THE IMPLIED ASSERTION DOCTRINE APPLIED TO LEGISLATIVE HISTORY

by

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This Article derives a new approach towards the use of legislative history to interpret statutes by adapting and applying the law of evidence. Courts use legislative history as hearsay evidence: out-of-court statements used for the truth of the matter asserted. Evidence law includes many exceptions under which hearsay becomes admissible. One such exception, the implied assertion exception, can be applied to courts' use of legislative history. Under this framework, legislative history can illuminate the interpretive enterprise, while many of the problems identified by opponents of legislative history are mitigated. After presenting the development of the implied assertion doctrine in evidence law, this Article demonstrates the efficacy of this approach through three case studies from recent Supreme Court statutory interpretation opinions—General Dynamics v. Cline, Hobby Lobby v. Burwell, *and* King v. Burwell. *The resulting doctrinal proposal exemplifies a novel approach to legislative history that can be extended to other evidence law doctrines.*

* J.D., Harvard Law School, May 2016; J.D., Harvard Law School, May 2016. We are deeply grateful to Professors John Manning, Intisar Rabb, Susan Davies, Alexandra Lahav, Leah Litman, and Susannah Barton Tobin for their insight and guidance. The suggestions and comments from Hannah Schutzengel, Cary Glynn, Arjun Ramamurti, and Neda Khoshkhoo were also invaluable in preparing this Article for publication.

INTRODUCTION

As many have observed, the textualism revolution is over, and the textualists have won.[1] Indeed, modern textualism as an interpretive methodology can now claim almost all members of the Supreme Court as adherents.[2] But despite the best efforts of Justice Scalia,[3] who led the charge against any use of legislative history as an interpretive aid,[4] most

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[1] *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); *In Scalia Lecture, Kagan Discusses Statutory Interpretation*, HARV. L. SCH. (Nov. 18, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation/ [hereinafter Kagan, *Scalia Lecture*] (Justice Kagan: "We're all textualists now").

[2] Kagan, *Scalia Lecture*, *supra* note 1.

[3] Justice Scalia has been joined by several other influential judges and academics that have raised extensive critiques of using legislative history in judicial decision-making. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) [hereinafter Manning, *Equity of the Statute*], John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Nondelegation Doctrine*]; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371.

[4] As is widely acknowledged, after ascending to the Supreme Court in 1986, Justice Scalia waged a fierce campaign against the use of legislative history. As one commentator explained, "[f]rom the beginning of his tenure, Justice Scalia . . . rejected as illegitimate reliance on most forms of legislative history as guides to statutory meaning. He did this in case after case, often concurring alone to note his objection." William K. Kelley, *Justice Antonin Scalia and the Long Game*, 80 GEO. WASH. L. REV. 1601, 1604 (2012); *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1162 n.261

judges, including many self-identified textualists, are comfortable with the use of legislative history for limited purposes.[5] For these judges, the most salient question is *how* legislative history may be used.[6]

This Article derives a new approach towards the use of legislative history. Recognizing that legislative history is used as *evidence* of legislative intent, we analyze legislative history using longstanding principles of the law of evidence. Through that lens, we identify legislative history as, more specifically, hearsay evidence. Evidence law has recognized various exceptions under which hearsay evidence becomes admissible, some of which are rooted in the belief that the risk of insincerity thought to pervade hearsay is mitigated in certain situations. That sincerity concern, we argue, aligns with one of textualists' most potent critiques of legislative history, that it does not accurately convey legislative intent because it is subject to manipulation. Therefore, the sincerity-based hearsay exceptions can be applied in legislative history analysis to mitigate textualists' sincerity concern.

This Article applies one sincerity-based hearsay exception, the implied assertion doctrine, to legislative history. We argue that courts can use certain implications of legislative history (called "implied assertions") to illuminate important background assumptions upon which Congress legislated. Those background assumptions will sometimes prove determinative in difficult statutory interpretation questions. When used properly, implied assertions can provide benefits to the interpretive enterprise while mitigating many of the problems identified by opponents of legislative history.

(2002) (collecting cases). It is reasonable to expect that Justice Scalia's consistent refusal to join opinions citing legislative history pushed the court collectively, even justices who would otherwise cite and rely on it, to move away from its use in service of preserving, or attempting to court, his vote. *See, e.g.*, James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 163–64 (2008) (noting the "Scalia effect" in employment law cases).

[5] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 131 n.93; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 658–59 (1990); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005).

[6] *See* Note, *Why Learned Hand Would Never Use Legislative History Today*, 105 HARV. L. REV. 1005, 1020 (1992) [hereinafter *Why Learned Hand*] ("Ideally, a methodology could be devised to separate 'good' and 'bad' legislative history."). A significant body of modern scholarship attempts to do just this. *See, e.g.*, George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 408 (1989); *see also* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 95 (3d ed. 2001) (aggregating articles); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 253–55.

Section I identifies legislative history as evidence and categorizes it as hearsay evidence. Section II aligns the sincerity issue in hearsay evidence with textualists' sincerity critique of legislative history. Section III presents the development of the implied assertion doctrine in evidence law. Section IV derives an implied assertion doctrine for legislative history that mitigates many of the critiques of legislative history. Second V applies the doctrine in three case studies: *Burwell v. Hobby Lobby*,[7] *General Dynamics Land Systems v. Cline*,[8] and *King v. Burwell*.[9]

I. LEGISLATIVE HISTORY IS EVIDENCE, SPECIFICALLY, HEARSAY EVIDENCE

It is often repeated and well understood that legislative history is used by judges as evidence of legislative intent.[10] However, legislative history is rarely conceptualized as *evidence* per se, and the doctrines of evidence generally have not been applied to analyses and critiques of legislative history.[11] But legislative history is evidence.[12] Evidence is

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[7] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[8] Gen. Dynamic Land Sys. v. Cline, 540 U.S. 581 (2004).

[9] King v. Burwell, 135 S. Ct. 2480 (2015).

[10] The description of legislative history as evidence dates back more than a century. *See, e.g.*, Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (describing the Court's use of legislative history as extrinsic evidence); Hill's Adm'rs v. Mitchell, 5 Ark. 608, 608 (1844) ("In the construction of all doubtful statutes . . . the history of the enactment . . . is the very best evidence as to its meaning and intention."); James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930). It has also been used in more modern cases and scholarship. *See, e.g.*, Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law."); Gomez-Perez v. Potter, 553 U.S. 474, 484–85 (2008); Baker v. Gen. Motors Corp., 478 U.S. 621, 639 (1986); Manning, *Nondelegation Doctrine*, *supra* note 3, at 683–84.

[11] Indeed, almost all of the commentary at the intersection of evidence law and legislative history is wholly unrelated: it describes the legislative history of particular federal rules of evidence. *See, e.g.*, Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267, 270 (1993). However, writers have occasionally made connections between the use of legislative history and evidence doctrines. *See, e.g.*, Robert J. Araujo, S.J., *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 135 (1992) ("Legislative history is evidence used to reach legal conclusions. Like any evidence used in a legal proceeding, it must be tested for integrity, veracity, and reliability. As with all other evidence, it must be examined carefully to determine its probative value, if any."); Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 480 (2005); *Why Learned Hand*, *supra* note 6, at 1019 (comparing legislative history to the hearsay use of business records made in anticipation of litigation). Courts, when applying constitutional tests that involve identifying impermissible legislative intent, such as Establishment Clause doctrines, have also applied evidentiary doctrines to regulate whether particular indicia of intent are admissible. *See, e.g.*, Brooks v. Miller, 158 F.3d 1230, 1242 (11th Cir. 1998); May v.

introduced by litigants to an adjudicative body to make a particular determination of a fact more or less probable;[13] legislative history is introduced by litigants to an adjudicative body to make a particular interpretation of a statute more or less probable.[14]

Conceptualizing legislative history as evidence is useful because the taxonomy of evidence law can organize the use of legislative history to interpret statutes. One example is that even proponents of legislative history typically understand it to consist of recorded, official statements by legislators and those close to the drafting process, and not to include informal, malleable communications such as tweets, press releases, or statements from others in the legislative orbit, such as lobbyists. The unstated justification for this delineation is likely the determination that recorded, official statements are the most *relevant* and *reliable* indicia of statutory meaning while the attendant risks of considering more attenuated or informal statements—their manipulation or unreliability, for example—substantially outweighs their probative value. Such a determination aligns with Federal Rule of Evidence 401's definition of evidentiary relevance and Federal Rule of Evidence 403's grounds for excluding some relevant evidence due to the risk of unfair prejudice.[15]

A second example is that legislative history is often stratified into tiers of quality, with committee reports ranked toward the top and floor statements relegated to the bottom.[16] Committee reports are the "gold standard" of legislative history,[17] likely because of the quasi-adversarial

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Cooperman, 780 F.2d 240, 261 (3d Cir. 1985); Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1170 n.1 (M.D. Ala. 2011), *vacated sub nom.* Cent. Ala. Fair Hous. Ctr. v. Comm'r, Ala. Dep't of Revenue, No. 11-16114-CC, 2013 WL 2372302, at *1 (11th Cir. May 17, 2013).

[12] For the purposes of this Article, we define legislative history as statements pertaining to legislation, particularly from those who drafted or voted for a law. *See* District of Columbia v. Heller, 554 U.S. 570, 605 (2008); *see also* Simpson v. United States, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting) (listing various sources of legislative history).

[13] *See* FED. R. EVID. 401.

[14] Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 n.9 (1989) ("Nor does it strike us as in any way 'unhealthy' or undemocratic to use all available materials in ascertaining the intent of our elected representatives . . . ." (citations omitted)).

[15] FED. R. EVID. 401, FED. R. EVID. 403.

[16] *See* Eskridge, *supra* note 5, at 651 n.117; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1879–80 & n.159 (1998); *see also* Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 617 (1991) (citing Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 168 (1989) for the proposition that "legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute").

[17] *See, e.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'"(quoting Zuber v. Allen, 396 U.S. 168,

committee process, the expertise of committee members accrued through their tenure and through hearings, and the recursive editing process involved in the production of such reports. They are often contrasted with one-off floor statements, which can be made by any given legislator to no one in particular—or even to no one at all in the dead of night or to an empty chamber.[18] The analysis inherent in ascribing quality gradations[19] is directly akin to credibility determinations and the standards for determining to what extent evidence is probative.

This Article focuses on one particularly fruitful parallel between legislative history and evidence law: hearsay evidence. Hearsay is an out-of-court statement that is offered "to prove the truth of the matter asserted in the statement."[20]

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186 (1969))); *Pub. Citizen*, 491 U.S. at 475–76 (Kennedy, J., concurring in the judgment) (Committee reports contain "Congress' own explicit statement of its purposes" and accordingly are the "most obvious place for finding those purposes."); *see also* Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 609 (2010) (Scalia, J., concurring in part and concurring in the judgment).

[18] *See, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017) ("The legislative materials in these cases consist almost wholly of excerpts from committee hearings and scattered floor statements by individual lawmakers—the sort of stuff we have called 'among the least illuminating forms of legislative history.'" (quoting NLRB v. SW General, Inc., 137 S. Ct. 929, 943 (2017))); Lapina v. Williams, 232 U.S. 78, 90 (1914) ("Counsel for petitioner cites the debates in Congress as indicating that the act was not understood to refer to any others than immigrants. But the unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out and we are not disposed to go beyond the reports of the committees." (citations omitted)); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318–19 (1897) ("The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.").

[19] *See, e.g.*, United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO), 352 U.S. 567, 585–86 (1957) ("Although not entitled to the same weight as these carefully considered committee reports, the Senate debate preceding the passage of the Taft-Hartley Act confirms what these reports demonstrate." (citation omitted)); United States v. St. Paul, Minn. & Manitoba Ry. Co., 247 U.S. 310, 318 (1918) ("It is not our purpose to relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment. But the reports of a committee, including the bill as introduced, changes made in the frame of the bill in the course of its passage, and statements made by the committee chairman in charge of it, stand upon a different footing, and may be resorted to under proper qualifications." (citation omitted)).

[20] FED. R. EVID. 801(c)(2). "Statement" is defined as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." FED. R. EVID. 801(a); *see also* MCCORMICK, EVIDENCE § 250 (2d ed. 1972) (stating common law definition of hearsay as "statements offered for the purpose of proving that the facts are as asserted in the statement"). The most famous historical example of hearsay may be the ex parte accusation of Lord Cobham, which was read aloud to

Applying the basic tenets of evidence law to legislative history, it is clear that legislative history is hearsay evidence: it is always an out-of-court statement[21] and it is generally used to prove the truth of what the speaker (the legislature, legislator, or legislators) asserted in the statement. For example, in *Burwell v. Hobby Lobby*, the government's brief cited to a Senate Report that stated that the purpose of the Religious Freedom Restoration Act was "'only to overturn the Supreme Court's decision in [*Employment Division v.*] *Smith*,' not to 'unsettle other areas of the law.'"[22] This statement was introduced for the truth of what it asserted: that the purpose of RFRA was indeed to overturn *Smith*, not to unsettle other areas of the law. Justice Ginsburg cited this legislative history in her dissent to help prove her ultimate claim that RFRA "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*."[23]

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the jury in the 1603 treason trial of Sir Walter Raleigh. *See* Crawford v. Washington, 541 U.S. 36, 44 (2004) (citing the trial of Sir Walter Raleigh as among "[t]he most notorious instances of civil-law examination"); Williams v. Illinois, 132 S. Ct. 2221, 2249 (2012) (Breyer, J., concurring); John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 443 (1904). Cobham's statement declared Raleigh's guilt, and the statement was hearsay because it was introduced for the truth of what it said: that Raleigh committed treason. Despite Raleigh's calls for Cobham to testify in person ("[L]et Cobham be here, let him speak it. Call my accuser before my face."), Cobham's hearsay testimony was admitted, and Raleigh was sentenced and put to death. *Crawford*, 541 U.S. at 44.

[21] For the sake of simplicity, our analysis ignores the phenomenon of legislators submitting amicus briefing attesting to their intent in enacting a particular statute. *See, e.g.*, Brief of United States Senators Murray, et al. as Amici Curiae Supporting Petitioners at 1–2, Hobby Lobby v. Sebelius, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); Brief of U.S. Senators Ted Cruz et al. as Amici Curiae Supporting Respondents at 1–3, Hobby Lobby v. Sebelius, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356); Brief of Senators Orrin G. Hatch, et al. as Amici Curiae Supporting Respondents at 4–5, Hobby Lobby v. Sebelius, 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356). We are unaware of anyone who treats such briefing as legislative history and, to the extent it is treated that way, it would be definitionally post-enactment legislative history, which we exclude from our analysis. *See infra* note 74.

[22] Brief for Petitioners at 43, Hobby Lobby v. Sebelius, 134 S. Ct. 2751 (2014) (No. 13-354).

[23] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 424 (2006) and S. Rep. No. 103-111, at 12 (1993) [hereinafter RFRA Senate Report]). Another example can be found in *Corley v. United States*, 556 U.S. 303, 317–18 (2009) ("[T]he Government concedes that subsections (a) and (b) were aimed at *Miranda*, while subsection (c) was meant to modify the presentment exclusionary rule. . . . The concession is unavoidable. . . . In the debate on the Senate floor immediately before voting on these proposals, several Senators, including the section's prime sponsor, Senator McClellan, explained that Division 1 'has to do with the *Miranda* decision,' while Division 2 related to *Mallory*.").

II. THE SINCERITY CONCERN IN HEARSAY PARALLELS A PRIMARY TEXTUALIST CRITIQUE OF LEGISLATIVE HISTORY

Evidence law holds that hearsay evidence is generally inadmissible. This rule against admitting hearsay evidence is based on four inherent flaws in hearsay.[24] Two of these flaws arise from a disconnect between what a hearsay declarant[25] says and what she believes: a declarant may be lying (insincerity)[26] or she may be using language in a way that fails to accurately convey her belief such that a listener gleans a different meaning than what she intended to say (faulty narration).[27] The other two flaws arise from a disconnect between a declarant's belief and the external fact about which she is speaking: a declarant may have contemporaneously perceived the fact incorrectly (faulty perception), or she may at the time of the hearsay statement remember the fact incorrectly (erroneous memory).

Three of the four flaws of hearsay evidence are not applicable in the legislative history context. Since pre-enactment legislative history[28] is contemporaneously transcribed, there is no risk of an erroneous memory. Faulty perception is also inapplicable because legislative history is used to demonstrate the subjective understanding of legislators at the time of a law's passage.[29] Finally, while faulty narration is a potential flaw because courts may have difficulty interpreting the meaning of written

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[24] *See, e.g.*, Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218 (1948) ("substantial risks of insincerity and faulty narration, memory, and perception"); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1796 (1980).

[25] In hearsay doctrine, the person who speaks or writes the hearsay evidence is referred to as the "declarant." The declarant is distinguished from the "witness," who is the person testifying in the courtroom. *See Declarant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[26] Although sincerity is a risk in all types of evidence, the traditional view holds that the risk of insincerity is much higher outside the courtroom than within it, because in-court testimony is made under oath and subject to cross-examination. *See, e.g.*, Morgan, *supra* note 24, at 186 ("The fear that cross-examination may uncover falsehood . . . is a strong stimulus to sincerity.").

[27] *See* Ohio v. Roberts, 448 U.S. 56, 71 (1980) ("[T]he declarant's intended meaning [was not] adequately conveyed by the language he employed."), *overruled by Crawford*, 541 U.S. at 60. This flaw is occasionally termed "ambiguity" rather than "narration." *See, e.g., The Theoretical Foundation of the Hearsay Rules*, *supra* note 24, at 1809 n.93 (If a declarant testifies in person, "ambiguous terms might be clarified.").

[28] Our doctrine excludes post-enactment legislative history due to its heightened risk of manipulation. *See infra* note 74.

[29] An interpreter of legislative history seeks Congress's intent. Because Congress's intent is all that matters, there can be no faulty perception problem because Congress cannot "misperceive" its own intent. By contrast, traditional trial testimony is subject to misperception. In a trial involving a car crash, for example, a witness testifying that a stoplight was green at the time of an accident may have misperceived—and the light could have actually been red.

legislative history, that issue is inherent in the judicial process: there is no reason why it would be harder for a court to interpret language within legislative history than statutory text.[30] The narrative flaw is no more a risk here than in any other judicial interpretive context.

The final flaw of hearsay—sincerity—is directly analogous to one of Justice Scalia's and textualists' most powerful critique of legislative history, its susceptibility to intentional manipulation. In Justice Scalia's words, legislative history "is much more likely to produce a false or contrived legislative intent than a genuine one."[31] This critique is particularly powerful because it directly attacks the primary reason for judicial use of legislative history: that, as a contemporaneous record of a bill's legislative development, legislative history can provide genuine insight into legislative intent.[32]

In support of their argument, sincerity critics have noted that the development of legislative history is often divorced from the development of legislation. For example, Justice Scalia explained that it is a "fantasy" that floor speeches in Congress are delivered to "throngs of eager listeners;" in reality they are "delivered . . . alone into a vast emptiness."[33] Some legislative history is not even contemporaneous: it is a "widespread practice, at least in Congress, of allowing legislators to amend or supplement their remarks in the published version in the Congressional Record."[34] Even legislative history that was prepared before

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[30] *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 990 (2004); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context."); Manning, *supra* note 6, at 79–80, 91 (maintaining that textualists "give primacy to" a statute's "semantic context").

[31] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 32 (Amy Gutmann ed., 1997).

[32] *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89–93 (2007).

[33] Hamdan v. Rumsfeld, 548 U.S. 557, 665–66 (2006) (Scalia, J., dissenting); *see also* SCALIA, *supra* note 31, at 32.

[34] Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983); *see also Hamdan*, 548 U.S. at 580 n.10 (rejecting statements that "appear to have been inserted into the Congressional Record *after* the Senate debate"); Shapiro v. United States, 335 U.S. 1, 48–49 (1948) (Frankfurter, J., dissenting) (describing "unsuspected opportunities for assuring desired glosses upon innocent-looking legislation"); *Why Learned Hand*, *supra* note 6, at 1015–16. In *Barnhart v. Sigmon Coal Co.*, for example, Justice Thomas criticized Justices Stevens, O'Connor, and Breyer for looking to a sentence inserted into the record three days following the passage of the bill in question. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 457 n.15 (2002); *see also Bruesewitz*, 562 U.S. at 242. As discussed, our doctrine excludes post-enactment legislative history due to its heightened risk of manipulation. *See infra* note 74.

a bill was passed is sometimes not available to legislators before the vote.[35] Instead, legislative history is crafted to appeal to particular audiences who are not involved in the process of developing legislation. It can serve as a public relations tool generally and, in particular, can be used to appease interest groups. Justice Frankfurter, writing in 1948, explained that "interests, public and private, often high-minded enough but with their own axes to grind" attempt to influence legislative history.[36]

To sincerity critics, the largest threat to legislative history's legitimacy is the prospect that legislative history can be developed specifically to influence the judicial decision-making process. Because legislators are aware that judges use legislative history to interpret statutes, affecting the courts often becomes the primary motivation for the development of legislative history.[37] A judge who consults the legislative record "corrupts" the subsequent development of legislative history by creating "profoundly anti-democratic incentives for the various actors who generate these histories . . . to inject statements intended solely to influence the later interpretation of the statute."[38] Indeed, then-Judge Kenneth Starr once proclaimed that "It is well known that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute."[39]

The threat of manipulation is further elevated, critics of legislative history argue, because the ability to manipulate legislative history does not lie in legislators alone. Unelected legislative staff members draft floor statements and exercise control over the content of committee reports.[40] This gives legislative staff extreme power to influence the courts. In perhaps the most famous example, Justice Scalia once excoriated the Court for relying on "references . . . inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist . . . not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction."[41] He continued, "[w]hat a heady feeling it must be for a young staffer, to know that his or her citation of obscure district

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[35] *See* Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991); *see also* Eskridge *supra* note 5, at 643–44.

[36] *Shapiro*, 335 U.S. at 48 (Frankfurter, J., dissenting); *see also* William D. Popkin, *Foreword: Nonjudicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301, 315–16 (1990).

[37] *See* SCALIA, *supra* note 31, at 34; W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397–98 (1992) (arguing that judicial reliance on legislative history gives members of Congress an incentive to manufacture it); *Why Learned Hand*, *supra* note 6, at 1016.

[38] *Why Learned Hand*, *supra* note 6, at 1015–16.

[39] Starr, *supra* note 3, at 377.

[40] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

[41] Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989).

court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself."[42]

Hearsay declarants may purposefully manipulate their statements, just as legislators may manipulate theirs. While judges and legislative history scholars have considered the sincerity problem of legislative history over the past twenty-five years, the law of evidence has grappled with hearsay's sincerity problem for centuries. Over time, evidence law has developed certain exceptions to the hearsay rule that are based on a long-held belief that certain categories of statements do not present a risk of insincerity.[43] Because sincerity is a shared risk between legislative history and hearsay, the exceptions to the hearsay rule that are justified on sincerity grounds produces useful analogues in the legislative history context.[44] Below, we demonstrate how one such exception, the implied assertion doctrine, applies to legislative history.

III. THE IMPLIED ASSERTION DOCTRINE IN EVIDENCE LAW

The implied assertion doctrine is codified in the definition of hearsay in Federal Rule of Evidence 801, which excludes from the definition of hearsay any statement "which is assertive but [is] offered as a basis for inferring something other than the matter asserted."[45] This type of statement is called an "implied assertion," which is a term of art denoting an assertive statement introduced only to show that a particular inference can be drawn from it.[46] The key to an implied assertion is *intent*:

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[42] *Id.*

[43] For example, declarations against interest are admissible because a declarant is not likely to lie to put himself in a worse position. FED. R. EVID. 804(b)(3). This exception is justified on sincerity grounds: "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." FED. R. EVID. 804(b)(3) Advisory Committee's Notes to 1972 Amendment. The same justification (though often-maligned) is used for dying declarations: traditional wisdom held that "no [person] who is immediately going into the presence of his Maker, will do so with a lie on his lips." Tribe, *supra* note 24, at 966 n.28 (quoting Regina v. Osman (1881) 15 Cox Crim. Cas. 1, 3).

[44] Any of these hearsay exceptions that are justified on sincerity grounds could be applied to the legislative history context, just as this Article applies the implied assertion doctrine. This is an area for future research. We also note that, once conceived as evidence, there are additional potentially fruitful overlaps between evidence law and legislative history.

[45] FED. R. EVID. 801(a) Advisory Committee's Notes to 1972 Amendment.

[46] *See* Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 MINN. L. REV. 783, 788 (1990) ("The term 'implied assertion' has become a term of art for hearsay writers, who tend to give it a meaning somewhat broader than what it may connote to many readers. To say that an utterance is offered as an 'implied assertion' is not to say that the declarant intended to insinuate the fact the proponent is trying to prove. It merely means that the trier is being asked to infer that fact from the declarant's utterance."). This term of art dates back at least to the early twentieth century. *See, e.g.*, 3 JOHN

an implied assertion is admissible as non-hearsay only when the statement is used to demonstrate an inference that the speaker did not intend to assert.[47]

For example, consider a note written by an unknown person to a criminal defendant that says: "I looked over to the street North of here + there sat a [police car] w/the dude out of his car facing our own direction."[48] This note makes two factual assertions: that the author looked to the street north of the defendant's house and that the author saw a police car and police officer near the defendant's house. It would be inadmissible hearsay to use the note as evidence to prove the truth of what it asserts: for example, to prove that there was in fact a police car outside of the defendant's house. But under the implied assertion doctrine, the note *is* admissible if it is used to prove an implication of the statement that was unintended by the note's writer: for example, that the writer believed that the defendant needed to be warned about the presence of the police car in the area.[49]

A. *The History and Development of the Implied Assertion Doctrine*

The implied assertion doctrine has deep roots in the common law, tracing back at least to the famous 1838 English case *Wright v. Tatham*.[50] In that case, the plaintiff's counsel argued that testator John Marsden had been incompetent to make a will because he was "extremely weak in understanding . . . not more intelligent than a child of eight."[51] To prove that Marsden was competent, the defendant's counsel sought to introduce into evidence letters written to the testator by acquaintances that had since deceased.[52] The letters contained no assertions that Marsden was competent.[53] Instead, the letters were sought to be admitted for their implication: to demonstrate that "Marsden was treated by persons well acquainted with him" as a competent adult, which could be inferred from the content of the letters themselves, particularly portions of the letters in which the writers described their business transactions to Marsden.[54] Though the court held that these letters were inadmissible

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HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2152 (1904).

[47] *See* FED. R. EVID. 801(a) Advisory Committee's Notes to 1972 Amendment (This rule "exclude[s] from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.").

[48] State v. Dullard, 668 N.W.2d 585, 588 (Iowa 2003).

[49] *Cf. id.* at 590–91, 595 (rejecting the implied assertion doctrine as a matter of state law but noting its presence under federal law).

[50] Wright v. Tatham (1837) 112 Eng. Rep. 488, 489 (Ex. Chamber).

[51] *Id.* at 489–90.

[52] *Id.*

[53] *Id.* at 490–92.

[54] *Id.* at 490.

hearsay, Judge Parke's opinion became noteworthy for delineating statements that are now categorized as implied assertions: "proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue."[55]

In the twentieth century, the question of whether implied assertions should be classified as hearsay was heavily debated, "fill[ing] many pages in the treatises and learned journals."[56] A significant body of scholarship supported the admission of implied assertions because they raised no sincerity concern.[57] Writing in 1912 in the *Harvard Law Review*, Eustace Seligman explained the traditional justification for the implied assertion doctrine: "[w]hen there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the . . . fundamental danger in admitting hearsay does not here exist, or at least not so strongly."[58] In 1962, one commentator

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[55] *Id.* at 516–17 (Parke, J). This opinion is best known for Judge Parke's sea-captain example, which is "perhaps even more famous than the case itself." United States v. Zenni, 492 F. Supp. 464, 466 (E.D. Ky. 1980). Judge Parke considered whether it is hearsay to offer as proof of the seaworthiness of a ship evidence that its captain, after inspecting the ship, embarked on an ocean voyage upon it with his family. *See* Park, *supra* note 46, at 790–91. This falls into the category of nonverbal implied assertions, which are the subject of significant scholarly debate. *See, e.g.*, Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930). Because legislative history is, by definition, verbal, this Article focuses the application of the implied assertion doctrine to verbal statements rather than nonverbal ones.

[56] *Zenni*, 492 F. Supp. at 465.

[57] *See, e.g.*, *id.* at 467 (describing that "[b]y the time the federal rules were drafted, a number of eminent scholars and revisers had concluded that" implied assertions are more reliable than express assertions because "when a person acts in a way consistent with a belief but without intending by his act to communicate that belief . . . the declarant's sincerity is not then involved"); Judson F. Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43, 45–46 (1954) (noting that for non-assertive statements, a declarant's "veracity is in no way involved in appraising the dependability of the evidence" and concluding that "[a]ccordingly, there is substantial reason to treat such evidence . . . more leniently than an assertive utterance"); Judson F. Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV. 133, 136 (1961) ("[I]f in doing what he does a man has no intention of asserting the existence or non-existence of a fact, it would appear that the trustworthiness of evidence of this conduct is the same whether he is an egregious liar or a paragon of veracity. . . . [Equating] the 'implied' to the 'express' assertion is very questionable."); John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741 (1961); Edmund M. Morgan, *Hearsay*, 25 MISS. L.J. 1, 8 (1953). Courts, on the other hand, were divided. While some followed *Wright v. Tatum* and excluded implied assertions as hearsay, others failed to address the hearsay issue and admitted the evidence. *See, e.g.*, Reynolds v. United States, 225 F.2d 123, 131 (5th Cir. 1955) (admitting content of phone calls as "circumstantial evidence going to show the operation of a lottery"); Billeci v. United States, 184 F.2d 394, 396–97 (D.C. Cir. 1950).

[58] Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV. L. REV. 146, 150 (1912).

summarized the "traditional analysis heretofore set forth by many writers" as:

> [S]ince an implied assertion by definition . . . [is] not intended as an assertion concerning *f*, there is no danger that the actor is being insincere about *f*. A person who did not intend to make any statement about *f* could not have intended to make a misleading statement about *f*. . . . Because implied assertions entail fewer dangers than express assertions—especially because implied assertions raise no problem of insincerity—it is argued that they should be classified as nonhearsay.[59]

Though not without its critics,[60] the implied assertion doctrine and its sincerity justification were codified into the Uniform Rules of Evidence[61] and subsequently into Federal Rule of Evidence 801. The advisory committee notes likewise contain the sincerity justification, explaining that:

> No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct . . . [and s]imilar considerations govern . . . verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted.[62]

B. The Modern Application of the Implied Assertion Doctrine

Since the introduction of the Federal Rules of Evidence in 1975, federal courts have treated implied assertions as non-hearsay and have continued to justify admission of these statements on the sincerity

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[59] Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 685–86 (1962).

[60] Criticism of the sincerity justification for the implied assertion doctrine has been steady. *See, e.g.*, David E. Seidelson, *Implied Assertions and Federal Rules of Evidence 801: A Continuing Quandary for Federal Courts*, 16 MISS. C. L. REV. 33, 35 (1995); Paul R. Rice, *Should Unintended Implications of Speech Be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529, 531–36 (1992) ("[B]ecause speech is almost always intended as an assertion of something to someone, it always carries with it the inherent danger of insincerity."); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 66–67 (1982) ("As for the risk of insincerity, an assertion used inferentially is nonetheless an assertion and therefore is as likely as any other to be insincere. . . . If the expression is one that would support an inference of belief, normally the speaker or writer would have been aware at least of the possibility of such an inference, and therefore the possibility that he intended it would also exist.").

[61] UNIF. R. EVID. 63.

[62] *See* FED. R. EVID. 801(a) Advisory Committee's Notes to 1972 Amendment; *see also* Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145, 148 (1991) (describing advisory committee as expressing the belief that "indirect assertions of external facts to possess enhanced reliability because of the minimized possibility of conscious fabrication by the declarant"); Rice, *supra* note 60, at 531–36.

rationale.[63] Additionally, many state courts have adopted the implied assertion doctrine into their state evidence rules.[64] The leading modern case on the issue is *United States v. Zenni*.[65] The *Zenni* court extensively analyzed the history of the implied assertion doctrine and the then-newly-enacted Rule 801. Under the implied assertion doctrine, the court admitted records of phone calls to the defendant's premises in which callers gave instructions for placing bets, such as "Put $2 to win on Paul Revere in the third at Pimlico." The statements were admitted as implied assertions because they were not used to prove the truth of what the callers said, but were introduced for their implication: that the callers believed that they were calling a betting parlor.[66]

IV. DOCTRINAL FRAMEWORK FOR LEGISLATIVE HISTORY IMPLIED ASSERTIONS

As described above, the implied assertion doctrine in evidence law permits an out-of-court statement to be introduced into evidence to prove the implication of a statement rather than the truth of the statement itself. This exception to the hearsay rule is justified on the longstanding agreement that implied assertions are not subject to intentional manipulation.

We offer a parallel doctrine to apply in the legislative history context. Specifically, we argue that judges may use statements in the legislative history to prove the implications of those statements ("implied

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[63] *See, e.g.*, United States v. Mendez-Perez, 9 F.3d 1554 (9th Cir. 1993); United States v. Anderson, 5 F.3d 540 (9th Cir. 1993); United States v. Long, 905 F.2d 1572, 1580 (D.C. Cir. 1990) (holding that a caller's nonassertive questions were not hearsay and explaining that "an unintentional message is presumptively more reliable"); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990); United States v. Groce, 682 F.2d 1359, 1364 (11th Cir. 1982) (admitting circumstantial evidence and explaining that under the Federal Rules of Evidence, "no oral or written expression is considered hearsay unless it was intended by its maker to be an assertion concerning the matter sought to be proven . . . because when a declarant does not intend to make an assertion, his sincerity generally is not at issue"); *see also* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 24 n.101 (2009) (citing FRE 801(a),(c) Advisory Committee Notes, and a post-1975 federal case for treating implied assertions as non-hearsay); Rice, *supra* note 60, at 531. *But see* Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 47 n.18 (1994) (arguing that federal courts have split on the most literal approach to this doctrine).

[64] *See, e.g.*, People v. Morgan, 23 Cal. Rptr. 3d 224 (Cal. App. 2005); Stoddard v. State, 887 A.2d 564, 595 (Md. App. 2005) (providing exhaustive list of state cases); Hernandez v. State, 863 So.2d 484 (Fla. App. 2004); Guerra v. State, 897 P.2d 447, 459–62 (Wyo. 1995); Burgess v. United States, 608 A.2d 733, 739–740 (D.C. App. 1992); State v. Carrillo, 750 P.2d 878, 882 (Ariz. Ct. App. 1987), *modified on other grounds*, 750 P.2d 883 (Ariz. 1988); People v. Griffin, 985 P.2d 15, 17–18 (Colo. App. 1998); People v. Jones, 579 N.W.2d 82, 93 (Mich. App. 1998); Jim v. Budd, 760 P.2d 782 (N.M. Ct. App. 1987).

[65] *See* United States v. Zenni, 492 F. Supp. 464, 465 (E.D. Ky. 1980).

[66] *Id.* at 469.

assertions"). Implied assertions, when aggregated, can reveal important background assumptions upon which Congress legislated, and those assumptions can be determinative in resolving some difficult statutory interpretation questions.

A. How to Apply the Implied Assertion Doctrine to Legislative History

We propose a narrow implied assertion doctrine in the legislative history context that applies only when particular criteria are met. Applying this doctrine carefully and in limited circumstances provides crucial interpretive guidance to judges while also mitigating the sincerity critique of legislative history, as well as several additional critiques of legislative history raised by Justice Scalia and other textualists.

The implied assertion doctrine should be applied in six sequential steps:

1. Identify the precise textual interpretation question.
2. Confirm that this question could have been anticipated by the enacting Congress.
3. Confirm that this question was not a subject of contention among the enacting Congress, as identified by explicit references in the legislative history.
4. Identify a body of uncontradicted statements from which an implied assertion can be derived.
5. Identify the implied assertion or assertions within the body of statements.
6. Use the implied assertion to suggest an answer to the precise textual interpretation question.

Below, we explain why we have proposed this specific doctrine, which derives from the corollary evidence law doctrine, responses to the legislative history critiques, and other pragmatic concerns.

1. What Statutory Interpretation Questions Does the Doctrine Apply To?

The implied assertion doctrine should be applied only to a very specific set of statutory interpretation questions:[67] questions that were potentially within the contemplation of the enacting Congress but were

[67] These requirements and this Article assume that one is turning to legislative history to answer a live question for which the text is not clear. A question beyond this Article's scope is the propriety and prevalence of utilizing legislative history as a matter of course and, accordingly, even in situations where a statute's text is clear. *See* Yates v. United States, 135 S. Ct. 1074, 1093–94 (2015) (Kagan, J., dissenting) ("And legislative history, for those who care about it, puts extra icing on a cake already frosted."); Kagan, *Scalia Lecture*, *supra* note 1 (asserting that most uses of legislative history are not actually necessary).

not explicitly considered.[68] These requirements derive from the nature of implied assertions and the sincerity critique in legislative history.

Implied assertions reveal the background assumptions of a speaker. Therefore, analyzing legislative history's implied assertions illuminates legislators' shared background assumptions. However, if an interpretive question could not have been contemplated by the enacting Congress, there could not have been any background assumptions. For example, if the FDA's statutory authority had been prescribed prior to the invention, manufacture, and distribution of cigarettes, Congress could not have had a background assumption about the FDA's jurisdiction over tobacco.[69] As such, to mitigate the risk that courts project anachronistic background assumptions into a legislative record, the implied assertion doctrine should only be used to answer interpretive questions that actually *could have been* contemplated by the enacting Congress.

This inquiry raises a level of generality problem in the threshold process of identifying the textual interpretation question. If the textual interpretation question is framed too broadly, the implied assertion doctrine will almost certainly be precluded, because Congress would have weighed in on the debate explicitly. If framed too narrowly, the implied assertion doctrine is likely to be precluded because the question may have been outside the potential consideration of Congress. Framing the textual interpretation question at the appropriate level of generality will require courts and litigants to discipline themselves to consider exactly which implications in the legislative history support which propositions, and how those propositions relate to the case as a whole.

Consider as an example a case that requires a court to determine whether cable internet companies are a telecommunications services under the Communications Act of 1934.[70] If the interpretive question was framed at a high level of generality such as "What is a telecommunications service under the Communications Act of 1934?"

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[68] One might conclude that any interpretive question of first impression would meet these requirements, because being a question of first impression implies that Congress could not and did not contemplate the question, and therefore this requirement is not particularly meaningful. However, not all issues of first impression meet these requirements. For example, technological advances raise novel interpretive questions that could be issues of first impression but could not have been within the contemplation of the enacting Congress and accordingly would be inappropriate for resolution using implied assertions. Additionally, a statute written with very general language (perhaps to avoid or mask disagreements) could frequently spawn statutory ambiguities requiring judicial or executive clarification that would be issues of first impression but would not meet the uncontested requirement.

[69] Family Smoking Prevention and Tobacco Control Act, 111 Pub. L. 31, 123 Stat. 1776 (granting the FDA authority to regulate tobacco in 2009).

[70] *Cf.* Nat'l Cable & Telecomm. Ass'n v. Brand X, 545 U.S. 967 (2005) (determining whether cable companies selling Broadband service provide telecommunications service as defined by the Communications Act of 1934); *see also* 47 U.S.C. § 153(53) (2012).

then the implied assertion doctrine could not be used, because this question was certainty contested in the legislative history. If the question is framed narrowly, to focus only on whether cable internet companies are telecommunications services, then the implied assertion doctrine could not be used, because Congress could not have anticipated the existence of the internet when the Act was passed. However, the implied assertion doctrine *could* be used to answer a question that was within the potential contemplation of the enacting Congress but was not actually the subject of contention as expressed in the legislative history, such as one that the Court raised in *Brand X*: Does the definition of "offering of telecommunications" in the Communications Act of 1934 include a "'stand-alone' offering of telecommunications, *i.e.*, an offered service that, from the user's perspective, transmits messages unadulterated"?[71]

Limiting the implied assertion doctrine to interpretive questions that were not considered or contested by the enacting Congress derives from the sincerity critique of legislative history. As discussed above, that critique recognizes that a legislator, staffer, committee, or even legislative chamber can manipulate the interpretation of statutory language by introducing into the legislative history statements that do not sincerely reflect their beliefs about what the language means.[72] The implied assertion doctrine in evidence law rests on the premise that it is impossible to manipulate what one cannot anticipate.

This applies in the legislative history context too. Most of the time, a legislator will not be able to anticipate implications of his or her statements. Therefore, implied assertions drawn from legislative history are generally not subject to manipulation and do not pose a meaningful sincerity concern.

However, if an issue of textual interpretation *is* contested among members of Congress, a legislator could anticipate that his or her statements would be used by judges to resolve the issue. With that knowledge, a legislator could intentionally manipulate the implications of her statements to favor one side of a contested issue over another. For example, a legislator who knows that the FDA's jurisdiction over tobacco is actively contested could make statements listing FDA jurisdiction over many non-tobacco products in an attempt to lead judges to rely upon the implication that the FDA lacks jurisdiction over tobacco.[73] Once susceptible to intentional manipulation, implied assertions lose their sincerity value and become equivalent to all other legislative history.

Thus, to avoid any intentional manipulation by legislators, the implied assertion doctrine must only be applied to statutory interpretation questions that were not actually considered or contested

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[71] *Cf. Brand X*, 545 U.S. 967.

[72] *See* Section II, *supra*.

[73] *Cf.* FDA v. Brown & Williamson, 529 U.S. 120, 132–33 (2000) (finding that the FDA may not regulate tobacco because Congress has spoken directly on the issue).

by the enacting Congress.[74] This use of legislative history does not present a sincerity risk.[75]

This limitation—applying the doctrine only to questions that were not directly contemplated by Congress—also mitigates the public choice critique of legislative history. Public choice critics, recognizing that "Congress is a 'they' not an 'it,'" argue that Congress *as a body* can have no collective intent because each legislator has a different purpose in passing legislation.[76] Because "[w]hat Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators," these textualists reject reliance on legislative history of any kind and instead examine statutory text alone, which, as the embodiment of legislative compromise, is the only legitimate indication of congressional intent.[77]

The use of implied assertions is compatible with this view because it does not ultimately rely on a shared intent of all members of Congress in passing a law, in the sense of the evil or wrong they sought to remedy

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[74] For similar reasons, the implied assertion doctrine must also be limited to pre-enactment legislative history. As soon as the bill is passed, changing circumstances can lead legislators to recognize interpretive challenges and manipulate their statements, and their implications, accordingly. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011).

[75] We note that whether or not an issue is explicitly considered or contested is not a perfect indication that a shared background assumption exists. Theoretically, a single prescient legislator (or her staff, or lobbyists) could identify an ambiguity in proposed legislation unnoticed by anyone else. Such a legislator could then intentionally make statements whose implications resolve the ambiguity without causing other legislators to notice the significant, otherwise unnoticed ambiguity. In such a situation, the interpretive question would not have been actually considered or contested but the implied assertions of said legislator would still raise sincerity issues. The use of legislative history implied assertions would be precluded in this rare circumstance, however, by the limitation discussed in Section IV-A-ii, that the implied assertion doctrine be used when, *in the aggregate*, the body of legislative history unanimously or near-unanimously presents the statements from which the implications are drawn. Whether or not an issue is contested is an accurate proxy for the likelihood of implications being manipulated the overwhelming majority of the time and, significantly, it is an easily administered test.

[76] NLRB v. SW General, Inc., 137 S. Ct. 929, 942 (2017); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–42 (1992); *see also, e.g.*, Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1076 (2010). However, one recent commentator has observed that this critique in the statutory interpretation context has not been applied to various constitutional tests that include identification of constitutionally forbidden legislative intent. *See* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527–28 (2016).

[77] *SW Gen., Inc.*, 137 S. Ct. at 942; *see* Kagan, *Scalia Lecture*, *supra* note 1 (Legislative history is "not what Congress passed. If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into their legislation if they want to.").

with a particular statute.[78] Instead, as discussed above, legislative history's implied assertions express legislators' shared background assumptions. Even if Congress, a "they," cannot have overarching shared intent, Congress can fashion statutory text on the basis of shared, unstated background assumptions about how particular statutory language would be understood.[79]

However, this does not hold when interpretive questions were *directly* contemplated by Congress, regardless of whether the questions were contested. When Congress specifically contemplates an interpretive question, the public choice critique counsels that chosen compromise language should be respected—we should not leave the text to search the legislative history for hidden or contrary meaning.[80]

2. The Nature of the Legislative History from which Implied Assertions are Derived

After the textual question is properly framed and it is confirmed that the question could have been but was not the subject of contention, the inquiry should turn to the legislative history to determine whether the body of legislative history unanimously or nearly unanimously[81] presents

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[78] The Supreme Court, in various contexts, has used this phrase as shorthand for "legislative intent." *See, e.g.*, Miller v. Ammon, 145 U.S. 421, 426 (1892) ("These exceptions are based upon a supposed intent of the legislature. . . . [T]he courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment." (quoting Pangborn v. Westlake, 36 Iowa 546, 549 (1873))); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999) ("Following *City of Boerne*, we must first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy."); Honig v. Doe, 484 U.S. 305, 327 (1988).

[79] *See* Alexander & Prakash, *supra* note 30, at 990 ("[A] statute is not simply (or even primarily) its text but is principally its meaning. Statutes forbid, compel, or authorize. Texts alone do not accomplish these tasks; meaning does. The text is just a means of conveying meaning, just as a pictogram or utterances are methods of conveying meaning. . . . If laws are meanings, and not the text standing alone as a set of marks or sounds; and if we are right that meaning is the product of and cannot exist without intent; then one must inevitably search for intent to give meaning to laws. Accordingly, searching for intent as a method of determining legal meaning is no more illegitimate than examining dictionaries and the like to discern legal meaning.").

[80] Indeed, even when the language Congress settles on is vague—though on point—turning to legislative history to refine the text undermines a possible, perhaps likely, implicit delegation to judges or agencies. *See* Manning, *Nondelegation Doctrine*, *supra* note 3, at 699–706; *see also, e.g.*, Midland Funding, LLC v. Johnson, 137 S. Ct. 1407, 1418 n.4 (2017). The issues raised by such delegations are beyond the scope of this Article and have been discussed at length elsewhere, but certainly in the latter case, judicial interpretation would raise too great a risk of usurping executive power.

[81] Near unanimity is a standard amenable to judicial determination that even Justice Scalia accepted in other judicial contexts. *See, e.g.*, Bruesewitz v. Wyeth, LLC, 562 U.S. 223, 243 (2011) ("When 'all (or nearly all) of the' relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress

the statements from which the implied assertions are drawn. Put another way, aggregated implied assertions should be drawn only from a large body of uncontradicted statements[82] in the legislative history.

The implications of a large body of uncontradicted statements in the legislative history can illuminate a background assumption of Congress that was widely shared when it was legislating. By contrast, implications drawn from conflicting statements have little, if any, interpretive value—they merely demonstrate that Congress did not share a particular set of assumptions. When there is no shared background assumption by Congress, judges must rely on other tools of statutory interpretation to find the statutory meaning.

Consider the FDA jurisdiction example mentioned above. Lack of jurisdiction can reasonably be inferred only if all statements on jurisdiction emphasized a few particular areas of regulatory authority without mentioning tobacco, supporting the implication that tobacco was not covered. In contrast, if some statements emphasize the broad, remedial, universal authority of the FDA, supporting the implication that tobacco was covered, while others emphasized a few particular areas of regulatory authority without mentioning tobacco, the legislative history implied assertions would indicate only a lack of shared assumption about the FDA's jurisdiction undergirding the legislative process.

This requirement aligns with the representation critique of legislative history, which recognizes a mismatch between the intent of an individual legislator or small subset of legislators and the intent of the legislature as a body with respect to the meaning of statutory language. These critics argue that even if pieces of legislative history accurately represent the intent of one or more legislators, they are unrepresentative of the intent of the legislature as a whole.[83]

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intended the term or concept to have that meaning when it incorporated it into a later-enacted statute." (quoting Merck & Co. v. Reynolds, 559 U.S. 633, 659 (2010) (Scalia, J., concurring))); *see also* Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 511 (1989) ("[T]he legislative history . . . is replete with assurances" that the Court's interpretation is correct.). Accepting near unanimity also mitigates somewhat the labor and cost-intensive nature of legislative history research. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 134–35 & nn.235–38 (2000).

[82] In general, we believe that the implied assertion doctrine should be used when the legislative history contains numerous statements (direct assertions) that do not contradict each other. However, there is another, unusual circumstance in which the use of the implied assertion doctrine may be appropriate: when a body of direct assertions contradict each other, but at a level of generality that is different from the implication. For example, the implied assertion doctrine could be used when some legislators say the sky is blue and others say the sky is red; these facially contradictory direct assertions both support a consistent implied assertion that the legislators can see (a fact at a higher level of generality than the direct assertions).

[83] *See, e.g.*, Zedner v. United States, 547 U.S. 489, 510 (2006) (Scalia, J., concurring). There are repeated instances where proponents of legislative history conclude that it is contradictory or susceptible to multiple interpretations and, on that basis, refuse to rely on it. *See, e.g.*, Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936,

The representation critique has often been levied against legislative history created by a single legislator, such as statements made on the House or Senate floor and introduced into the Congressional Record, which at best manifests each legislator's own purpose, and may not reflect broader Congressional intent.[84] But the representation critique is also directed at legislative history created by a Congressional committee or a legislative chamber, such as a Committee Report, House Report, or Senate Report, which may be unrepresentative in three ways. First, the committee or chamber may have a different intent than Congress as a whole.[85] Second, the committee or chamber may delegate the writing of legislative history to individual members who are particularly invested and have particularly unrepresentative views.[86] And third, because any

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955 (2016) (Ginsburg, J., dissenting); Lamie v. U.S. Tr., 540 U.S. 526, 541 (2004) ("These competing interpretations of the legislative history make it difficult to say with assurance whether petitioner or the Government lays better historical claim to the congressional intent.").

[84] NLRB v. SW General, Inc., 137 S. Ct. 929, 942–43 (2017) ("The Board contends that this compromise must not have happened because Senator Thompson, one of the sponsors of the FVRA, said that subsection (b)(1) 'applies only when the acting officer is the first assistant, and not when the acting officer is designated by the President pursuant to §§ 3345(a)(2) or 3345(a)(3).' But Senator Byrd—the very next speaker—offered a contradictory account: A nominee may not 'serve as an acting officer' if 'he is not the first assistant' or 'has been the first assistant for less than 90 . . . days, and has not been confirmed for the position.' This is a good example of why floor statements by individual legislators rank among the least illuminating forms of legislative history." (citations omitted)); Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934–35 (2016) ("Respondents point to isolated snippets of legislative history . . . but other morsels . . . point in the opposite direction."); *see also* Kagan, *Scalia Lecture*, *supra* note 1 ("We now know what one guy thinks. What does that have to do with anything?").

[85] *SW Gen., Inc.*, 137 S. Ct. at 942 ("That certain Senators made specific demands, however, does not mean that they got exactly what they wanted. Passing a law often requires compromise, where even the most firm public demands bend to competing interests. What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." (internal citations omitted) (citing Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 93–94 (2002) and Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."))); Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2515 (2014) (Scalia, J., dissenting) ("[T]he Court reaches out to decide the case based on a few isolated snippets of legislative history. The Court treats those snippets as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress." (citations omitted)).

[86] Rather than representing a cross section of Congressional opinion, committees may skew toward representatives with disproportionate interest in the issue. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) ("Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House."); Bank One Chicago, N.A. v.

particular portion of a report is but one small sliver of the total volume of papers associated with a bill, not to mention the fact that reports are often only printed after passage of the bill, the body of legislators who they purport to represent may not even have had the opportunity to read the report.[87]

These critics also note that the use of legislative history by judges can exacerbate representation problems. Judges can mistake sincerely-held minority opinions as the controlling majority view.[88] Furthermore, the sheer multitude of documents available to courts makes any comprehensive examination of legislative history difficult. Judges often intentionally or unintentionally "choose friends from a crowd" when using legislative history, which has the effect of elevating views of some legislators over others.[89]

Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring) ("[C]ongressional committees tend not to be representative of the full House, but are disproportionately populated by Members whose constituents have a particular stake in the subject matter—agriculture, merchant marine and fisheries, science and technology, etc."); *see also* Eskridge, *supra* note 5, at 643–44 (commenting that, according to public choice theory, committee reports may represent strategic, and not sincere, explanations of a statute).

We note that a large body of legislative history does not necessarily mitigate this piece of the representation critique. If the body is from an unrepresentative distribution of sources (e.g., the vast majority from a single source), the unintended implications of those sources may also be systemically skewed. The best body of legislative history from which to draw implications is one that is representative of the body as a whole. However, given the simultaneous requirements that the issue not be contested and not actively considered (*see supra* Section IV-A-i), there is unlikely to be an extensive representative body of relevant legislative history implied assertions. Therefore, the more representative the better; this interplay exemplifies that the application of the doctrine outlined in this Article is not mechanical and requires judgment.

[87] Lawson v. FMR LLC, 134 S. Ct. 1158, 1177 (2014) (Scalia, J., concurring in principal part and concurring in the judgment); *Wis. Pub. Intervenor*, 501 U.S. at 620 ("It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote. Those pertinent portions, though they dominate our discussion today, constituted less than a quarter-page of the 82-page House Agriculture Committee Report, and less than a half-page each of the 74-page Senate Agriculture Committee Report, the 46-page Senate Commerce Committee Report, and the 73-page Senate Agriculture Committee Supplemental Report. Those Reports in turn were a minuscule portion of the total number of reports that the Members of Congress were receiving (and presumably even writing) during the period in question."); Edwards v. Aguillard, 482 U.S. 578, 637–38 (1987) (Scalia, J., dissenting) ("Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read—even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for?").

[88] 132 CONG. REC. 29,726 (1986) (statement of Rep. Snyder) (noting that legislative history included opinions considered and rejected from committee report); *see also* Nourse, *supra* note 6, at 118–28.

[89] *See Lawson*, 134 S. Ct. at 1177 (Scalia, J., concurring in principal part and concurring in the judgment) ("Today's opinion . . . cites parts of the legislative

Implied assertions are not immune from legislative history's representation problem. One Senator's floor statement may have a particular implication, while another Senator may make a different floor statement that has the opposite implication. Judges and advocates could pick their favorite implications from the crowd. Thus, requiring a unanimous or nearly unanimous body of legislative history from which to derive the implied assertions mitigates this critique.

3. Identifying Legislative History Implied Assertions

Finally, we briefly note that critics of applying the implied assertion doctrine in the legislative history context may argue that the process of delineating the precise implications of legislative history statements is underdetermined. That is, the range of possible implications from a particular statement means that our doctrine would not meaningfully constrain or illuminate statutory interpretation.[90] That critique, however, is not specific to our doctrine but rather applies to the entire interpretive enterprise.[91]

The process of identifying implied assertions in legislative history is not any different from otherwise relying on inferences from legislative history, which courts commonly do to interpret statutes. Such inferences are drawn directly from statements in the record,[92] from congressional

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record that are consistent with its holding . . . but it ignores other parts that unequivocally cut in the opposite direction."); *Wis. Pub. Intervenor*, 501 U.S. at 617; *see also* SCALIA, *supra* note 28, at 36; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'"); Kagan, *Scalia Lecture*, *supra* note 1 ("[Y]ou have hundreds of people trying to talk about something, you end up getting lots of conflicting signals.").

[90] *Cf.* Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1661 (2017) (noting that both petitioner and respondent "constructed narratives from . . . bits and pieces [of indirect legislative history] about Congress's goals").

[91] For example, consulting dictionaries leaves to the court's discretion on which dictionary to rely. *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1569 (2017) (Justice Thomas, writing for the Court, relying on Merriam-Webster's 1996 Dictionary of Law and rejecting the Government's proposed reliance on Black's 1990 Law Dictionary).

[92] *See, e.g.*, Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553, 564 (2017) (using colloquy between senators to infer Congress's view of the status quo); Yates v. United States, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) (excusing statutory redundancy between two provisions on the basis of the sponsor of the amendment inserting the second, duplicative statement explaining that he was doing so at the specific request of the President); Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 553 (2014) (inferring codification of low pleading standard from Congressional statements disapproving of court decisions requiring detailed pleading); Tapia v. United States, 564 U.S. 319 (2011) (drawing implication from Senate Report's statement about rehabilitation); United States v. Tohono O'Odham Nation, 563 U.S. 307, 326–27 (2011) (citing 1868 statement of Senator Edmunds as supporting the inference that Congress intended to preclude requests for duplicative relief); United States v. Ressam, 553 U.S. 272, 279–80 (2008) (considering the

silence,[93] from enactment history,[94] and from the statutory language itself.[95] Indeed, many canons of construction codify inferences. For

implication of the phrase "intentional misuse" in the House Report); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 65 n.15 (2007) (drawing inference from the definition of "adverse action" in the House Report and Senate Report); United States v. X-Citement Video, Inc., 513 U.S. 64, 77 n.6 (1994) ("It may be argued that since the House Committee Report rejects any requirement of scienter as to the age of minority for § 2251(c), the House Committee thought that there was no such requirement in § 2252."); McCarty v. McCarty, 453 U.S. 210, 226 (1981) (using statement in Senate Report that military retired pay is "a personal entitlement" to infer that such pay is not a form of community property divisible upon divorce); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185–86 (1978) (drawing inference from "repeated expressions of congressional concern").

[93] *See, e.g.*, Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1663 (2017) (Sotomayor, J., concurring) ("[T]he available legislative history does not clearly endorse this result. That silence gives me pause: The decision to exempt plans neither established nor maintained by a church could have the kind of broad effect that is usually thoroughly debated during the legislative process and thus recorded in the legislative record."); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1556 n.2 (2017) (indicating relevance of silence in a Congressional report to determining whether statutory provision addressed personal jurisdiction); NLRB v. SW General, Inc., 137 S. Ct. 929, 943 (2017); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90 (2007) ("As far as we can tell, no Member of Congress has ever criticized the method the 1976 regulation sets forth nor suggested at any time that it be revised or reconsidered."); Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs., 531 U.S. 15, 168 n.3 (2001) ("[Nothing] else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation."); Aaron v. Sec. & Exch. Comm'n, 446 U.S. 680, 690–91 (1980); *Tenn. Valley Auth.*, 437 U.S. at 184–87 ("[T]he legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species. The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.").

[94] *See, e.g.*, Warger v. Shauers, 135 S. Ct. 521, 527 (2014) (interpreting statute based on, among other things, the fact that Congress had previously rejected alternate language); Corley v. United States, 556 U.S. 303, 317–20 (2009) (drawing inferences from the legislative history to suggest that Congress intended to cabin, rather than eliminate, *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957)); Dean v. United States, 556 U.S. 568, 579 (2009) (discussing the relationship between *Bailey v. United States* and Congress's intent to pass sentencing enhancements); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147–48 (2000) (considering the implications of rejected bills that would have given the FDA authority to regulate tobacco); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209–11 (1994) (drawing inferences from previous versions of the Coal Act); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 609–10 (1991) (considering rejected statutory language). *But see* Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1934–35 (2016) (refusing to rely on enactment history because it was amenable to two different, countervailing inferences).

[95] *See, e.g.*, Yates v. United States, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting) ("The presence of both § 1519 and § 1512(c)(1) in the final Act may have reflected belt-and-suspenders caution."); Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1176–77 (2013) ("Although Congress need not use explicit language to limit a

example, the canon against superfluity directs the court to draw a particular inference from the use of language in a statute.[96] In contrast, clear statement rules serve the opposite function: they *forbid* courts from drawing particular inferences, that is, from relying on circumstantial legislative history evidence of statutory meaning.

The tools judges already use to draw inferences fully enable them to do so within our doctrinal framework. The factors judges use to critique those inferences, such as how consistent an inference is with the source material,[97] also would apply to implied assertions identified in our doctrine.

V. CASE STUDIES

In this Section, we apply the implied assertion doctrine to three recent Supreme Court cases. After describing the facts and the Supreme Court's opinion in each case, we examine whether and how the implied assertion doctrine could have been applied to the statutory interpretation question presented.

A. Hobby Lobby v. Burwell *and the Religious Freedom Restoration Act*

In *Hobby Lobby v. Burwell*, the Supreme Court considered whether Hobby Lobby Stores, Inc.[98] could claim protection under the Religious

court's discretion under Rule 54(d)(1), its use of explicit language in other statutes cautions against inferring a limitation in § 1692k(a)(3).").

[96] *See, e.g.*, *Yates*, 135 S. Ct. at 1084–85 ("[I]f § 1519's reference to 'tangible object' already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact § 1512(c)(1): Virtually any act that would violate § 1512(c)(1) no doubt would violate § 1519 as well.").

[97] *Compare* Small v. United States, 544 U.S. 385, 393 (2005), *with id.* at 406 (Thomas, J., dissenting); *compare Brown & Williamson Tobacco Corp.*, 529 U.S. at 157–59, *with id.* at 181–82 (Breyer, J., dissenting); *see also* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 360 (1999) (Stevens, J., dissenting). Also, the Court often evaluates the merits of a party's proposed implication. *See, e.g.*, Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 752 (2012); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 240–41 (2011); *Tenn. Valley Auth.*, 437 U.S. at 185, n.31 (1978).

[98] There were other corporations seeking exemption as well. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2764–65 (2014) (discussing co-plaintiffs Conestoga Wood Specialities and Mardel, a sibling business to Hobby Lobby, Inc.). Days after *Hobby Lobby* was decided, the Court also either remanded or denied review in six additional cases that had been held pending *Hobby Lobby*. The corporations in those cases were Autocam (*Autocam Corp. v. Burwell*, 134 S. Ct. 2901 (2014)), Freshway Foods, (*Gilardi v. Dep't of Health & Human Servs.*, 134 S. Ct. 2902 (2014)), Eden Foods (*Eden Foods, Inc. v. Burwell*, 134 S. Ct. 2902 (2014)), Hercules Industries (*Burwell v. Newland*, 134 S. Ct. 2902, 2903 (2014)), Grote Industries, and Korte & Luitjohan Contractors (*Burwell v. Korte*, 134 S. Ct. 2903 (2014)). *Hobby Lobby* emphasized that the corporations were "owned and controlled by members of a single family." 134 S. Ct. at 2774. The Internal Revenue Service defines "closely held corporation" as a corporation where "more than 50% of the value of its outstanding stock is, directly or indirectly, owned by or for five or fewer individuals." *See* IRS, PUBLICATION 542:

Freedom Restoration Act of 1993[99] ("RFRA") in order to determine whether corporations were entitled under RFRA to an exemption from the Department of Health and Human Services' "contraceptive mandate."[100] The corporate plaintiffs sought exemption from offering employee insurance coverage for contraceptives deemed abortifacient by their controlling individuals.[101]

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[102] Therefore, the precise textual interpretation question in *Hobby Lobby* was whether RFRA's prohibition on substantially burdening "a person's exercise of religion" applies to a corporation's exercise of religion.[103]

1. The Court's Opinion

The Court first considered whether the term "person" in RFRA could include a corporation. Because RFRA did not include "person" in its definition section,[104] the Court looked to the Dictionary Act,[105] which defined "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[106] Drawing on precedent for non-profit corporations

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CORPORATIONS 3 (2016), http://www.irs.gov/pub/irs-pdf/p542.pdf; *see also* Drew Desilver, *What is a 'Closely Held Corporation' Anyway and How Many are There?*, PEW RESEARCH CENTER (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/ (describing the ambiguities in Justice Alito's emphasis on "closely held corporation" in *Hobby Lobby*).

[99] 42 U.S.C. § 2000bb-1 (2012).

[100] As summarized in *Hobby Lobby*, the Affordable Care Act mandates that health insurance furnish "preventive care and screenings," 42 U.S.C. § 300gg-13(a)(4), but does not specify what types of preventive care must be included. *Hobby Lobby*, 134 S. Ct. at 2788–89. The Health Resources and Services Administration (HRSA, part of HHS) promulgated regulations requiring coverage of all FDA-approved contraceptive methods. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Apr. 16 2013) (to be codified at 45 C.F.R. pt. 147). HRSA also promulgated regulations exempting some religious organizations from coverage. *See* 45 CFR § 147.131(a), (b) (2016) (citing 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii); *id.* § 147.131(b)).

[101] *See Hobby Lobby*, 134 S. Ct. at 2765.

[102] 42 U.S.C. § 2000bb-1.

[103] *Cf. Hobby Lobby*, 134 S. Ct. at 2768 ("[I]t is important to keep in mind that the purpose of [the legal fiction of corporate personhood] is to provide protection for human beings. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. . . . [P]rotecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.").

[104] *See id.*

[105] 1 U.S.C. § 1.

[106] *Id.*

asserting RFRA protection[107] and a dearth of indication within RFRA's text indicating deviation from the Dictionary Act, the Court concluded that Hobby Lobby and other corporate petitioners were included within the term "person."[108]

The Court then considered whether Hobby Lobby and other corporate plaintiffs could come within RFRA's scope by engaging in the "exercise of religion."[109] The Court concluded that the corporate form could not categorically preclude religious exercise because non-profit corporations had brought RFRA claims and non-profits and for profit corporations equally further individual religious freedom.[110] The profit-making objective of for profit corporations did not preclude religious exercise because individuals who sought profit[111] could exercise religion;[112] corporate law authorizes all corporate purposes, not merely profit;[113] and there is "inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals."[114] The Court also rejected the dissent's argument[115] that RFRA merely codified pre-*Smith* First Amendment jurisprudence because RFRA's initial text ("exercise of religion under the First Amendment") and subsequent revision through the Religious Land Use and Institutionalized Persons Act of 2000[116] (eliminating that reference[117]) do not indicate a scope tied to "the exercise of religion as recognized only by then-existing Supreme Court precedents."[118] The Court did not cite any legislative history of RFRA in its opinion.

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[107] *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

[108] *See Hobby Lobby*, 134 S. Ct. at 2768–69.

[109] *Id.* at 2769–72.

[110] *Id.*

[111] For example, through a partnership.

[112] *See Hobby Lobby*, 134 S. Ct. at 2769 (citing Braunfeld v. Brown, 366 U.S. 599 (1961)).

[113] *See id.* at 2770 (citing 1 J. COX & T. HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4:1 (3d ed. 2010); 1A W. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 102 (rev. ed. 2010); 15 PA. CONS. STAT. § 1301 (2017); OKLA. STAT., tit. 18, §§ 1002, 1005 (West 2017)).

[114] *Hobby Lobby*, 134 S. Ct. at 2771.

[115] *See id.* at 2791 (Ginsburg, J., dissenting).

[116] 42 U.S.C. § 2000bb–2 (2012) (referencing an amendment that changed the definition to reflect the one found in 42 U.S.C. § 2000cc–5).

[117] 42 U.S.C. § 2000cc–5(7)(A); *see also* 42 U.S.C. § 2000cc–3(g) (mandating that exercise of religion "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution").

[118] *Hobby Lobby*, 134 S. Ct. at 2772; *cf. id.* at 2791 (Ginsburg, J., dissenting) (citing 42 U.S.C. § 2000bb(b)(1) (The purposes of this chapter are "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).")).

2. Applying the Implied Assertion Doctrine to Hobby Lobby

The precise textual interpretation question at issue in *Hobby Lobby* is whether the text of RFRA that prohibits substantially burdening "a person's exercise of religion" applies to corporate exercise of religion.[119] This is a question that the enacting Congress certainly could have considered. However, there is no sign in the legislative history that Congress considered this question explicitly when enacting RFRA.

The question is, however, answered *implicitly* in the expansive legislative history of RFRA. Myriad examples of RFRA's application were presented in the legislative history. These examples are limited only to the exercise of religion by natural persons and religious institutions, and do not extend to cover corporations.[120] This is unanimous; there are no examples used in the legislative history of for-profit corporations exercising religion (indeed, the legislative history of RFRA "does not so much as mention for-profit corporations"[121]). Two particular examples were prominently featured in floor debates on RFRA:[122] autopsies that violate individual religious beliefs[123] and church zoning.[124] Neither has any application to corporations as "legal people." House and Senate Floor speeches[125] and Committee Reports[126] also contained numerous

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[119] 42 U.S.C. § 2000bb-1.

[120] Religious Freedom and Restoration Act of 1991: *Hearing on H.R.2797 Before the Subcomm. on Civil & Constitutional H. Comm. on the Judiciary*, 102d Cong. 3 (1991) [hereinafter *RFRA House Hearings*].

[121] *Hobby Lobby*, 134 S. Ct. at 2796 (Ginsburg, J., dissenting).

[122] There was additional focus on a federal investigator who was fired because investigating a pacifist organization was against his religion and on Minnesota requiring the Amish to place electric lights on their vehicles. *See* 139 CONG. REC. 9,681 (1993) (statements of Rep. Edwards).

[123] *RFRA House Hearings, supra*, note 120, at 81; *id.* at 107–10 (statement of William Yang); *id.* at 118 (statement of Rep. Stephen J. Solarz); *id.* at 336 (statement of Professor Douglas Laycock); *Religious Freedom Restoration Act: Hearing on S. 2969 before the S. Comm. on the Judiciary*, 102d Cong., 5–6, 14–26 (1993) [hereinafter *RFRA Senate Hearings*] (statement of William Yang); *id.* at 27–28 (statement of Hmong-Lao Unity Assn., Inc.); *id.* at 44–49 (statement of Baptist Joint Committee).

[124] *RFRA House Hearings, supra* note 120, at 17, 57 (statement of Robert P. Dugan, Jr.); *id.* at 81 (statement of Nadine Strossen); *id.* at 122–23 (statement of Rep. Stephen J. Solarz); *id.* at 157 (statement of Edward M. Gaffney, Jr.); *id.* at 327 (statement of Douglas Laycock); *RFRA Senate Hearings, supra* note 123, at 143–44 (statement of Forest D. Montgomery); *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong., 39 (1990) (statement of Robert P. Dugan, Jr.) [hereinafter *RFRA House Judiciary Hearings*]; RFRA Senate Report, *supra* note 23 at 8; H. Rep. 103-88 at 5–6 and n.14 (1993) [hereinafter RFRA House Report] Judiciary Committee Report)).

[125] *See* 139 CONG. REC. S14,461 (daily ed. Oct. 27, 1993); 139 CONG. REC. S14,350 (daily ed. Oct. 26, 1993); 139 CONG. REC. H9,681 (daily ed. May 11, 1993).

[126] The Committee Reports cited: *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 524–525 (1993) (church's challenge to a city ordinance regarding ritual slaughter of animals by a church); *Empl. Div. v. Smith*, 494 U.S. 872, 874 (1990) (individuals' challenge to a state controlled-substance law on religious grounds by an

references to pre-*Smith* free exercise cases involving the rights of only individuals or of religious, non-profit organizations—never for-profit corporations.

This unanimous body of legislative history contains the implication that Congress believed RFRA did not apply to corporations. The breadth and unanimity of these implied assertions is strong evidence that members of Congress, as represented in individual speeches, committees, and bodies, all shared a background assumption that the statutory phrase "person's exercise of religion" conveyed only protections for individuals and religious entities, not corporations.

Another set of implied assertions in RFRA bolsters this evidence. Numerous sources of legislative history interchange the word "person" with other words that imply the scope is limited to natural persons and religious organizations. The Senate Report argues that RFRA is needed to protect "the right to observe *one's* faith"[127] and to respond to "governmental rules of general applicability which operate to place

individual); *Hernandez v. Comm'r*, 490 U.S. 680, 683–84 (1989) (individuals' challenge to a denial of tax deduction for payments made to churches for training courses by an individual); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988) (challenge by "an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California" to government harvesting and construction in a portion of a National Forest used for religious purposes); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 344–45 (1987) (prison inmates' challenge to policies that prevented their attendance at a weekly Muslim congregational service by prison inmates); *Bowen v. Roy*, 476 U.S. 693, 695 (1986) (individual's free-exercise challenge to statutory requirement of use of social security number by individual); *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (individual's challenge to Air Force regulation preventing wearing yarmulke while in uniform by individual); *Bob Jones Univ. v. United States*, 461 U.S. 574, 577 (1983) (religious, nonprofit school's denial of tax-exempt status); *United States v. Lee*, 455 U.S. 252, 254 (1981) (individual employer's challenge to social security and unemployment insurance taxes); *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981) (individual's challenge to denial of unemployment compensation); *Harris v. McRae*, 448 U.S. 297, 320 (1980) (individuals' free-exercise challenge to Hyde Amendment); *Wisconsin v. Yoder*, 406 U.S. 205, 208–11 (1972) (individuals' challenge to compulsory school-attendance law); *Tilton v. Richardson*, 403 U.S. 672, 676–77 (1971) (individuals' challenge to federal aid for church-related colleges and universities); *Sherbert v. Verner*, 374 U.S. 398, 399 (1963) (individual's challenge to state unemployment compensation statute); *Braunfeld v. Brown*, 366 U.S. 599, 600–01 (1961) (individuals' challenge to state criminal statute proscribing the retail of "certain enumerated commodities" on Sundays); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943) (individuals' challenge to regulation requiring public school students to salute the American flag); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–92 (1940) (individuals' challenge over expulsion for refusal to salute national flag); *Cantwell v. Connecticut*, 310 U.S. 296, 300–01 (1940) (individuals' free-exercise challenge to convictions for solicitation of money and inciting a breach of peace); and *Reynolds v. United States*, 98 U.S. 145, 146 (1878) (individual's challenge to bigamy statute).

[127] RFRA Senate Report, *supra* note 23 at 4; *see also* Hobby Lobby Stores Inc. v. Sebelius, 723 F.3d 1114, 1168–69 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part) (quoting 139 CONG. REC. 1,892, 1,893–94).

substantial burdens on *individuals'* ability to practice their faiths."[128] Similarly, the House Report stated that "this bill is applicable to all Americans."[129] Before the House Judiciary Committee, Representative Solarz explained that the bill would "enable States to insist that their laws of general applicability be applied even when *individuals* say this would obligate them to violate the tenets of their faith if they can demonstrate they have a compelling interest in doing so and if they can demonstrate that they've chosen the least restrictive way of achieving that objective."[130] Again, these common statements suggest that the legislators shared a background assumption that the statutory phrase "person's exercise of religion" conveyed only protections for individuals and religious entities, not corporations.

Using the implied assertion doctrine to address the legislative history of RFRA as it applies to the key interpretive question in *Hobby Lobby* demonstrates the power of the doctrine. Many pieces of RFRA's legislative history provide evidence that the legislators assumed that the statutory phrase "a person's exercise of religion" would be limited to natural persons and religious entities and would not be extended to corporations. This implied assertion—found in many different pieces of legislative history, approaching unanimity—is powerful evidence that legislators shared a background assumption about the meaning of the text of the statute that should bear on its interpretation by courts.

Notably, by ignoring legislative history, the majority opinion in *Hobby Lobby* failed to take into account this important evidence of RFRA's context. The dissent too missed this opportunity. Justice Ginsburg's dissent uses legislative history primarily to affirmatively (and "emphatic[ally]") demonstrate that the legislative intent in enacting RFRA was to restore pre-*Smith* jurisprudence.[131] Justice Ginsburg could have invoked the implied assertion doctrine to put the legislative history strongly on her side by arguing that the unanimity of legislative history provides significant evidence to resolve the textual interpretation question.[132]

B. General Dynamics Land Systems v. Cline *and the Age Discrimination in Employment Act*

In *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004), the Supreme Court had to determine whether the petitioner's decision to

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[128] RFRA Senate Report, *supra* note 23 at 4–5.

[129] RFRA House Report, *supra* note 124 at 7.

[130] *RFRA House Judiciary Hearings*, *supra* note 124, at 15.

[131] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting).

[132] Justice Ginsburg notes that RFRA's legislative history does not mention for-profit corporations, but uses this evidence of absence to argue that Congress could not have *intended* to expand religious protections without making a clear statement. *Id.* at 2796.

eliminate health insurance for employees under the age of fifty violated the Age Discrimination in Employment Act (ADEA).[133] The ADEA prohibits employers from discriminating against any individual above the age of forty "because of such individual's age."[134] Therefore, the precise textual question in *General Dynamics* was: Does a corporation's decision to favor older employees at the expense of younger employees fall within the ADEA's prohibition of discrimination based on age?[135]

1. The Court's Opinion

The Court's opinion drew extensively on legislative history to demonstrate that the sole purpose of the ADEA was to protect older workers against discrimination in favor of younger workers. The Department of Labor report that precipitated the passage of the ADEA declared that "arbitrary discrimination against older workers was widespread and persistent enough to call for a federal legislative remedy."[136] President Johnson sent a message to Congress supporting legislation that opened opportunity to "the many Americans over 45 who are qualified and willing to work."[137] In addition, House and Senate committee reports "dwelled on unjustified assumptions about the effect of age on the ability to work."[138]

The Court then turned to the statutory text. It noted that the ADEA's introductory provisions stress the challenges faced by older workers.[139] In addition, the ADEA specifically limited coverage to individuals older than forty. Taken together, the Court held it "beyond reasonable doubt that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young."[140] Therefore, the court concluded that General Dynamics' decision did not violate the ADEA.

Justice Thomas dissented. He focused on a single piece of legislative history, which he believed to be "the only relevant piece of legislative history addressing the question before the Court,"[141] but which had been

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[133] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2012).

[134] *Id.* § 623(a)(1). While that provision is written broadly, the ADEA also includes a provision limiting the prohibitions to "individuals who are at least 40 years of age." *Id.* § 631(a).

[135] Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 584 (2004).

[136] *Id.* at 587; *see, e.g.*, UNITED STATES DEPT. OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 21 (June 1965) (describing barriers to employment for older employees).

[137] *Gen. Dynamics Land Sys.*, 540 U.S. at 588 (citing Special Message to the Congress Proposing Programs for Older Americans, 1 Pub. Papers 37 (Jan. 23, 1967)).

[138] *Id.* at 588; *Age Discrimination in Employment: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. (1967).

[139] *Gen. Dynamics Land Sys.*, 540 U.S. at 589 (citing 29 U.S.C. § 621(a)).

[140] *Id.* at 590–91.

[141] *Id.* at 606 (Thomas, J., dissenting).

dismissed by the majority as "the only item . . . going against the grain of the common understanding."[142] This key piece of legislative history was an exchange on the Senate floor among Senators Javits, Dominick, and Yarborough. Senator Dominick asked whether discrimination between two people within the ADEA's protection (between forty and sixty-five years old) would violate the ADEA.[143] Senator Javits, in response, expressed the view that choosing a forty-two year old candidate over a fifty-two year old candidate because the former was younger would violate the act, and Senator Yarborough added that "[t]he law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way [the] decision went."[144]

2. Applying the Implied Assertion Doctrine to General Dynamics

The precise textual interpretation question at issue in *General Dynamics* is whether the text of the ADEA prohibits benefitting an older employee to the detriment of a younger, though over forty years old, employee. This is a question that could have arisen during the Act's passage. As the majority identified, there are numerous pieces of legislative history that assert that the purpose of the ADEA was to protect older workers. The implication of these statements is that the ADEA would not protect a younger worker from discrimination in favor of an older worker, even if both workers fall within the Act's purview.

However, the body of legislative history is not unanimous and provides some evidence that the precise question at issue was contemporaneously considered by the legislature; therefore, implied assertion analysis is inappropriate in this case. Specifically, the exchange between Senators Yarborough, Javits, and Dominick indicates that the question of reverse discrimination against the young was something Congress considered and disagreed about. There are several other pieces of legislative history on the question of "reverse" discrimination against young employees: Senator Dominick inserted the question of the ADEA applying to young workers discriminated against due to their youth as an unanswered question in the Senate Committee Report,[145] and Representative Brademas made a floor statement that "it is the intent of the committee that [the ADEA] apply to age discrimination at all age levels, from the youngest to the oldest."[146]

This legislative history demonstrates that there was no unanimous, agreed-upon background assumption evident through the implications of the legislative history. Instead, the question of the scope of the ADEA was a live issue and there is some evidence to suggest that members had different perspectives rather than a shared assumption. The contestation

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[142] *Id.* at 599.

[143] *Id.* at 598.

[144] *Id.* (citing 113 CONG. REC. 31,255 (1967)).

[145] 113 CONG. REC. 31,255 (1967).

[146] 121 CONG. REC. 9,212 (1975).

also increases the chance that a legislator could anticipate the implications of their statements and thereby manipulate the legislative history.

Where, as here, the implied assertion doctrine is inapplicable, interpreters are left with the traditional tools to determine what "discriminate . . . because of [one's] age" means, and they must grapple with the ensuing debates on the use of direct legislative history writ large.

C. King v. Burwell *and the Affordable Care Act*

In *King v. Burwell*, the Supreme Court had to determine whether tax credits are available under the Patient Protection and Affordable Care Act ("ACA")[147] in states that have a federal health insurance exchange.[148] Plaintiffs were individuals residing in Virginia, a state with a federal exchange.[149] They argued that the tax credits were unavailable in their state; available tax credits would require the plaintiffs "to either buy health insurance they do not want, or make a payment to the IRS."[150]

Section 36B of the ACA provides that tax credits "shall be allowed" for any "applicable taxpayer"[151] but also provides a method of calculating the amount of tax credits that limits the provision of the credits to individuals enrolled in "an Exchange established by the State."[152] The precise textual interpretation question in *King v. Burwell* was: Are tax credits available only to individuals enrolled in a state-established exchange or are they available also to individuals enrolled in the federally-established exchange?

1. The Court's Opinion

Chief Justice Roberts, writing for a six-Justice majority, ultimately determined that the tax credits are available on both the state and federal exchanges. He began by finding that "when read in context, with a view to its place in the overall statutory scheme, the meaning of the phrase 'established by the State'" in section 36B is ambiguous.[153] Justice Roberts then turned to "the broader structure" of the ACA to determine the meaning of section 36B.[154] He found that it was "implausible" that Congress intended for states with only federal exchanges to enter the "death spiral" that was likely to arise if the tax credits were limited only to

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[147] King v. Burwell, 135 S. Ct. 2480, 2485 (2015); Patient Protection and Affordable Care Act, 26 U.S.C. § 36B (2012).

[148] *King v. Burwell*, 135 S. Ct. at 2487.

[149] *Id.*

[150] *Id.* at 2488.

[151] 26 U.S.C. § 36B(a).

[152] *Id.* at § 36B(b–c).

[153] *King*, 135 S. Ct. at 2489 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

[154] *Id.* at 2492.

state exchanges.[155] Considering the text, purpose, and context of the statute, he concluded that section 36B allows tax credits for insurance purchased on federal exchanges. Chief Justice Roberts did not cite legislative history to support his position, though he did note that Congress' use of reconciliation procedures likely contributed to the ACA's "inartful drafting."[156]

2. Applying the Implied Assertion Doctrine to King

The precise textual interpretation question at issue in *King v. Burwell* is whether the provisions of section 36B permit tax credits to be provided to individuals who are enrolled in a federal exchange.[157] The Congress that enacted the ACA certainly could have considered this question; as Chief Justice Roberts noted, "[w]hether those credits are available on Federal Exchanges is . . . a question of deep economic and political significance that is central to this statutory scheme."[158] Despite its centrality to the statutory scheme, this question was not directly addressed by legislators who debated the bill's passage.

Many pieces of legislative history, including numerous floor speeches, state that the goal of the ACA was to provide universal coverage.[159] Additional pieces of legislative history made a similar but more specific claim: that exchanges with tax credits will be available in every state.[160] As the government argued, an implication can be drawn

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[155] *Id.* at 2493–94.

[156] *Id.* at 2492.

[157] 26 U.S.C. § 36B(b–c).

[158] *King*, 135 S. Ct. at 2489 (internal quotations omitted).

[159] *See, e.g.*, 156 CONG. REC. 4,637 (2010) (Senator Leahy describing a constituent's relative, location indeterminate, who ended up with amputations since she waited to obtain health care due to lack of insurance); *Health Care and Education Reconciliation Act of 2010: Hearing on H.R. 4872 Before the H. Comm. on the Budget*, 111th Cong. 69 (2010) (statement of Rep. Paul Ryan, R-Wis.) (Rep. Ryan explaining that the ACA establishes "a new, open-ended entitlement that basically [guarantees government-funded health insurance to] *just about everybody in this country.*" (emphasis added)); 155 CONG. REC. 30,744 (2009) (Senator Johnson describing a constituent ruined by medical bills and commenting that the ACA will "form health insurance exchanges in *every* State through which those limited to the individual market will have *access to affordable and meaningful coverage.*" (emphasis added)); 155 CONG. REC. 29,762 (2009) (Senator Boxer noting the ACA would decrease nationwide the number of Americans who obtain primary health care through emergency rooms at greater expense); 155 CONG. REC. 27,920 (2009) (Senator Casey defining the goal of the ACA as ensuring that no poor or special needs child is worse off); 155 CONG. REC. S11,964 (daily ed. Nov. 21, 2009) (Senator Baucus noting that tax credits will "help to ensure all Americans can afford quality health insurance"); 155 CONG. REC. 29,410 (2009) (Senator Bingaman explaining that the ACA "a new health insurance exchange in each State which will provide Americans . . . *refundable tax credits*" (emphasis added)).

[160] *See, e.g.*, 156 CONG. REC. H1,854, H1,871 (daily ed. Mar. 21, 2010) (Representative Maloney indicating that all citizens would be able to "shop for more affordable coverage on exchanges set up by states or the Federal Government"); 155 CONG. REC. S12,779 (Dec. 9, 2009) (Senator Durbin commenting that the ACA will

from both of these sets of statements in the legislative history that section 36B applies to federal exchanges as well as state exchanges.[161] After all, universal coverage is only ensured if the tax credits are available in every state, in order to avoid the "death spiral" that can come from the failure of the interlocking reforms.

However, a different implication could also be derived from this same body of legislative history. Universal coverage and the availability of tax credits in each state could support an implication that the legislators believed that each state would establish its own exchange. Doing so would provide both universal coverage and universal applicability of tax credits. Universal establishment of state exchanges supports the *petitioners'* argument that section 36B purposefully excludes tax credits in federal exchanges to encourage universal state exchanges.[162]

King v. Burwell demonstrates that even when a unanimous body of statements in the legislative history supports an implication, using the implied assertion doctrine cannot solve all interpretive problems. The interpretive question in *King* is one that is properly raised for the implied assertion doctrine: it could possibly have been addressed by the legislators but was not, suggesting that there was a shared background assumption at the time of the ACA's passage that could be illuminated through implications of legislative history statements. However, *King* shows that even when a unanimous body of statements in the legislative history exists, conflicting implications can sometimes be drawn from the statements that will support both potential readings of the statute. Therefore, the implied assertion doctrine does not solve the interpretive question reached in *King*.

VI. CONCLUSION

Justice Scalia's textualism significantly impacted statutory interpretation, and at the time of his death nearly the entire Supreme Court agreed that interpretation begins with statutory text and proceeds to other tools, including legislative history, only when the text does not provide a definitive answer on its own.[163] At the same time, legislative

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provide insurance for the "30 million Americans today who have no health insurance . . . [and they] *will qualify for . . . tax credits*" (emphasis added)); 155 CONG. REC. S12,358 (daily ed. Dec. 4, 2009) (Senator Bingaman describing the ACA as creating "a new health insurance exchange in each State which will provide Americans . . . refundable tax credits to ensure that coverage is affordable"); 155 CONG. REC. S12,799 (daily ed. Dec. 9, 2009) (Senator Johnson explaining that the ACA "will . . . form health insurance exchanges in every State" that will "provide tax credits to significantly reduce the cost of purchasing . . . coverage").

[161] *See, e.g.*, Brief for Respondent at 47–48, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

[162] *See* Brief for Petitioner at 30, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

[163] *See* Manning, *supra* note 5, at 129.

history has not been eradicated from the statutory interpretation toolbox.[164] Early prognostication on Justice Scalia's successor, Justice Gorsuch, ranged widely from pronouncements of a return of legislative history[165] to declarations that he was Justice Scalia's clone.[166] Either way, the debate over the proper use of legislative history will continue to unfold for years to come.

In this Article, we have identified legislative history as hearsay evidence and, based on that identification, have argued that sincerity-based exceptions in evidence law can be applied fruitfully to the use of legislative history to mitigate textualists' sincerity critique. As an example, we provided a systematic way of identifying and utilizing implied assertions within the body of legislative history to resolve statutory interpretation questions.

Our proposed doctrine is administrable. The vast majority of the legislative history necessary for our three case studies was presented in the Supreme Court briefing, so adopting our doctrine will not require shifts in litigation practice. In addition, the combination of the adversarial process and our doctrine's requirement that implied assertions be taken from a large body of uncontradicted statements in the legislative history will preclude judges from looking into the sea of legislative history to pick out a few friends. Providing a standard structure through which legislative history can be used will also mitigate the sense that the use of legislative history is an *ad hoc* and murky process.[167] Most fundamentally, we believe that our implied assertion doctrine for legislative history provides courts with a reliable process for utilizing legislative history in statutory interpretation and is consistent with, or mitigates, many of the textualists' critiques of legislative history.[168]

Notably, our approach builds upon a way of thinking about legislative history that the Court has engaged with in the past. For

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[164] *See id.* at 131.

[165] *See* Ronald Mann, *Opinion Analysis: Justices Unanimously Uphold ERISA Exemption for Church-Affiliated Pension Plans*, SCOTUSBLOG (June 5, 2017), http://www.scotusblog.com/2017/06/opinion-analysis-justices-unanimously-uphold-erisa-exemption-church-affiliated-pension-plans/ (discussing Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) and remarking "It shows how far the court has moved in the still-nascent post-Scalia epoch that an opinion can justify its sense of what Congress could and could not have meant by reference to legislative history, without a single word of objection or qualification").

[166] *See* Oliver Roeder, *Just How Conservative was Neil Gorsuch's First Term?*, FIVETHIRTYEIGHT (July 25, 2017), https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuchs-first-term/.

[167] *See, e.g.*, Lawson v. FMR LLC, 134 S. Ct. 1158, 1176 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) ("I do not endorse, however, the Court's occasional excursions beyond the interpretative terra firma of text and context, into the swamps of legislative history. Reliance on legislative history rests upon several frail premises.").

[168] *See* Manning, *supra* note 6, at 84 (noting that textualists reject legislative history due in significant part to its lack of reliability).

example, in *Samantar v. Yousuf*,[169] the Court was faced with the question of whether the Foreign Sovereign Immunities Act's grant of immunity to any "agency or instrumentality of a foreign state" includes an individual official acting on behalf of the state. Writing for the Court in 2010, Justice Stevens surveyed the legislative history.[170] He identified three relevant portions of the legislative history: statements of the overall purpose of the Act[171]; the legislative history's repeated reference to entities rather than individuals[172]; and specific references to intent to exclude particular individuals.[173] From each of these categories, Justice Stevens drew the implication that the FSIA was not intended to apply to foreign officials.

In *Samantar*, as well as other cases,[174] the Court has identified the background assumptions upon which Congress legislated and utilized them to resolve statutory interpretation questions.[175] Our approach builds

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[169] 560 U.S. 305 (2010).

[170] Justices Scalia, Alito, and Thomas wrote concurring opinions primarily to object to the majority's use of legislative history. *See id.* at 326 (Alito, J., concurring); *id.* (Thomas, J., concurring); *id.* at 327 (Scalia, J., concurring) ("The Court's introduction of legislative history serves no purpose except needlessly to inject into the opinion a mode of analysis that not all of the Justices consider valid. And it does so, to boot, in a fashion that does not isolate the superfluous legislative history in a section that those of us who disagree categorically with its use, or at least disagree with its superfluous use, can decline to join. I therefore do not join the opinion, and concur only in the result.").

[171] *Id.* at 323 ("The immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA. The FSIA was adopted, rather, to address a modern world where foreign state enterprises are every day participants in commercial activities, and to assure litigants that decisions regarding claims against states and their enterprises are made on purely legal grounds.").

[172] *Id.* at 316 n.9 ("[T]he legislative history, like the statute, speaks in terms of entities.").

[173] *Id.* at 319 n.12.

[174] For example, in his 2012 majority opinion in *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012), Justice Kennedy also used the implications of the body of legislative history to support his determination that the self-care provision of the Family and Medical Leave Act is not grounded in claims of sex discrimination. He explained that "[t]he legislative history of the self-care provision reveals a concern for the economic burdens on the employee and the employee's *family* resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex." *Id.* at 1335 (emphasis added).

[175] We note that this existing intuition, our proposed doctrine, and the various ways in which courts have drawn inferences and implications from legislative history discussed above, *supra* notes 87–90 and accompanying text, is a separate paradigm from the conventional wisdom that legislative history is best used when there is a single, authoritative "high-quality" source of legislative history that "addresses the exact question before" the court. Kagan, *Scalia Lecture*, *supra* note 1 ("Suppose that you have a text that's quite uncertain, that's quite ambiguous, and you use all your textual methods of trying to figure out the ambiguity and you just still can't do it. And suppose that you had legislative history of a high quality which means, let's say, that it's like a Senate committee report rather than some floor statement or something . . . that is actually remarkably clear. Which occasionally you will find, I mean *occasionally*.

on this existing intuition about the use of legislative history and its implications by offering a systematic, functional way to consider and use a body of legislative history. It does not, however, resolve all questions or critiques of legislative history.[176] It is rather a useful first step in analyzing analogues between evidence law and legislative history.

That sort of addresses the exact question before you and says 'this is how we think it will work.' Then I see absolutely no problem . . . . I see absolutely no problem in saying 'well look, the text is mysterious and they seemed to have addressed exactly this issue in the Senate report so yes, go with that.'"). For examples of the Supreme Court dealing with legislative history directly on point, see Honeycutt v. United States, 137 S. Ct. 1626, 1635 (2017); Yates v. United States, 135 S. Ct. 1074, 1085 n.5 (2015); Boumediene v. Bush, 553 U.S. 723, 778 (2008); Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106–07 (2007) (Stevens, J., concurring). *See also* Lockhart v. United States, 136 S. Ct. 958, 967–68 (2016) (Justice Sotomayor) ("The legislative history, in short, 'hardly speaks with [a] clarity of purpose' through which we can discern Congress' statutory objective." (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 483 (1951))); Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095–96 (2015) (Justice Kennedy); Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2669 (2015) (Justice Ginsburg); Am. Broad. Cos., Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2505–06 (2014); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 583 (2008) (Justice Alito); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 214 (1988) (Justice Kennedy); Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 500 (1st Cir. 2011); United States v. Logan, 453 F.3d 804, 805 (7th Cir. 2006); Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 679 (5th Cir. 2006); Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373, 380 (4th Cir. 2006); Favreau v. United States, 317 F.3d 1346, 1349 (Fed. Cir. 2002); Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs., 173 F.3d 175, 181 (3d Cir. 1999); *In re* Klein Sleep Prods., Inc., 78 F.3d 18, 28 (2d Cir. 1996).

[176] The three critiques addressed in this Article—sincerity, representation, and public choice—are the critiques most pertinent to the implied assertion doctrine we delineate. Other critiques include the argument that because the Constitution prescribes lawmaking through bicameralism and presentment, only laws that are passed through this process and not legislative history materials may be considered by judges under their Article III authority. *See* Lawson v. FMR LLC, 134 S. Ct. 1158, 1176–77 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) ("Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law *says*."); Manning *Nondelegation Doctrine*, *supra* note 3, at 700–06. Under this critique, it is constitutionally forbidden for judges to treat legislative history as a legislatively-enacted text. *See id.* We believe that, as "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), it is possible to examine legislative history as *evidence* of statutory meaning without necessarily supplanting statutory text. *Cf.* Fed. Energy Regulatory Comm'n. v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 788 (2016), *as revised* (Jan. 28, 2016) (Scalia, J., dissenting) ("One would *expect* the congressional proponents of legislation to assert that it is 'comprehensive' and leaves no stone unturned. But even if one is a fan of legislative history, surely one cannot rely upon such generalities in determining what a statute actually does. Whether it is 'comprehensive' and leaves not even the most minor regulatory 'gap' surely depends on what it says and not on what its proponents hoped to achieve.").

Future work should probe additional connections between evidence doctrine, particularly the hearsay exceptions justified on sincerity grounds, and the use of legislative history, which is hearsay evidence. We suspect that there are many more aspects of evidence law applicable to the use of legislative history in statutory interpretation.