underlying *Chevron*, 93% reported that the technical or complex nature of the issue, 99% reported the need for consensus, and 77% reported lack of knowledge about the best answer results in ambiguities.

As the Figure reveals, our method of inquiry proved particularly illuminating in this context. Our respondents effectively validated the assumptions underlying almost all of the administrative law doctrines currently in play, even as they seemed unfamiliar with the doctrines by name or as judicial rules. Indeed, *Mead*—the doctrine among the administrative law canons subject to the most vociferous criticism—was second only to *Chevron* among *all* the canons in the survey in terms of reflecting our respondents’ drafting practices, even though most of our respondents had never heard of it.

Our findings thus suggest that, contrary to the assumption of most judges and academics,<sup>336</sup> many of the so-called fictions of congressional delegation in the Court's cases may not be fictions at all. But apart from *Chevron*—which 82% of our respondents knew and most use when drafting—those doctrines are not getting through to Congress. Rather, the assumptions underlying these doctrines seem to be reasonable proxies for how Congress delegates interpretive authority to agencies, but not doctrines that drafters realize courts employ. In the language of our typology, these administrative law doctrines (save *Chevron*) are *approximation canons*.

What our findings mean for the theoretical and doctrinal debates depends on the big question of why we have any presumption of delegation in the first place. For example, grounds for judicial deference that are not necessarily related to congressional intent—such as superior agency expertise, political accountability, and the desire for federal law uniformity or judicial coordination—may be compelling justifications for the doctrines regardless of what drafters know or intend.

That said, our study seems to have particular significance for *Mead*, which has struggled for *any* ground to justify the layer of doctrinal complexity that it imposes. *Mead*, despite abundant criticism, is more rooted in our respondents' drafting practice than any other canon in our study except perhaps *Chevron*. Our findings also suggest that, if the goal is to link deference doctrine to congressional practice, the Court has been remarkably good at divining many of the factors that our respondents considered relevant to delegation. Our drafters emphasized, for example, that they feel an obligation to address major questions and that Congress is not trying to "punt" big decisions as often as some theorists have assumed. These findings further substantiate the Court's efforts to depart from a blanket presumption of judicial deference. In that sense, the Court has been correct to tailor deference more narrowly than *Chevron*'s broad presumption initially suggested.

At the same time, our findings also suggest that *Chevron* may be underinclusive in other ways. Our respondents told us that Congress signals an intent to delegate in many ways that fall outside the text, including in the legislative history of the statute and sometimes by virtue of the longstanding nature of the agency interpretation. This point has particular relevance to the ongoing debate about what should be considered at Step One of *Chevron*. The Court currently looks only to textual cues for evidence of congressional intent to delegate and considers the "traditional tools of statutory construction" in construing such cues. Our study suggests that Congress often uses extratextual signals as well.

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336. See *supra* Part I.A.

Finally, we note that our respondents' answers in this context continued to highlight the themes that we have already introduced. Specifically, we learned that *committee jurisdiction* can be an important signal of when Congress intends to delegate authority and that *inside information* that may be impenetrable to courts—such as the personal reputation of the agency head—carries over into assumptions about delegation. We also introduce a new theme: the presence of *linguistic signaling conventions* of delegation widely deployed inside of Congress but virtually unknown to courts.

#### A. *Chevron and the Presumption of Delegation*

Our respondents displayed a greater awareness of *Chevron* by name than of any other canon in our study. Of our respondents, 82% were familiar with *Chevron*. By contrast, only 20% or fewer knew *Skidmore* and *Mead* by name in addition to *Chevron*;<sup>337</sup> 18% knew *Skidmore* but not *Mead*; and 8% knew *Mead* but not *Skidmore*.<sup>338</sup> Even among the respondents who said that they were familiar with *Mead* or *Skidmore*, most told us that these doctrines were never considered in the drafting process, and 15% of respondents additionally stated that only *Chevron* played any role.<sup>339</sup> Our respondents often mentioned *Chevron* elsewhere in our interviews, too, even when we were not asking about it. For example, when we asked our respondents to list any interpretive principles or conventions that the Court consistently follows, our respondents mentioned *Chevron* more than any other rule except the plain meaning rule.<sup>340</sup>

##### 1. *Chevron is a feedback canon*

Our findings suggest the existence of a feedback loop for *Chevron*, as they do for the federalism canons. But as in the case of the federalism canons, the feedback loop is only a partial one. Our respondents did realize that courts use

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337. We believe the true numbers are actually lower with respect to familiarity with *Skidmore* and *Mead* and were inflated by the way in which we initially asked the question. On the first two days of interviews, we asked respondents if they were familiar with any of the three doctrines. Eight answered they were familiar with all three. After that point, however, we asked the questions differently: we asked only about *Chevron*, and then awaited respondents' answers before asking about *Skidmore*, and then in turn asked about *Mead*. After we made that change, very few respondents told us they were familiar with *Skidmore* or *Mead*.

338. See Q20.

339. Fifteen percent of respondents said that *Skidmore* played a role in the drafting process and 10% said *Mead* did. However, these responses are likely inflated for the same reasons stated above in note 337. Q21.

340. Q66. As one respondent put it, when answering a question on a different topic in the survey: "Each of the Justices is mostly consistent, but they each have their own inconsistencies . . . *Chevron* is fairly settled." *Id.*

ambiguity as a signal of delegation; unlike in the federalism context, our respondents understood the consequences of *Chevron*. Our respondents also told us that knowing the canon affects the degree of specificity they use while drafting. At the same time, most of our respondents told us that their knowledge of *Chevron* does not mean that they intend to delegate whenever ambiguity remains in finalized statutory language. Instead, they told us that, although ambiguity sometimes signals intent to delegate, often it does not, and *Chevron* is not a reason that drafters leave statutes ambiguous. Intriguingly, then, in the language of our typology, for our respondents, *Chevron* is a feedback canon that does not well approximate how Congress drafts.

*Chevron* does function for many of our respondents as a reminder about the consequences of ambiguity and as an incentive to think about the level of detail in a statute. Eighty respondents (58%) said that *Chevron* plays a role when they are drafting. Forty-three respondents (31%) specifically indicated through their comments that they understood that statutory ambiguity results in judicial deference to agency interpretations.<sup>341</sup> Forty respondents (29%) told us that *Chevron* forces them to think about how precisely to draft, and whether or not they need to “curtail”<sup>342</sup> the agency.<sup>343</sup> As one respondent remarked, “the main issue in drafting is how much discretion and we assume the courts will give deference. I’m hyperconscious of the extent to which we are giving them room. That’s always part of the debate.”<sup>344</sup> Another explained: “*Chevron* is more like an incentive to be more specific when you want to be clear about what the agency should do. The presumption is broad deference, so we try to be clear when we want otherwise.”<sup>345</sup> If true, *Chevron*, like the federalism canons, may function more as a “deliberation-forcing” rule about the level of textual specificity than as a common language through which courts and Congress communicate about how to resolve lingering statutory ambiguity.

## 2. *Chevron is not a reason for ambiguity*

Our respondents did not strongly identify *Chevron* as an affirmative reason to leave an ambiguity. They told us that decisions to leave statutory terms am-

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341. Q21; Q22.

342. Q21.

343. Q21; Q22.

344. Q21.

345. Q22. The focus on specificity obviously runs in two directions. On the one hand, thirty-two respondents told us that *Chevron* incentivizes them to be more specific because they want to control the agency. See, e.g., Q21 (“We’ve had to be more specific because when you leave ambiguities, agencies will run with it,” and “[i]f an agency has shown from its past behavior that it won’t do what you want, you put it in black and white.”). On the other hand, nine respondents (including one of the thirty-two mentioned above) made comments like “*Chevron* sometimes gives us comfort when things are ambiguous because we can’t get more clarity.” *Id.*



biguous are typically made without regard to whether the courts will later defer to an agency interpretation. Almost half of our respondents (45%) expressed agreement with the statement that the deference rules allow drafters to leave statutory terms ambiguous because they know that agencies can fill the gaps. But 15% of that 45% (and 28% of all 137 respondents, including some respondents who did not agree with this statement about the deference rules) offered comments specifically directed at resisting the notion that *Chevron* itself was the reason that drafters leave aspects of statutes ambiguous. They stated, for example, “it’s about punting to the agency and not about *Chevron* in particular, but you do know the agency can fill the gaps.”<sup>346</sup> To be sure, respondents were quick to acknowledge the prevalence of ambiguity in statutes, and 91% reported that one reason for statutory ambiguity is a desire to delegate decisionmaking to agencies.<sup>347</sup> But an even greater number of our respondents also identified reasons apart from and unrelated to *Chevron* that account for statutory ambiguity, including lack of time (92%), the complexity of the issue (93%), and the need for consensus (99%).<sup>348</sup> “It’s not because courts give deference,” one explained, “but it’s often intentional for other reasons. There are multiple reasons that statutes are ambiguous, sometimes political, getting consensus, sometimes quite intentional because regulators have the expertise and things get worked out better by the agency.”<sup>349</sup> These are the reasons for ambiguity that the Court identified in *Chevron*; it appears that those remain the reasons for ambiguity. In other words, for our respondents, *Chevron* does not appear to have increased the likelihood of ambiguity or its use as an additional signal that drafters were not using before the Court’s decision.

What we take away from these findings is that *Chevron* now seems to be a relatively fixed point in many of our respondents’ drafting practices, but that the doctrine’s assumptions are not entirely reflective of their intent. While most of our respondents indicated that they would think about agency delegation even in the absence of these canons, our data suggest that *Chevron* itself encourages more thought about the questions at issue and how specific statutes should be. At the same time, for our respondents, *Chevron* itself does not seem to be a typical reason for ambiguity. Rather the reasons for ambiguity remain those that the Court identified in *Chevron*.

We note a parallel to our observation about dictionary use. We did not ask respondents how they signal ambiguity or how they would define “ambiguity” if asked. Given that the Court has recently used the *Chevron* doctrine in cases concerning the meaning of words such as “charge,” “percentile,” and “stu-

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346. Q22.

347. Q50f.

348. Q50a-c.

349. Q22.

dent,”<sup>350</sup> it seems unlikely here too that even those drafters who would use ambiguity as a signal would always—or often—be able to predict which words will ultimately become the cause of dispute. One reason this concern may not have received much previous attention is because most judges and scholars have assumed that *Chevron*’s primary assumption—that Congress uses ambiguity to signal delegation—is a fiction in the first place. But our findings indicate that at least some staffers do seem to draft in *Chevron*’s shadow. The potential feedback loop that we have identified faces an obstacle, however, if the length of *Chevron*’s shadow is ultimately unpredictable.

### B. *Mead and Other Signals of Delegation as Reasonable Approximations*

As mentioned above, our drafters were not familiar with *Mead* by name, undermining any argument that Congress has “received the message” of what the Court is looking for in that decision. The remaining question is whether it is otherwise a reasonable approximation of how Congress delegates. *Mead* has been subject to unrelenting attack, beginning on the very day that it was issued. Justice Scalia wrote a scathing dissent, arguing that *Mead* rests on a fiction about the circumstances under which Congress delegates—a pernicious fiction, he said, because *Mead* does not simply establish a presumption of delegation as *Chevron* does, but calls for a particularized analysis of delegation that creates confusion and uncertainty.<sup>351</sup> Specifically, *Mead* fixates on certain signals that the majority of the Court presumed Congress employs when it delegates to agencies, such as the authorization and use of certain relatively formal procedures.<sup>352</sup> Scholars have joined Justice Scalia, arguing that the connection between interpretive authority and procedural formality is neither what Congress intends nor otherwise defensible.<sup>353</sup>

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350. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 709, 711, 716 (2011) (deferring to agency interpretation of “student” for purposes of the exclusion from taxation of any “service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at [the school]” (omissions in original) (quoting 26 U.S.C. § 3121(b)(10)) (internal quotation marks omitted)); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395, 403 (2008) (deferring to agency interpretation of “charge” under ADEA requirement that “[n]o civil action . . . be commenced . . . until 60 days after a charge alleging unlawful discrimination has been filed” (quoting 29 U.S.C. § 626(d)) (internal quotation mark omitted)); *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 88-89, 100, app. B at 102 (2007) (deferring to agency interpretation of “percentile” for purposes of federal education law directing that “local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State” be disregarded (quoting 34 C.F.R. § 222.162) (internal quotation marks omitted)).

351. *See United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

352. *See id.* at 236-37 (majority opinion).

353. *See, e.g., Barron & Kagan, supra* note 33, at 212-13.

This argument has formed a cornerstone in the debate about maintaining the *Skidmore-Chevron-Mead* trilogy as opposed to the binary *Chevron-or-no-Chevron* choice.<sup>354</sup> If we consider this issue based solely on familiarity with the doctrines, the vast majority of our drafters think in terms of a binary choice between *Chevron* and no *Chevron*, as Justice Scalia has been advocating, rather than in terms of the basic trilogy that the majority of the Court has embraced.

But when we asked about the doctrines by concept, we saw a different picture entirely. Indeed, *Mead* was a “big winner” in our study—the canon whose underlying assumption was most validated by our respondents after *Chevron*: 88% told us that the authorization of notice-and-comment rulemaking (the signal identified by the Court in *Mead*) is always or often relevant to whether drafters intend for an agency to have gap-filling authority.<sup>355</sup> Of the small number (nine respondents or 7%) who said that the authorization of rulemaking authority is only sometimes relevant, four offered comments that still supported the *Mead* assumption. For example: “If an agency doesn’t have rulemaking authority, they have less flexibility of interpretation,”<sup>356</sup> and “Anything related to technology, you don’t want to prescribe that an agency meets a specific goal to get performance standards. You leave it up to the agency . . . Rulemaking authority is relevant.”<sup>357</sup> Only one respondent said that the authorization of rulemaking was rarely relevant and none said it never was.<sup>358</sup>

Moreover, our respondents did not qualify their endorsement of *Mead*’s assumption in the same way that they qualified their endorsement of *Chevron*’s. Whereas in the context of *Chevron*, they emphasized that not every statutory ambiguity signals an intent to delegate—that is, that *Chevron* assumes too much—they did not say the same about statutes that give rulemaking authority to agencies.

Our respondents also substantiated, although not as overwhelmingly, the other signals of delegation that the Court and some scholars have identified. Figure 10, above, provides a summary, and we elaborate on these findings below. We note that some of the connections between our respondents’ assumptions and the current doctrines are weaker than others; identifying these gaps may contribute to ongoing discussion of whether or how to streamline the doctrines to improve their judicial administrability.

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354. See Sunstein, *supra* note 322, at 198-206 (summarizing the debate between Justices Scalia and Breyer over these doctrines).

355. Q51.

356. *Id.*

357. *Id.*

358. Six respondents answered “other.”

1. Barnhart, *agency participation in drafting, and divided government: substantiated but with qualifications*

In addition to *Mead*, the Court has articulated several other doctrines that make assumptions about what matters to Congress when it delegates. Foremost among these is *Barnhart v. Walton*, which presumes that Congress intends to delegate when there is a longstanding agency interpretation, even if that interpretation was not issued through formalized procedures.<sup>359</sup> We also asked about two factors that scholars have argued may be relevant to the delegation of interpretive authority—namely, the participation of the agency in drafting (an argument that one of us has advanced<sup>360</sup>) and the existence of divided government.<sup>361</sup>

Sixty-six percent of our respondents told us that the longstanding nature or consistency of the agency's interpretation was relevant to their decision to delegate interpretive authority, 19% said it was sometimes relevant, and only 10% said it was never or rarely relevant.<sup>362</sup> With respect to the participation of the agency in drafting, half of our respondents thought that this factor was often or always relevant in the delegation of interpretive authority, 23% said that it was sometimes relevant, and 23% said that it was rarely or never relevant.<sup>363</sup> This is not to say that our drafters did not value agency participation in drafting; they told us that agencies often do participate in drafting and can be very useful partners in the drafting process.<sup>364</sup> Some simply qualified whether that participation is relevant to delegation.

A substantial minority (40%) of our respondents also indicated that whether the same political party controls both Congress and the White House at the time of enactment is always or often relevant to whether drafters intend for an agency to have gap-filling authority, but 36% said sometimes and 22% said never or rarely.<sup>365</sup>

All of these findings were more qualified, and more nuanced, than our findings with respect to *Mead*. For at least some of our respondents, each of

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359. See *Barnhart v. Walton*, 535 U.S. 212, 219-22 (2002).

360. See Bressman, *supra* note 75, at 582.

361. See EPSTEIN & O'HALLORAN, *supra* note 49, at 121-62.

362. Q52.

363. Q53.

364. *Id.* ("We usually consult with the agency when drafting. We listen to them and make sure they can do what they need to do. We have faith in the professionals to give us technical advice on drafting. They can be an independent voice to help you draft it the right way.") Of course, our drafters also told us they sometimes avoided the agency, particularly when they were aware of a conflicting position. See, e.g., *id.* ("There are some pieces of legislation that you will never attempt to move to the floor without consulting the agency first . . . but if the agency has a different view from my boss, I don't care what the agency thinks.").

365. Q54.

these factors at times had precisely the opposite effect of encouraging delegation. Here, again, we saw the idea that personal familiarity with the agency staff or its positions affects drafting decisions. For instance, with respect to the *Barnhart* assumption, sixteen respondents (12%) made comments on the order of: “If you are writing something with a long history, you are hyper-aware of the agency view and you decide whether you want to change that”;<sup>366</sup> “It would depend on what that position has been and whether drafters intend to redirect or not”;<sup>367</sup> and “If an agency is working on the issue for a long time, sometimes it brings a lot of trust . . . . People are willing to give a lot of authority to the agency. But sometimes it’s exactly the opposite. They want to transfer that authority somewhere else.”<sup>368</sup>

With respect to divided government, eight respondents (6%) likewise told us that the personal and reputational characteristics of the agency mattered more than the party of the President (for example: “It is not partisan when you trust the experts not to be partisan.”);<sup>369</sup> six (4%) stated that the timing of the regulations with respect to the election cycle was most important;<sup>370</sup> and four (3%) focused on the degree of controversy surrounding the issue in question.<sup>371</sup> Finally, thirteen respondents (9%) said that drafters take a longer-term perspective, writing legislation on the assumption that administrations change.<sup>372</sup>

## 2. *Different subject matters also validated with nuances*

Although the Court has never expressly acknowledged that the subject matter of a particular statute affects the presumption of delegation, recent empirical work by William Eskridge and Lauren Baer has attempted to draw a connection between the variety of deference doctrines that the Court employs and the type of question being considered. The authors identified a “continuum” of defer-

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366. Q52.

367. *Id.*

368. *Id.*

369. Q54.

370. *Id.* (stating that the party of the President matters “if regulations are expected to be implemented fairly quickly”).

371. *Id.*

372. Compare, for instance, one response to Question 54 (“Most people take a longer view that there are statutes that will outlast a particular administration.”), with another response to the same question (“If you don’t think about the next administration, you’re a fool. But drafters often ignore this because they want to give their administration what it wants.”). We cannot make strong claims about how the different signals of delegation might work together. Although we asked about each of the different signals in separate questions, we did not directly ask, for example, whether longstanding interpretation alone (*Barnhart*) would be a sufficient signal in the absence of the *Mead* factor. It is our impression that *Mead*’s signal alone would be sufficient for our respondents, but we cannot offer hypotheses about the others.

ence doctrines that ranges from strong deference in foreign affairs cases to a presumption of no deference in criminal law cases.<sup>373</sup> Our findings are consistent with their argument, but as in the case of the other signals, our respondents qualified the generalized application of these presumptions.

Sixty percent of our respondents agreed with the proposition that the subject matter of a statute affects whether drafters intend for agencies to have gap-filling authority, and only 17% disagreed.<sup>374</sup> Although we did not ask our respondents to identify particular subject matters, forty-four respondents (32%) singled out specific areas, ranging from criminal law (12%)<sup>375</sup> to foreign affairs and national security (5%)<sup>376</sup> to tax (4%).<sup>377</sup> As we did not have a substantial number of comments about any one area (likely due to the fact that our drafters were drawn from a variety of committees),<sup>378</sup> we cannot make strong claims. But we note that these are some of the subject matters that Eskridge and Baer also singled out.<sup>379</sup>

Here, again, however, some respondents qualified their answers using facts unique to a particular agency or involving the personal reputations of agency staff. For example: “No, it’s about whether we trust the agency head in that area”;<sup>380</sup> or “[I]t also depends on the view of the particular agency. For example, in the Consumer Products Safety Improvement Act of 2008, drafters recognized the problems that agency had, and so drafted very specifically to leave little ambiguity.”<sup>381</sup>

In addition, rather than focusing on the subject matter, 12% of our respondents focused on the nature of the issue. They indicated that when the question is more complex or technical, agencies are likely to get deference, and when the question is more politically controversial, agencies might not. These

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373. See Eskridge & Baer, *supra* note 50, at 1090, 1097-1120.

374. Q24.

375. See, e.g., *id.* (“For example, with criminal statutes, it is unlikely that they would expect federal agencies to be involved in interpreting.”); *id.* (“In criminal law, we are more specific, whereas in complex areas like healthcare we give more discretion.”); *id.* (“In the criminal code there is less deference than others—more constitutional law coming into play.”).

376. See, e.g., *id.* (“In dealing with foreign affairs, we give a lot of deference to the Department of State because what you don’t want to do is undo centuries of foreign affairs law.”); *id.* (“The degree of deference definitely depends on which agency—for example, national security, we defer much more, we give them much broader leeway.”); *id.* (“Homeland security issues get more gap-filling authority.”).

377. *Id.* (“Tax law and criminal law are two very specific areas where it’s almost required by court precedent that we be very specific.”); *id.* (“In the tax world, a lot of deference goes to prior IRS interpretations.”).

378. Of the remaining respondents, eight told us they were only familiar with one subject area.

379. See Eskridge & Baer, *supra* note 50, at 1097-1120.

380. Q24.

381. *Id.*

comments are illustrative: “It depends on how complex the area is—the more complex, the more for the agency”;<sup>382</sup> “The political sensitivity of an issue drives the legislative branch to more specificity”;<sup>383</sup> and “Historically, it depends on how much consensus there has been in the area. We can draft with less precision where there is more consensus and give more to an agency.”<sup>384</sup> These comments were consistent with others we heard about the reasons for ambiguity and the kinds of gaps that drafters intend for agencies to fill.

### 3. *Major questions, preemption questions, and the obligation not to punt*

Like *Mead*, the major questions doctrine is a departure from *Chevron*’s simple presumption of delegation. In particular, that doctrine supports a presumption of *nondelegation* in the face of statutory ambiguity over major policy questions or questions of major political or economic significance on the theory, as Justice Scalia has memorably described it, that Congress “does not . . . hide elephants in mouseholes.”<sup>385</sup> Scholars have long debated the legitimacy and wisdom of the major questions doctrine,<sup>386</sup> and many have assumed that Congress wishes to punt difficult question to courts and agencies when possible.<sup>387</sup>

Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption. Only 28% of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions; only 38% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major economic significance; and only 33% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major political significance (answering questions that tracked the Court’s three formulations of the major questions doctrine).<sup>388</sup> We also note that we did not find differences across respondents based on whether they worked for members in the majority

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382. *Id.*

383. *Id.*

384. *Id.*

385. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (Scalia, J.).

386. For a sampling of articles discussing and debating the major questions doctrine, see Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 776-79 (2007); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 76-78; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; and Sunstein, *supra* note 332, at 2605-10.

387. See, e.g., Nourse & Schacter, *supra* note 10, at 576-77.

388. See Q55b-d.

or the minority of Congress,<sup>389</sup> which suggests that, at least for our respondents, the answer did not depend on whether the respondent was a member of the same party as the President.

By contrast, almost all of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to more “everyday” questions, such as the details of implementation (99%)<sup>390</sup> and ambiguities or gaps relating to the agency’s area of expertise (93%).<sup>391</sup> These comments were typical: “[Major questions], never! They [i.e., elected officials] keep all those to themselves”;<sup>392</sup> “We try not to leave major policy questions to an agency . . . [They] should be resolved here”;<sup>393</sup> and “We are more likely to defer when an agency has technical expertise.”<sup>394</sup> To be sure, resolving major questions is not always possible for drafters,<sup>395</sup> and distinguishing major questions from everyday ones may be difficult for courts. But our drafters did convey a surprising sense of *obligation* to decide certain questions themselves.

We also saw this theme emerge, although to a lesser extent, in the context of our questions about administrative preemption. Scholars have vigorously disagreed about whether preemption questions should be left to agencies when statutes are ambiguous,<sup>396</sup> and the Court continues to defer ultimate resolution of that question.<sup>397</sup> Our respondents’ answers reflected this divide. But of note, 55% of our respondents equated preemption questions with major policy questions, in the sense that they viewed those as not for agencies to resolve.<sup>398</sup> As one respondent remarked: “Major policy questions, major economic questions, major political questions, preemption questions are all the same . . . . Drafters don’t intend to leave them unresolved.”<sup>399</sup> The following Figure summarizes these findings:

389. Q55b-d.

390. Q55a.

391. Q55h.

392. Q55c.

393. Q55d.

394. Q55.

395. *See, e.g., id.* (“Sometimes because of controversy, we can’t say what to include—either complexity or controversy.”); *id.* (“But sometimes you have to punt.”); *id.* (stating that drafters might leave ambiguous language “[w]hen we can’t reach agreement”).

396. For excellent discussions of the various views and illustrations of the competing positions, see Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 740-42 (2004); Catherine M. Sharkey, Essay, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437, 444 (2009) (arguing that courts should consider agency input on the preemption question); and Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 870-71 (2008).

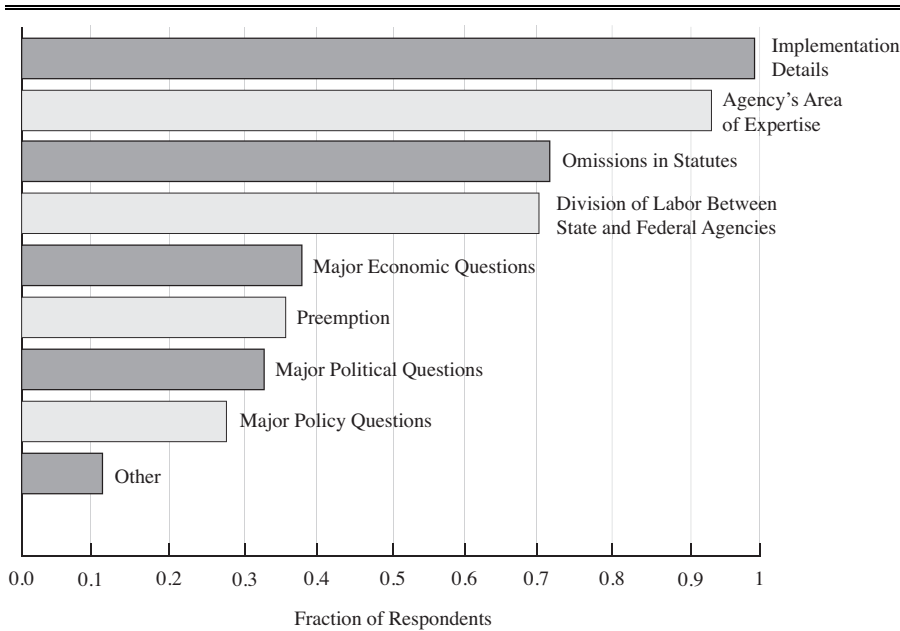
397. *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 455 (2008) (noting that the Court “has been less than forthcoming about its reliance upon the views of the agency” in preemption cases).

398. Q55e.

399. *Id.*



FIGURE 11  
 Empirical Survey of 137 Congressional Staffers 2011-2012:  
 Types of Statutory Ambiguities or Gaps That  
 Legislative Drafters Intend Agencies to Fill



Source: Q55a-i.

These findings may also shed light on a related doctrinal question that is subject to debate among scholars and that the Court is poised to address, but about which we did not inquire: whether Congress intends for agencies to resolve questions concerning the scope of their own jurisdiction.<sup>400</sup> Jurisdictional questions often overlap with or are indistinguishable from “major questions.” For example, the question of whether an agency has authority to regulate a particular subject or activity may be both a major question and a jurisdictional question, as were the questions in *FDA v. Brown & Williamson Tobacco Corp.* (challenging an FDA interpretation extending the Food, Drug, and Cosmetic Act to authorize the regulation of tobacco products)<sup>401</sup> and *Gonzales v. Oregon* (challenging an interpretation by the Attorney General extending the federal

400. See *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 248 (5th Cir.), cert. granted, 133 S. Ct. 524 (2012) (No. 11-1545) (presenting the question whether *Chevron* deference applies to an agency’s determination of its own jurisdiction).

401. See 529 U.S. 120, 131-36 (2000).

drug laws to include the regulation of physician-assisted suicide).<sup>402</sup> Based on our findings, we suspect that our respondents would emphasize the obligation of Congress, not agencies, to resolve such questions.

C. *More than One Federal Agency and State Implementers of Federal Law*

The typical *Chevron* (or *Mead*) case involves one federal agency. But a new set of questions has emerged concerning how the Court's delegation doctrines should apply when more than one federal agency is in the picture or when a combination of state and federal agencies is involved in implementing the federal statute. Jacob Gersen, Jody Freeman, and Jim Rossi have studied split enforcement authority between or among federal agencies.<sup>403</sup> Other scholars (including one of us) have focused on the possibility that Congress sometimes intends to delegate interpretive authority to state actors as well.<sup>404</sup>

The Court addressed one version of the multiple-agency question in *Martin v. Occupational Safety & Health Review Commission*, holding that Congress intends to delegate interpretive authority to the federal agency with rulemaking authority when another is given lesser enforcement authority.<sup>405</sup> But how courts are to know which agency has interpretive authority when two or more have rulemaking authority remains unresolved,<sup>406</sup> as does the question of interpretive deference to state implementers of federal law. We inquired about both.

1. *Multiple federal agencies and new linguistic conventions of delegation*

In the context of multiple federal agencies, only two of our 137 respondents (1%) indicated that overlapping regulatory duties indicate a congressional

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402. See 546 U.S. 243, 267-69 (2006).

403. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212; see also Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 82-83 (2012), [http://www.harvardlawreview.org/issues/125/march12/forum\\_868.php](http://www.harvardlawreview.org/issues/125/march12/forum_868.php) (responding to Freeman & Rossi, *supra*); Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 750-56 (2011); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 187-90 (2011).

404. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 565-66 (2011); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 3 (1999).

405. 499 U.S. 144, 151-57 (1991).

406. See *id.* at 157-58.

intent to delegate to *neither* agency.<sup>407</sup> Almost 25% of our respondents told us that overlapping regulatory duties signal intent to delegate to both agencies, and roughly the same number (23%) indicated that only one agency is intended to have interpretive authority. The remainder answered “other,” with most of that number indicating that Congress signals its intent in several particular ways. Notably, many respondents’ qualitative explanations for their answers were to the same effect regardless of which answer choice they selected, and themes emerged about the signals that Congress uses.

Specifically, forty-six respondents (34% of 137) said that Congress signals its intent with respect to multiple delegations through the use of *specific linguistic conventions*, and twelve (9%) said that Congress signals its intent by reference to the *jurisdiction of the drafting committee*.<sup>408</sup> To our knowledge, the use of special language and the jurisdiction of the drafting committee have not been utilized by courts in deciding these questions.<sup>409</sup> Those conventions, however (and likely many others of which courts are unaware), seem to be common currency inside Congress.

We elaborate on these overlooked influences on the drafting process in the companion Article. But as an example of the centrality of the committee system as a signal of delegation, the following comment was typical: “Unless it’s explicit, it’s often based on the jurisdiction of the committee. The agency under your committee jurisdiction takes the lead. They do that even if they aren’t the obvious choice or the best choice.”<sup>410</sup>

In terms of special signaling words, 41% of the forty-six respondents who mentioned such words specifically referenced the phrase “in consultation with” to indicate that one agency has the lead interpretive authority, and the phrases “jointly” and “in collaboration with” to denote joint interpretive authority.<sup>411</sup> (Our respondents did not indicate how agencies with joint interpretive authority would exercise it, though some flagged the coordination problem. Thus, one respondent remarked, “If you say ‘Just do it jointly,’ how does that work?”<sup>412</sup>

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407. Q23.

408. *Id.*

409. In seeking to explain why delegation to multiple agencies occurs, Freeman and Rossi were interested in the role of committees, but did not explore whether jurisdiction might help answer the doctrinal question. Freeman & Rossi, *supra* note 403, at 1139 (“Perhaps such delegations [to multiple agencies] are best explained as by-products of the congressional committee system . . . . This view predicts that, whenever the assignment of bureaucratic authority is up for grabs, committees will work hard to ensure that *their* agencies get some piece of the pie.”).

410. Q23; *see also id.* (“It depends entirely on the committee of jurisdiction: the committee wants the agency over which they have jurisdiction to have the lead: this is a territorial thing because we have power over them.”).

411. *Id.*

412. *Id.*

and another noted that “joint regulations are becoming more typical but are very difficult.”<sup>413</sup>)

These signaling words are essentially the same ones that Freeman and Rossi identified in their analyses of multiagency statutes. Freeman and Rossi suggest several situations where Congress might include “shall jointly” and “in consultation with” in statutes, and they describe a set of “coordination tools” that can promote interagency coordination.<sup>414</sup> They also cite two examples of statutes in which Congress used these terms.<sup>415</sup> One such example, the Dodd-Frank Act, provides a nice illustration. Freeman and Rossi cite a report that lays out the Act’s rulemaking provisions and explains that 80% of the provisions in the Act assign rulemaking to four separate agencies.<sup>416</sup> The Act contains numerous provisions that include the language “shall jointly” and numerous provisions that use the “in consultation with” language.<sup>417</sup> Thus, in this major piece of legislation, Congress often used these types of words to navigate and prescribe the relationships among the relevant agencies.

Our own search of the statutory landscape corroborates this insight. We identified at least 125 statutes using the same signaling words to designate the relationship between or among agencies involved in issuing rules or regulations.<sup>418</sup> But we have found no federal court decision that expressly relies upon

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413. *Id.* A few respondents (seven or 5% of all respondents) emphasized that one reason drafters try to signal in this manner is because they understand the doctrinal and pragmatic confusion that may otherwise result: “When there’s an ambiguity, we try to clarify or you end up with each agency claiming *Chevron* deference and with a circuit split.” *Id.* Another put it more vividly as trying to avoid “some kind of food fight.” *Id.*

414. Freeman & Rossi, *supra* note 403, at 1155-81.

415. *Id.* at 1158 (Endangered Species Act); *id.* at 1168 (Dodd-Frank Act).

416. *Id.* at 1168 n.172 (citing CURTIS W. COPELAND, CONG. RESEARCH SERV., R41472, RULEMAKING REQUIREMENTS AND AUTHORITIES IN THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT 6-7 (2010), available at <http://www.llsdc.org/attachments/files/255/CRS-R41472.pdf>).

417. COPELAND, *supra* note 416, at 7-8 (listing examples of such provisions).

418. A Westlaw search of the U.S. Code on March 19, 2013, of the word combination “‘shall jointly’ /p ‘issue’” returned thirty results, of which we determined that twelve involved multiple agencies issuing rules or regulations under a single statute. *See, e.g.*, 7 U.S.C. § 8411(d) (2011) (stating that “the Secretary of Health and Human Services and the Secretary of Agriculture shall jointly issue regulations” regarding certain overlap agents and toxins); 16 U.S.C. § 460q-1(e) (“Prior to the approval of any zoning ordinance for the purposes of this section, the Secretary of the Interior and the Secretary of Agriculture shall jointly issue regulations, which may be amended from time to time, specifying standards for such zoning ordinances.”). A search on March 22, 2013, of the word combination “‘shall jointly’ /p ‘adopt’” and “‘shall jointly’ /p ‘prescribe’” returned five and twenty-nine results, respectively, of which we determined three and seventeen, respectively, to involve multiple agencies prescribing or adopting rules or regulations under a single statute. *See, e.g.*, 15 U.S.C. § 78c(a)(4)(F) (“The [Securities and Exchange] Commission and the Board of Governors of the Federal Reserve System shall jointly adopt a single set of rules or regulations to implement the exceptions in subparagraph (B).”); 15 U.S.C. § 1269(b) (“The Secretary of the Treasury and the [Consumer Products Safety] Commission shall jointly

this language (or committee jurisdiction, for that matter) to resolve a dispute over which agency has interpretive authority under *Chevron*.<sup>419</sup>

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prescribe regulations for the efficient enforcement of the provisions of section 1273 of this title . . . .”). A search on March 18, 2013, of the word combination “‘in consultation with’ /p ‘issue’” returned seventy-five results, of which we determined thirty-eight to involve multiple agencies issuing rules or regulations under a single statute. *See, e.g.*, 12 U.S.C. § 5709 (providing that “[t]he Secretary [of the Treasury], in consultation with the Administrator of the Small Business Administration, shall issue such regulations and other guidance as the Secretary determines necessary” to implement the statute, which provided for the State Small Business Credit Initiative); 16 U.S.C. § 1385(f) (stating that “[t]he Secretary [of Commerce], in consultation with the Secretary of the Treasury, shall issue regulations to implement” the Dolphin Protection Consumer Information Act). A search on March 25, 2013, of the word combinations “‘in consultation with’ /p ‘adopt’” and “‘in consultation with’ /p ‘prescribe’” returned thirty-two and 155 results, respectively, of which we determined six and fifty-nine to involve multiple agencies adopting or prescribing rules or regulations under a single statute. *See, e.g.*, 16 U.S.C. § 1371(a)(3)(A) (“The Secretary [of the Interior], on the basis of best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, . . . to adopt suitable regulations . . . .”); 49 U.S.C. § 32304(h) (“In consultation with the Secretaries of Commerce and the Treasury, the Secretary of Transportation shall prescribe regulations necessary to carry out this section.”). A search on March 28, 2013, of the word combination “‘in coordination with’ /p ‘issue’” returned twenty-seven results, of which we determined three to involve multiple agencies issuing rules or regulations under a single statute; a search on March 25, 2013, of the word combinations “‘in coordination with’ /p ‘adopt’” and “‘in coordination with’ /p ‘prescribe’” returned three and thirteen results, respectively, of which none and six, respectively, involved agencies adopting or prescribing rules or regulations under a single statute. *See, e.g.*, 12 U.S.C. § 5365(i)(2)(C) (“Each Federal primary financial regulatory agency, in coordination with the Board of Governors and the Federal Insurance Office, shall issue consistent and comparable regulations to implement this paragraph . . . .”); 49 U.S.C. § 21106(c) (“[T]he Secretary of Transportation, in coordination with the Secretary of Labor, shall prescribe regulations to implement subsection (a)(1) to protect the safety and health of any employees and individuals employed to maintain the right of way of a railroad carrier that uses camp cars . . . .”).

419. Searching for federal court decisions using the phrase “shall jointly” and citing “467 U.S. 837” (*Chevron*) in the Westlaw federal courts database, we found four results, none of which applied “shall jointly” in the context of two agencies and a single statute. *See Metro. Hosp., Inc. v. U.S. Dep’t of Health & Human Servs.*, 702 F. Supp. 2d 808, 812, 826 (W.D. Mich. 2010) (“The parties shall jointly file a proposed Judgment . . . .” (capitalization altered)), *rev’d on other grounds*, Nos. 11-2465, 11-2466, 2013 WL 1223307 (6th Cir. Mar. 27, 2013); *Anderson v. U.S. Dep’t of Hous. & Urban Dev.*, No. 06-3298, 2010 WL 1407983, at \*1, \*6 (E.D. La. Mar. 25, 2010); *Graboski v. Guiliani*, 937 F. Supp. 258, 261, 268 (S.D.N.Y. 1996), *aff’d sub nom. Castellano v. City of New York*, 142 F.3d 58 (2d Cir. 1998); *Hughes Aircraft Co. v. United States*, 29 Fed. Cl. 197, 223, 229 (1993). Searching for federal court decisions involving the phrase “in consultation with” and citing “467 U.S. 837” (*Chevron*) in the Westlaw federal courts database, we found 201 cases, a large number of which involved consultation requirements but none of which involved the question of which agency was the lead agency, most likely because the “in consultation” signal makes Congress’s intended lead-agency designee clear to courts when it is considered. *See, e.g.*, *Nat’l Ass’n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (noting that the Endangered Species Act provides that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize’ endangered or threat-

The Supreme Court has gotten close, albeit in a case that did not involve rulemaking authority. In *Gonzales v. Oregon*, in which the Court considered whether to defer to the Attorney General's interpretation of the Controlled Substances Act as criminalizing physician-assisted suicide, Justice Kennedy's opinion for the majority listed, among many other reasons for not applying *Chevron*, the fact that another portion of the statute "gives the Attorney General a limited role; for it is the Secretary [of Health and Human Services] who, after *consultation* with the Attorney General and national medical groups, 'determine[s] the appropriate methods of professional practice in the medical treatment of . . . narcotic addiction.'"<sup>420</sup> This is the same signaling language that our respondents volunteered.

It also is revealing that the statutory provision in question in *Gonzales* was drafted by the House Interstate and Foreign Commerce Committee,<sup>421</sup> which, like its modern counterpart (the House Energy and Commerce Committee), had *jurisdiction* over the Department of Health, Education, and Welfare (today called the Department of Health and Human Services).<sup>422</sup> The hearings on the bill were held by the Subcommittee on Public Health and Welfare. The signals our respondents identified—the linguistic convention and the committee of jurisdiction—both support the result the Court reached, although the Court had to do a lot more work to reach it.

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ened species or their habitats," and describing the "no-jeopardy requirement" as "imperative" (first alteration and omission in original) (quoting 16 U.S.C. § 1536(a)(2)); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 751 (1982) (noting that the Public Utility Regulatory Policies Act of 1978 "directs FERC, in consultation with state regulatory authorities, to promulgate 'such rules as it determines necessary to encourage cogeneration and small power production'"); Nat'l Petrochem. & Refiners Ass'n v. EPA, 630 F.3d 145, 149 n.14 (D.C. Cir. 2010) (noting that the Energy Independence and Security Act of 2007 authorizes the EPA Administrator, "in consultation with the Secretaries of the Agriculture and Energy Departments," to waive certain provisions of the Act); *see also* Cal. Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1079-80, 1087-89 (9th Cir. 2011) (interpreting "consultation" within the context of the Energy Policy Act of 2005, which provides that the Secretary of Energy "in consultation with affected States, shall conduct a study of electric transmission congestion," as requiring more than response to comments submitted by the states, and collecting cases interpreting "consultation" in other statutes in a similar fashion). Our findings on this point thus might not change the result in any prior case, but they do suggest that drafters use certain linguistic conventions to designate relationships between or among agencies and that these conventions might be relevant to courts going forward, particularly as multiple-agency statutes proliferate.

420. 546 U.S. 243, 265 (2006) (alteration and omission in original) (emphasis added) (quoting 42 U.S.C. § 290bb-2a).

421. *See* H.R. 18583, 91st Cong. (1970); H.R. REP. NO. 91-1444, pt. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566.

422. *See* STAFF OF H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 91ST CONG., INTERIM REPORT ON ACTIVITIES THROUGH AUGUST 14, 1970, at 1, 3, 6 (Comm. Print 1970).

## 2. *Delegation to state agencies implementing federal statutes*

Our findings on the question of whether Congress ever intends to delegate interpretive authority to state implementers of federal law were more mixed, but substantiate the importance of that debate. Nearly 18% of our respondents reported that they often or always intend for state implementers to interpret ambiguities in federal statutes, and another 39% said they sometimes do. Thus, even though the Court has extended none of its deference rules to state implementers, the possibility of such deference was realistic to—and sometimes intended by—some of our respondents.

In explaining their answers, seven respondents (5%) told us that their answer depends on the area (e.g., “in certain areas like Medicaid where states have always had a role. It’s harder to take away state flexibility there.”).<sup>423</sup> Nine respondents (7%) emphasized that state agencies receive interpretive authority to the same extent that federal agencies would—in other words, where the federal agencies would receive *Chevron* deference, state agencies implementing federal law should receive such deference for the same question (e.g., “They have the same ability to implement as federal agencies,”<sup>424</sup> and “it can be equivalent to federal agencies depending on the role states are given”<sup>425</sup>). Ten others (7%) also said that state deference is sometimes intended, but that it depends on the level of detail in the statute,<sup>426</sup> a set of comments similar in nature to those who said that the same level of deference as *Chevron* is intended for states. About 20% reported that state deference was never or rarely intended, and the remaining 23% declined to answer, with 19% declining specifically based on lack of experience with state implementation.<sup>427</sup>

At the same time, the vast majority of our respondents (70%) agreed that drafters intend for *federal* agencies to interpret the division of labor between state and federal agencies when both are given implementation roles, a finding that indicates that state implementers are not on equal footing with federal drafters in the perception of even those drafters who sometimes intend deference to the states.<sup>428</sup>

### D. *Theoretical and Doctrinal Interventions*

Our findings suggest that, apart from *Chevron*, the assumptions underlying the most commonly employed administrative law doctrines may accurately re-

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423. Q56.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. Q55.

flect how some congressional drafters write legislation. *Chevron* is known to our respondents and is now a part of the way they think about drafting, even if it did not track that practice from the start. But *Chevron* presumes both too little and too much about how our respondents signal delegation.

The doctrinal and theoretical interventions that we might make are less apparent. As we have noted, there are common justifications for *Chevron* that are independent of the existence of the feedback loop that we have identified. For example, if the role of *Chevron* is to facilitate agency expertise, political accountability, regulatory uniformity, or judicial coordination, the presence of courts-Congress communication on delegation matters is not essential. Likewise, if the other deference doctrines are best understood as having similarly independent normative or institutional justifications, the fact that our respondents did not know that those doctrines exist is of small moment.

The other doctrines, however, much more so than *Chevron*, have not been so understood. Rather, the Court has explicitly invoked a desire to track how Congress delegates in creating and invoking them. Thus, our intuition for those rules is that our findings have strong potential doctrinal significance. The legitimacy of those other doctrines stands to benefit from the confirmation of our findings that they accurately approximate how Congress drafts. That our findings do not reveal the existence of a feedback loop for these doctrines seems less important—the doctrines are not typically defended based on congressional awareness of them—but awareness might be important if the Court desires to tweak those doctrines based on communication with Congress.

We suspect that the impact of our findings will be greatest for *Mead*, which has suffered the most criticism. Judges and scholars have disputed the link the Court made in *Mead* between procedural formality and lawmaking authority, arguing that the Court's effort to find congressional delegation in *Mead*'s signals is fictitious and thin cover for judicial aggrandizement that cannot justify the layer of doctrinal complexity that the doctrine imposes.<sup>429</sup> By contrast, many who believe that intent to delegate is fictitious in the context of *Chevron* still find the fiction there benign, because it supports judicial deference, in line with other arguments that are not as empirically grounded, such as agency expertise and political accountability.

At a more pragmatic level, our findings might be useful in heeding common calls to streamline the doctrines to improve their judicial administrability. The fact may well be that some of the doctrines, even if grounded in actual practice, are too complicated for lower courts to manage.<sup>430</sup> Our drafters drew some fine distinctions in how they applied some of the assumptions. For exam-

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429. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 243 (Scalia, J., dissenting); see also Barron & Kagan, *supra* note 33, at 225-34.

430. Empirical studies of *Mead* so suggest. See generally Bressman, *supra* note 50; Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).



ple, our respondents told us that *Barnhart*'s assumption about the consistency of an agency interpretation may cut for or against delegation. As a different kind of example, the validity of some assumptions—including the consistency of the agency interpretation, the participation of the agency in drafting, the presence of divided government, and even subject matter—seems to turn, at times, on the personal characteristics of the agency head or the personal relationships between drafters and agency staff. Some assumptions were not validated as strongly as others, such as subject matter differences and preemption questions.

For theorists interested in doctrinal simplification, then, our findings provide the strongest support for preservation of *Mead* and the major questions doctrine. Although *Barnhart* received a similar level of validation from our respondents as the major questions doctrine, its application was qualified in the ways described above, while the major questions doctrine was not.

### 1. Chevron Step One

Our findings also have relevance for the ongoing debate about what courts should consider at Step One of *Chevron*.<sup>431</sup> Courts currently consider the relative clarity of the text at Step One, but our findings indicate that textual clarity is not always a reliable signal of delegation. As an initial matter, courts often look to textual and substantive canons as indications of congressional intent in deciding whether statutory text is clear. But our respondents did not know many of those canons—a finding that calls into question their utility as proxies for drafter intent here, as elsewhere.

Moreover, our drafters identified signals of delegation outside of ambiguous text, such as the longstanding nature of the agency's interpretation, directives in legislative history, and linguistic signaling conventions of intent to delegate, that might appear in otherwise unambiguous text. These other signals of delegation may be masked or lost by the current approach.

Justice Breyer raised a similar point in a recent decision, *Zuni Public School District No. 89 v. Department of Education*<sup>432</sup>—to the surprise and disapproval of nearly every other Justice, even those who joined his majority opinion.<sup>433</sup> Specifically, he recognized that, by focusing only on the text of the statute, the Court would miss the signals of delegation that he saw in the statute's context—including the longstanding nature of the agency's interpretation and the technical nature of the issue—as well as in the history of the statute, which revealed the participation of the agency in drafting the very language at is-

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431. See Bressman, *supra* note 75, at 599-606.

432. 550 U.S. 81, 90-91 (2007).

433. See *id.* at 106 (Stevens, J. concurring); *id.* at 107 (Kennedy, J., concurring); *id.* at 116-17, 121-22 (Scalia, J., dissenting).

sue.<sup>434</sup> To avoid this result, he considered these signals of delegation *before* looking at the language of the statute at *Chevron* Step One and deferred to the agency's interpretation.<sup>435</sup> No one previously had questioned *Chevron* in this way, and several Justices joining the majority opinion wrote separately to discourage the recurrence of this approach. Justice Stevens concurred but wrote separately to reinforce the normal order of *Chevron*, and Justice Kennedy, joined by Justice Alito, concurred but wrote to express dismay that Justice Breyer was willing to prioritize "agency policy concerns" over "the traditional tools of statutory construction."<sup>436</sup> Justice Scalia dissented, joined by the three remaining Justices, and accused Justice Breyer of committing the sin of *Holy Trinity*, disregarding the plain meaning of the statutory text.<sup>437</sup> Our findings, however, suggest that Justice Breyer was not off the mark, and may actually have understated the concern.

Our findings have additional implications for the use of legislative history at Step One. Courts typically consult legislative history at Step One for guidance on the meaning of a particular word or phrase, although textualists generally refuse to do so. But the legislative history may actually be useful in a different way: as a relevant signal of delegation. For example, the legislative history might contain instructions to an agency for implementing or interpreting a provision. Recall that 94% of our respondents told us that the purpose of legislative history is to shape the way that agencies interpret statutes,<sup>438</sup> and 21% separately described legislative history as a mechanism of agency oversight.<sup>439</sup> Rather than using legislative history to determine the clarity of text, courts might consult it at Step One as a signal of delegation itself.<sup>440</sup>

## 2. *The obligation not to punt difficult questions in broader context*

Finally, our findings about delegation may have implications for some of the other canons that our study investigated, as well as for broader theories about the role of courts in interpretation. At the more granular level, the notion that the Court must use canons of construction to force Congress to deliberate on hard questions does not quite fit the picture that our respondents painted about their sense of obligation to resolve major policy questions. We recognize

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434. *See id.* at 89-91 (majority opinion).

435. *See id.* at 90, 100.

436. *See id.* at 106 (Stevens, J., concurring); *id.* at 107 (Kennedy, J., concurring).

437. *See id.* at 108, 113-16 (Scalia, J., dissenting). Justice Souter joined only Part I of Justice Scalia's dissent. *See id.* at 123 (Souter, J., dissenting).

438. Q60f.

439. Q57.

440. Courts also might leave questions of whether the agency followed the instructions in the legislative history for "reasonableness" review under Step Two or arbitrary and capricious review.

that our respondents' answers on this point may have been self-serving; that is, that they might have been reluctant to admit that they "punt." And it certainly seems to be the case that Congress cannot help but leave certain matters unresolved—our findings on delegation corroborate that fact—but it seems less the case that any consequential ambiguity is the result of a deliberate attempt to push big decisions onto courts and agencies.

Even if one were to question the sincerity of our respondents' claims that they do not punt big decisions, they were emphatic about the branch to which they do intend to delegate when ambiguity is inevitable or delegation is otherwise desired. As discussed in the companion Article, our respondents told us that courts are not their intended delegates and that they would rather have difficult questions returned to Congress than resolved by judges. Our respondents were much more receptive to the notion of agencies as statutory interpreters, but again resisted the notion that they delegated to agencies without limitation.

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The assumptions underlying a surprising number of the administrative law doctrines were validated by our respondents. Why the Court has done such a good job at approximating how Congress works in the administrative law context is an interesting question, particularly because those administrative law doctrines have come under much more vigorous attack than the other canons that our study did not validate to the same degree. We consider this comparison and offer some other concluding thoughts in the Conclusion, which follows.

#### CONCLUSION: COMPARING THE CANONS, THE ENDURING ALLURE OF FAITHFUL AGENCY, AND CONGRESS AS "FAITHFUL PRINCIPAL"

Examining the relationship between congressional drafting practice and the Court's interpretive doctrines reveals, at best, only a partial picture of how federal statutes are put together. Our respondents emphasized many other influences on the drafting process that legal doctrine does not take into account. We alluded to some of those influences in the preceding pages, including the central role of Legislative Counsel in drafting text, the division of Congress into committees, the type of statute and legislative process, and the personal and professional differences across drafters and agency personnel. We explore those influences and many others in the companion Article. There, we also address the ability of doctrine to incorporate the kind of real-world detail uncovered by our study, as well as the theoretical implications for textualism, purposivism, and pragmatism of our respondents' rather limited view of the role of courts in statutory interpretation (both by themselves and contrasted with agencies). Before proceeding to those topics, however, we wish to offer some brief, hopefully unifying, reflections on the many findings already presented in these pages.

A. *Comparing Canons*

Returning to our typology of canon awareness and use, the Table below summarizes where we are thus far:

TABLE 3  
Empirical Survey of 137 Congressional Staffers 2011-2012:  
Typology of Canon Awareness and Use

	Awareness	No Awareness
Use	<b>Feedback Canons</b> <ul style="list-style-type: none"> <li>• federalism</li> <li>• preemption</li> <li>• <i>Chevron</i></li> <li>• perhaps constitutional avoidance</li> </ul>	<b>Approximation Canons</b> <ul style="list-style-type: none"> <li>• <i>expressio unius</i></li> <li>• <i>noscitur a sociis</i></li> <li>• <i>ejusdem generis</i></li> <li>• constitutional avoidance</li> <li>• <i>Mead</i></li> <li>• <i>Barnhart</i></li> <li>• major questions</li> <li>• subject-matter-related delegation doctrines</li> <li>• perhaps administrative preemption</li> </ul>
Non-Use	<b>Rejected Canons</b> <ul style="list-style-type: none"> <li>• whole act / whole code presumptions of consistent usage</li> <li>• superfluities</li> <li>• dictionaries</li> <li>• ban on legislative history</li> </ul>	<b>Disconnected (“Loose”) Canons</b> <ul style="list-style-type: none"> <li>• clear statement rules</li> <li>• perhaps lenity</li> </ul>

The canons that have been least controversial in the courts and scholarship seem to raise the hardest questions viewed through the lens of our study. Legislative history and the many administrative law doctrines continue to come under sustained attack, but the assumptions underlying judicial use of those tools were strongly validated by our respondents. In contrast, the textual and substantive canons are widely used by judges of all interpretive stripes, but our study reveals that the normative bases for the application of these rules are exceedingly fuzzy and sometimes not apparent at all.

We can only hypothesize about the causes of these differences. Some of the differences may relate to the origins of the respective canons. For example, canons with older pedigrees, like the rule of lenity, or canons that are general-

ized presumptions about drafting that go back to Blackstone, like some textual canons, were not originally tailored to the mold of our modern Congress in the same way as the administrative law doctrines or the federalism canons<sup>441</sup> seem to be. The number of Justices with administrative law experience appointed over the past several decades may further help to explain why the Court has been so apparently good at approximating how Congress delegates.

With respect to the feedback canons, it also seems possible that the Court is speaking “more loudly” on some questions than others, making the doctrines that emerge from them impossible for drafters to ignore. One hallmark of the Rehnquist Court was that it brought federalism to the forefront of statutory interpretation, and of course the “*Chevron* revolution” occurred at almost the exact same time. In light of that history, perhaps it is no coincidence that the federalism canon, the presumption against preemption, and *Chevron* were the most known to our respondents. The federalism doctrines and *Chevron* are also doctrines through which Congress allocates government authority. As such, these may be high-stakes matters for drafters that are more frequently brought to their attention by the states and interest groups likely to be affected by the allocation.

#### B. *The Allure of Faithful Agency and Judicial Reluctance to “Make Law”*

For those canons whose justifications are less apparent, some of the fuzziness seems linked to the strong gravitational pull of the faithful-agent model to the exclusion of all other normative frameworks. Our study puts pressure on that choice. We already have highlighted the various forms that faithful agency in statutory interpretation might take—reflecting Congress, teaching Congress, imputing constitutional considerations to Congress, and so on—and also the fact that theorists have not been precise about which form of faithful agency they are embracing.

The other question is why the faithful-agent model is so compelling in the first place and whether a more frank acknowledgment that federal judges often operate outside the model is possible. Any theory of what makes judicial interpretive choices legitimate requires a theory of what that legitimacy is based upon. If the concern is a countermajoritarian one—that unelected judges’ statutory interpretation decisions are made more legitimate by the extent to which they are tied to the practices of officials who are publicly accountable—such a theory does not justify many interpretive approaches already in deployment, including the “teaching” goal of some of the canons; the imposition of external policy

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441. See Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists’ Gamble*, 81 *FORDHAM L. REV.* 1749, 1750-51 (2013) (explaining how the federalism canons reflect a modern understanding of how the post-New Deal Congress interacts with the states).

values (substantive canons); judicial efforts to make statutes more workable;<sup>442</sup> or the canons that our respondents rejected. A faithful-agent theory focused instead on interbranch “comity”<sup>443</sup> likewise seems ill tailored to rules that do not reflect how Congress drafts or whose use by courts Congress does not recognize or otherwise welcome. Even canons that might find alternative justifications in rule of law values are not being applied by courts consistently or predictably enough for such values to bear the weight of justifying those rules’ application.

Moreover, new empirical studies show that Congress rarely overrides the Court’s statutory interpretation decisions.<sup>444</sup> Without that “check” on judicial interpretations, the verifiability of an interbranch interpretive dialogue—central to both faithful-agent and rule of law theories—takes on greater salience for democracy-based justifications for the rules: the most effective way that Congress can shape and respond to how judges interpret ambiguous statutes is arguably through a common language of interpretive conventions whose existence our study calls into some question.

Closely related to the democracy concern, and likely driving as much of the loyalty to the faithful-agent model, seems to be a profound—but unspoken—uneasiness with the judicial power to create and apply the various interpretive rules in the first place. Modern federal judges are notoriously reluctant to be viewed as “making law.” Whether that reluctance stems from the pallor that *Erie*<sup>445</sup> cast over federal common lawmaking<sup>446</sup> or from the dominance of modern legal culture’s opposition to “activist” judging, it favors at least the superficial embrace of the most passive version of the faithful-agent model: one based on judicial rules that approximate how Congress drafts. A reflective vision of faithful agency implies a (very pre-*Erie*<sup>447</sup>) understanding of the rules as ones that come *to* judges *from* congressional practice and not vice versa.

The discomfort with lawmaking in this context also contributes, we believe, to the allure of the rule-of-law-oriented canons. References to Latin textual rules and dictionaries may seem less like “making law” than Justice Breyer’s approach, even though both may be equally disconnected from legis-

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442. See BREYER, *supra* note 19, at 92.

443. Katzmman, *supra* note 53, at 670 (“When courts construe statutes in ways that respect what legislators consider their work product, the judiciary promotes comity with the first branch of government.”).

444. See *supra* note 14 and accompanying text.

445. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

446. Consider, for example, the common textualist justification for canons that go back hundreds of years: “[T]heir long pedigree makes it difficult to dismiss their use as fundamentally inconsistent with the limits that the Constitution imposes upon the exercise of judicial power.” Barrett, *supra* note 22, at 128; see also Gluck, *Federal Common Law*, *supra* note 165 (discussing canons as federal common law even after *Erie*).

447. For the pre-*Erie* conception of the common law as something to be discovered, not created, see *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842).

lative practice. The discomfort was recently reflected in Justice Scalia's book, which, within a span of ten pages, claims both that canons are not "rules" that courts must apply and also that "statutory interpretation is governed as absolutely by rules as anything else in the law . . . ." <sup>448</sup> John Manning explains the anxiety this way:

When the Court, in effect, tells a coordinate branch that it must do its business in a different way . . . , it is imperative to anchor that instruction firmly in a source of higher law. Otherwise, it is not clear why the Court has any warrant to reform the legislative process. <sup>449</sup>

The canons provide at least a veneer of legitimacy by allowing judges to point to something other than their own personal preferences or intuitions to justify their decisions. At the same time, the legitimacy of the canons themselves is a cause for discomfort. Judges, and even scholars, seem reluctant to discuss more frankly where the canons come from and whether at least some are necessarily judicial creations rather than reflections of legislative intent or practice.

We do not aim to resolve here the questions of whether the rules of interpretation are "law," a cover for judicial legislating, "common sense," or something else entirely; <sup>450</sup> how much work they actually do; or from where the power to create them is derived. But we do wish to point out that these are, in fact, unresolved questions. It is impossible to construct a coherent theory of legitimacy—that is, what the rules should be, how they should relate to Congress, or who has the power to change them—without a more exact understanding of what the rules *are* and where they come from. Conceptualizing the rules as judicial conventions, judicial procedure, or judicial "shortcuts" has different implications from conceptualizing the rules as constitutional implementation, judge-made common law, or legislative presumptions that courts have no power to create themselves. Judicial procedures or constitutional implementation doctrines arguably need not be tied to Congress, nor is it evident that Congress has the power to change them. Rules that, on the other hand, are better understood as common law or as necessarily derived from congressional practice may have the opposite implications. One suggestion of our study is that not all of the canons may even be the same type of legal tools, as a jurisprudential matter, for the purpose of answering these questions.

Another result of this exercise of disaggregating the canons and their various justifications is that it drives home Jerry Mashaw's point that all theories of statutory interpretation are, at bottom, highly contested theories of constitution-

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448. Compare SCALIA & GARNER, *supra* note 13, at 51, with *id.* at 61 (omission in original) (internal quotation mark omitted).

449. See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1306-07 (2010) (explaining why textualism's recent emphasis on the constitutional argument against legislative history puts the theory "on firmer ground").

450. For elaboration of this question, see generally Gluck, *Federal Common Law*, *supra* note 165.

al law.<sup>451</sup> The legal status of the canons and what legitimizes them are constitutional-level conclusions that go to the essence of the courts-Congress relationship. The muddiness of the governing paradigm makes clear that what form that relationship should take remains unsettled.

C. *Canons as Collective Knowledge, the Shifting Effect of Legal Education, and the Potential for a Dynamic Interpretive Regime*

We also wish to acknowledge some limitations on the findings thus far presented and related challenges for doctrine. One potential limitation is that we interviewed individuals, but Congress works collectively, and so canon knowledge may be shared and thus more pervasive than our findings suggest. If different staffers have different types of knowledge, or if staffers routinely check their drafting work with particularly expert drafters, the presumptions underlying the canons may find their way into more statutes.

It does appear from our findings that certain respondents were generally more familiar with the canons than others—canon knowledge was not random or sporadic. Those who knew one substantive or textual canon were likely to know another. Our respondents also repeatedly volunteered that they have their statutes checked (or drafted entirely) by drafters in the Offices of Legislative Counsel, whom they assumed to be more expert.<sup>452</sup> At the same time, even the more knowledgeable respondents in our sample were themselves familiar only with those canons with which our broader respondent population also was generally familiar (like preemption, *Chevron*, *expressio unius*, and the rule against superfluities), and not with those generally less known by our respondents.<sup>453</sup> As such, while it may be the case that the better-known canons find their way into even more statutes than our results suggest, it does not appear that the lesser-known canons are finding their way in through our more expert respondents either.

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451. Mashaw, *supra* note 162, at 1686.

452. We have some doubts about this conclusion, which we present in the companion Article.

453. For example, about 70% of those who knew the federalism canons knew the rule against superfluities—70% for preemption, 71% for federalism, as compared to 38% and 52% of those who did not know the federalism canons (at 99% confidence for the first and 95% for the second using the super population assumption; 99% confidence for both using a population of 650 counsels), and almost half of the respondents who knew the federalism canons knew *expressio unius*, although only the preemption findings on *expressio unius* were statistically significant (at 95% confidence using the super population assumption; 99% confidence using a population of 650 counsels). Of those who knew *Chevron*, 68% knew the rule against superfluities (at 99% confidence using both populations), and 49% knew *expressio unius* (95% confidence using the super population assumption; 99% confidence using a population of 650 counsels).



We also did not investigate how *outsiders'* knowledge of the canons may trickle into the final legislative product. For example, if the agency counsels, other executive branch officials, lobbyists, or academics who often draft portions of statutes are more familiar with the canons than congressional counsels, statutory text that is drafted by such outside writers might incorporate the assumptions underlying the canons more often than our findings indicate. There are likely external networks of these noncongressional drafters of federal legislation, with deep resources of institutional and legal knowledge, that may influence statutory drafting in ways that have been unappreciated and merit their own separate study. We return to this question of multiple drafters in the companion Article, but we note here that it also complicates the faithful-agent question. Is Congress necessarily the only agent to which the courts should be faithful in this interpretive conversation?

We also report that, in general, we did not find notable patterns of differences due to population characteristics. Age and experience made a statistically significant difference across only a small number of questions,<sup>454</sup> and not in ways that lend themselves to coherent explanation. A law degree may matter more—and having taken a legislation course in law school may make an even greater difference. Given that we only interviewed fifteen nonlawyers, we are reluctant to make strong claims, but we note that, across our sample, our lawyer respondents were more familiar with the presumption against preemption, *Chevron*, and the textual canons (with the exception of *noscitur a sociis* and the whole code rule) than the nonlawyers.<sup>455</sup> In addition, those who had taken a legislation or statutory interpretation course in law school<sup>456</sup> were more likely than those who had not to know *Mead*; to say that *Chevron* played a role in drafting; to say they could name a clear statement rule; to know *noscitur a sociis*, *ejusdem generis*, *expressio unius*, and the rule against superfluities by

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454. Where significant, it was at the 95% confidence level. All statistics were computed from cross tabs of the demographic characteristics (i.e., age or experience) and the responses to each survey question, without other controls. Significance for the super population assumption was computed using Fisher's exact test and Pearson's chi-squared test. Significance for the population of 650 was computed using a corrected Pearson's chi-squared test.

455. Q8; Q17; Q20; Q45a-g (omitting one respondent who was currently in law school). We note that the ranking of law schools attended generally had no significant impact on the results, whether measuring the top fourteen law schools versus the rest or the top fifty versus the rest (omitting from the calculation the many respondents for whom we did not have law school information). Based on the information we have, however, those who attended elite schools were more likely to know *in pari materia* and *expressio unius*, and to say they drafted in accordance with the rule against superfluities.

456. When asked by respondents, we defined "legislation or statutory interpretation course" to cover only those subjects or legislative drafting or the legislative process. We did not include statute-based courses such as tax law (which several respondents asked about) in that number.

name; and to say that courts should consult textual and agency-deference canons when interpreting statutes.<sup>457</sup>

These differences raise the additional possibility that drafter awareness of the canons is *generational* and is changing across time. We surveyed our respondents at a single point in time, and so our data cannot confirm these dynamics. But it also was our impression that, with respect to each drafter whom we interviewed, his or her views about the matters we surveyed had reached equilibrium—that is, that canon awareness and use is not dynamic for particular drafters over time, but perhaps may be dynamic across different drafters. As legislation courses proliferate in law schools and increasingly enter the first-year curriculum, it is possible that awareness will continue to grow as newly trained lawyers enter congressional service.

There are some interesting doctrinal implications of this potentially generational—and shifting—aspect of canon knowledge. Most obviously, it means that where canons sit in our typology may be subject to change. Canons that are unknown today may be feedback canons that affect congressional drafting ten years from now, if legal education has something to do with it. A normative framework that depends on drafter awareness and/or use of the canons and their concepts thus might have to move with the generations. There would obviously be difficult operational issues associated with such an approach—or any approach that shifts with the realities of the drafting process. In the short term, it would be impossible for courts to determine which lawyers had taken a legislation course and which had not. Over the longer term, even if one assumes that most future counsels will be familiar with the canons, not all statutes are drafted by counsels. Courts also would have to decide whether the canon knowledge of the enacting Congress or current Congress should control. Ultimately, the question would be whether the doctrines of the field should be understood as dynamic or static. This question might extend not only to drafter knowledge of the canons but also to other potentially changing facets of the legislative process—for instance, if Congress moves increasingly toward unorthodox legislation over time.

D. *A Normative Framework for Congress's Side of the Relationship: Congress as "Faithful Principal"?*

Finally, we note that, although we have focused on the Court's doctrines and the prevailing theoretical conceptions of the judicial role, there is another side to this story (and, indeed, this is one point of our study): Congress. To our knowledge, little consideration has been given to the normative framework that Congress should adopt to effectuate its side of the interbranch relationship in statutory interpretation.

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457. Q9; Q20; Q21; Q35; Q45a, b, d; Q68a, d.

A few scholars and judges have suggested some steps that Congress might take to produce more coherent statutes<sup>458</sup> or to foster more courts-Congress communication.<sup>459</sup> One set of justifications for such proposals has emphasized the importance of statutory coherence for the public and the desirability, from a democracy perspective, of Congress rather than courts imposing that clarity upon the U.S. Code.<sup>460</sup> Another set of justifications has focused on interbranch comity and the need for Congress to assist courts working to discern congressional intent.<sup>461</sup> Still another set of arguments has been rule-of-law-oriented, emphasizing that some predictability is needed and that Congress is in the best position to impose it.<sup>462</sup>

But we wonder whether, as a matter of theory, there is more to say about Congress as a “faithful principal” relative to the courts as “faithful agents.” For instance, does Congress have *its own* set of obligations to pay more attention to the Court’s interpretive work? Are there arguments about Congress’s institutional role that are distinguishable from more common arguments that are really about the courts (such as those describing courts as undemocratic or emphasizing the need for predictable legal rules)? Should Congress more aggressively try to change the rules of interpretation with which it disagrees or that it knows cannot practically be implemented (like broad presumptions of consistent usage)? Or perhaps Congress should change its *own* rules or practices to bring them in line with judicial interpretation. For example, Congress might address the disconnect between its rules preventing substantive legislative language in appropriations text and the federal courts’ refusal to give legal effect to the appropriations legislative history that typically contains the key directives, or the disconnect between the institutional importance of the markup and the fact that Congress does not make markup transcripts readily accessible to the (litigating) public.<sup>463</sup> Might that obligation be heightened in the current climate, when congressional overrides are rare? If Congress cannot address judicial interpreta-

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458. See Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1431-32 (1987) (suggesting a congressional committee to propose minor changes to ambiguous legislation and noting similar proposals by Judge Friendly and Justice Stevens).

459. See Katzmann, *supra* note 53, at 686-93 (describing a pilot project for transmitting D.C. Circuit statutory interpretation opinions to the House of Representatives); Nourse & Schacter, *supra* note 10, at 621-22.

460. See Ginsburg & Huber, *supra* note 458, at 1426 (“Nonuniform application of national statutes, most especially those intended for the micromanagement of human affairs, is unsettling and on balance undesirable. We neither want nor need the reflective fluidity of judge-made common law; we need the definition, discipline, and precision of a well-written statute.”); see also *id.* at 1417.

461. See Katzmann, *supra* note 53, at 693.

462. See Rosenkranz, *supra* note 15, at 2088, 2143-48.

463. See *supra* notes 282, 312, and accompanying text.

tions with which it disagrees *ex post*, does it have an obligation to try to better coordinate or communicate with the courts *ex ante*?

Intriguingly, these are questions that have been addressed in the context of constitutional law, but not statutory interpretation. Scholars who have debated whether Congress has its own obligations to consider constitutional issues have addressed matters such as whether judges have a “monopoly” on constitutional interpretation; the two branches’ relative competence to interpret the Constitution; and whether there is a real distinction between policy and constitutionality that justifies the separation.<sup>464</sup> The answers to these questions may be clearer in the statutory interpretation context, given the obviously shared authority between the branches over statutory meaning, as well as Congress’s understanding of the documents it drafts and the perhaps inextricable link between policy (and possibly even politics) and statutory law.

As we detail in the companion Article, however, a theory of Congress as a faithful principal has its own set of operational difficulties. Most importantly, even taking into account the centrality of the Offices of Legislative Counsel in the drafting process, there is currently no mechanism for coordinating drafting behavior. As we illustrate, not only the House and Senate Offices of Legislative Counsel but also many different committees each have different drafting practices—including different drafting manuals!—and many parts of statutes are drafted by noncommittee staff who report only to their members.<sup>465</sup> These kinds of institutional barriers would have to be dismantled if Congress were expected to exercise its obligations as a faithful principal through a more coordinated drafting process. An easier reform might be the establishment of a special federal office, like those that exist in many states, tasked with the job of monitoring judicial statutory decisions and bringing opinions involving statutory ambiguities, potential mistakes, and the like to Congress’s formal attention periodically.<sup>466</sup> Many noted jurists through the years have suggested that such an office be created.<sup>467</sup>

We did ask our drafters whether they had ever drafted or considered drafting rules of interpretation for courts to follow. A small number (5%) responded that they thought such rules would raise constitutional issues. Thirty-seven percent, however, said they had drafted or considered drafting such rules, and 24% pointed to the literally *thousands* of “rules of construction” that already exist in the U.S. Code. Interestingly, Justice Scalia’s new book claims that Congress

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464. See MORGAN, *supra* note 166, at 12-15, 331; Brest, *supra* note 166, at 587-89.

465. See Bressman & Gluck, *supra* note 8.

466. See Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1059-64 (1991) (describing similar offices in several states).

467. See Ginsburg & Huber, *supra* note 458, at 1432; Katzmann, *supra* note 53, at 687 (noting that Justice Stevens supported a similar proposal).

rarely legislates interpretive rules.<sup>468</sup> But federal courts already routinely follow many of these already-codified rules of construction, and there is arguably little difference between many of them and the court-created canons.<sup>469</sup> As just one example, consider the similarity between the Employee Retirement Income Security Act (ERISA)'s famous "savings clause"—"[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"<sup>470</sup>—and the presumption against preemption.

Scholars have exhaustively debated whether Congress has the power to impose rules of interpretation on the courts.<sup>471</sup> To our knowledge, however, that debate has not addressed these rules of interpretation that Congress already imposes. Nor has that debate occurred within a framework of what theory should animate Congress's *own conception* of its role in the relationship. Any theory of statutory interpretation that depends at least in part on an interbranch dialogue—like most in current deployment—requires more attention to Congress's participation and obligations in that conversation.

In that vein, we turn our focus now from the doctrines that courts employ to the companion Article, which details other aspects of the drafting process that our respondents emphasized were essential to understanding how statutes are interpreted on the inside.

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468. SCALIA & GARNER, *supra* note 13, at 245 (calling this question "academic" on the ground that "[a]part from the rule-of-lenity abridgments . . . , the only common enactments directing judicial interpretation that we are aware of are those prescribing that the provisions of a statute 'are to be liberally construed'").

469. For examples of the Court's reliance on savings clauses, see *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011); and *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1135-36 (2011). For examples of reliance on severability clauses, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) ("[The Medicaid statute] includes a severability clause confirming we need go no further."); and *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). For examples of reliance on preemption clauses, see *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012); *Whiting*, 131 S. Ct. at 1977. ERISA's savings clause has been cited in at least twenty-six cases in the U.S. Supreme Court, fifty-three cases in state supreme courts, and 352 cases in the courts of appeals. Its preemption clause has been cited at least fifteen times in the Supreme Court, eighty times in state supreme courts, and 349 times in the federal courts of appeals. These numbers are derived from a Westlaw KeyCite search of 29 U.S.C. § 1144, limited to terms "savings" or "preemption clause." For elaboration of this point, see Gluck, *Federal Common Law*, *supra* note 165, at 801-04.

470. 29 U.S.C. § 1144(b)(2)(A) (2011).

471. See, e.g., Rosenkranz, *supra* note 15 (arguing that Congress could legislate interpretive canons that are not constitutionally required).

