

## WHO CARES HOW CONGRESS REALLY WORKS?

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### ABSTRACT

*Legislative intent is a fiction. Courts and scholars accept this, by and large. As this Article shows, however, both are confused as to why legislative intent is a fiction and as to what this fiction entails.*

*This Article first argues that the standard explanation—that Congress is a “they,” not an “it”—rests on an unduly simple conception of shared agency. Drawing from contemporary scholarship in the philosophy of action, it contends that Congress has no collective intention, not because of difficulties in aggregating the intentions of individual members, but rather because Congress lacks the sort of delegatory structure that one finds in, for example, a corporation.*

*Second, this Article argues that—contrary to a recent, influential wave of scholarship—the fictional nature of legislative intent leaves interpreters of legislation with little reason to care about the fine details of legislative process. It is a platitude that legislative text must be interpreted in “context.” Context, however, consists of information salient to author and audience alike. This basic insight from the philosophy of language necessitates what this Article calls the “conversation” model of interpretation. Legislation is written by legislators for those tasked with administering the law—for example, courts and agencies—and those on whom the law operates—for*

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*example, citizens. Almost any interpreter thus occupies the position of conversational participant, reading legislative text in a context consisting of information salient both to members of Congress and to citizens (as well as agencies, courts, etc.).*

*The conversation model displaces what this Article calls the “eavesdropping” model of interpretation—the prevailing paradigm among both courts and scholars. When asking what sources of information an interpreter should consider, courts and scholars have reliably privileged the epistemic position of members of Congress. The result is that legislation is erroneously treated as having been written by legislators exclusively for other legislators. This tendency is plainest in recent scholarship urging greater attention to legislative process—the nuances of which are of high salience to legislators but plainly not to citizens.*

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## INTRODUCTION

Claims about legislative intent are pervasive and, contrary to popular scholarly opinion, unavoidable.<sup>1</sup> The reason is that statutory interpretation, like ordinary conversation, is rife with what linguists and philosophers call pragmatic inference—inference based upon the surrounding practical circumstance.

In both everyday contexts and the law, attribution of practical intentions is indispensable to understanding what people mean. The War Powers Resolution (WPR), for example, states that the President shall “terminate any use of United States Armed Forces” for hostilities or another specified action within sixty days “unless,” among other things, “the Congress . . . has declared war.”<sup>2</sup> Setting aside constitutional concerns,<sup>3</sup> all agree that the WPR requires the President to terminate the use of the Armed Forces within sixty days unless Congress has declared war *since the initial use of the Armed Forces for the hostilities or other specified action*. That Congress has declared war at some point in the past is, by contrast, irrelevant.<sup>4</sup> Interpreters rightly treat this as obvious. But how do they know? As this Article explains, interpreters know what Congress is trying to *say* only because they understand what Congress is trying to *do*; here, trying to limit the President’s authority to use the Armed Forces without congressional approval.

Although necessary for the reasons above, attributions of legislative intent to Congress are also literally false. This is because, as an empirical matter, members of Congress do not *share* intentions.<sup>5</sup>

1. See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 76 (2012) (“[N]o one need look for the fictional intent of Congress in searching for the meaning of its decisions.”); see also *id.* (“‘[L]egislative intent’ is obscuring, even for those of us who consider ourselves ‘originalists’ in matters of statutory interpretation. Intent is simply a constitutional heuristic used to remind judges . . . it is [Congress’s] decision.”); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 777 n.7 (1999) (“The notions of congressional understanding and legislative intent are merely metaphors, of course, and somewhat misleading anthropomorphizing metaphors at that . . .”).

2. 50 U.S.C. § 1544(b) (2012).

3. See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 108–12 (1984) (surveying the prevailing arguments for and against the War Powers Resolution).

4. See, e.g., S.J. Res. 116, 77th Cong., 55 Stat. 795 (1941) (declaring war on Japan in the wake of Pearl Harbor).

5. See generally MICHAEL E. BRATMAN, *SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER* (2014) (articulating a theory of shared agency); MARGARET GILBERT, *JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD* (2013) (same); John R. Searle, *Collective*

That Congress is a “they,” not an “it,” is a common refrain.<sup>6</sup> But as this Article explains, familiar public-choice-theory arguments against legislative intent of the sort voiced by Professor Kenneth Shepsle rest on a doubtful premise, namely that the sharing of intentions is about the aggregation of attitudes. As this Article shows, the ability to aggregate lots of individual intentions is neither necessary nor sufficient for the formation of shared intentions. One can, for example, attribute to a corporation its general counsel’s intention to settle a lawsuit, even if other members of the corporation are unaware of the suit.

As this Article argues, however, the in-vogue analogy between corporations and Congress also fails.<sup>7</sup> To use the previous example, one can make sense of an attribution of an intention to settle only because members of a corporation share an intention to delegate to the corporation’s general counsel control over legal strategy. Members of Congress, by contrast, share no corresponding intention to treat as authoritative the views of a statute’s “principal sponsors” or “others who worked to secure enactment.”<sup>8</sup> Add to this the lack of a mechanism for reconciling the intentions of committee drafters with the intentions of drafters of later amendments, and it becomes clear that, even on a more sophisticated understanding of shared agency, Congress has few if any intentions *qua* “it.”

To resolve the above tension—that Congress must have intentions for legislation to be meaningful but reliably fails to form them—this Article argues that one should accept what philosophers call “fictionalism” about legislative intent.<sup>9</sup> Fictionalism is the thesis that claims made within some area of discourse are best understood as involving a useful fiction instead of aiming for literal truth. When children play cops and robbers, for example, utterances such as “Mary

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*Intentions and Actions*, in INTENTIONS IN COMMUNICATION 401 (Philip R. Cohen, Jerry Morgan & Martha E. Pollack eds., 1990) (same).

6. See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

7. See, e.g., JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 280 (2009) (arguing that because “[w]e find no problem attributing intentions to corporations, groups, and institutions in ordinary life,” lawmaking institutions can have intentions); Nourse, *supra* note 1, at 82 (“Just as corporations are bound by the statements of their agents, Congress may be bound by the statements of its agents.”).

8. ROBERT A. KATZMANN, JUDGING STATUTES 48 (2014).

9. See generally Matti Eklund, *Fictionalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015), <http://plato.stanford.edu/archives/win2015/entries/fictionalism> [<https://perma.cc/WA9K-DVH6>] (providing an overview of fictionalism).

has a gun!” or “The money is in the vault!” involve an obvious pretense. As this Article explains, utterances within a fictionalist discourse are still true or false—or, perhaps better, apt or inapt. It is just that truth is determined by pretense combined with facts on the ground. Whether Mary “has a gun,” for instance, could hinge on whether Mary possesses a twig.

This Article defends fictionalism about legislative intent in regards to the U.S. Congress. As this Article explains, intent claims about Congress are false if taken literally because federal statutes have no unitary author. For that reason, the Article argues that interpreters of statutes should accept the pretense that statutes have some singular author. Relative to this pretense, a claim about legislative intent is apt if and only if one would make the claim about a generic author just on the basis of her having written the statute as enacted. So conceived, fictionalism about legislative intent amounts to a philosophical refinement of what textualists sometimes refer to as “objectified” legislative intent, characterized as “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”<sup>10</sup>

To say that intent is a fiction is not to say that one can attribute any desired “intention” to a piece of legislation. It is a platitude that a legislative text must be interpreted “in context.”<sup>11</sup> As this Article emphasizes, however, context consists of information salient to both author and audience.<sup>12</sup> As philosopher Robert Stalnaker observes, “participants in [a] conversation” depend upon cognitive “common

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10. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005); see also Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) (explaining that textualists appeal to “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*”).

11. See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“The philosophy of language, and most particularly the work of Ludwig Wittgenstein, has established that sets of words do not possess intrinsic meanings and cannot be given them . . . .”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) (“[I]t is now well settled that textual interpretation must account for the text in its social and linguistic context.”).

12. See, e.g., Kent Bach, *Content ex Machina*, in SEMANTICS VERSUS PRAGMATICS 15, 19 (Zoltán Gendler Szabó ed., 2005) [hereinafter Bach, *Content ex Machina*] (“Communicative success requires uttering a sentence which, given the *mutually salient information* that comprises the extralinguistic cognitive context of utterance, makes the speaker’s communicative intention evident and enables his audience to recognize it.” (emphasis added)).

ground” to make their communicative intentions known.<sup>13</sup> When one person says to another, “I will see you at the beach,” that attempt at communication succeeds only if there is some beach salient to both.

That context consists of common ground has significant implications for statutory interpretation. It necessitates what this Article calls the “conversation” model of interpretation. In this model, legislation is assumed to be written by Congress both for those tasked with administering the law and for those on whom the law operates. An interpreter occupies the position of conversational participant, hearing statements directed at her and other participants. So situated, an interpreter reads legislative text in a “context” consisting of information salient both to members of Congress and to citizens (as well as agencies, courts, etc.).

As this Article explains, adherence to the conversation model does not itself dictate what sources of information an interpreter should consider when interpreting a statute. What it does is alter the range of plausible answers to that question. If, in addition to text, one thinks that courts should consider legislative history, one is hard-pressed to explain why they should not also consider public statements by officials or popular-media reports. Such visible portrayals of legislation are of much higher salience to most Americans than a report by the U.S. House of Representatives.

The conversation model displaces what this Article calls the “eavesdropping” model of interpretation, the prevailing paradigm among both courts and scholars. When asking what information an interpreter should consider, both courts and scholars have typically privileged the epistemic position of members of Congress. The result is that legislation has erroneously been treated as having been written by legislators exclusively for other legislators. An interpreter is relegated to eavesdropper, listening in on—but not serving as a participant in—those legislators’ conversations. So situated, an interpreter reads legislative text in a context consisting of information salient to members of Congress.

Both textualists and purposivists adhere to the eavesdropping model much, if not all, of the time. The longstanding debate over whether to consider legislative history,<sup>14</sup> for example, reflects an

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13. Robert Stalnaker, *Common Ground*, 25 LINGUISTICS & PHIL. 701, 701 (2002) (emphasis omitted).

14. See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65

impulse to eavesdrop on both sides.<sup>15</sup> Adherence to the eavesdropping model is plainest, however, in recent, influential scholarship urging greater attention to “how Congress really works.”<sup>16</sup> This scholarship asks interpreters to sort legislative history “wheat” from “chaff” by paying careful attention to the legislative process.<sup>17</sup> Judge Robert Katzmann, for example, suggests that courts pay special attention to the materials that participants in the drafting process use to “become educated about [a] bill.”<sup>18</sup> Likewise, Professors Abbe Gluck and Lisa Bressman recommend attention to different types of legislative history—as well as other nontextual information like Congressional Budget Office (CBO) scores or legislation’s “path through Congress”<sup>19</sup>—in proportion to the significance assigned to those sources by “drafters,” that is, participants in the legislative drafting process.<sup>20</sup> This Article argues that none of these approaches makes sense when the context consists of information salient to all, not only

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STAN. L. REV. 901, 964 & n.212 (2013) [hereinafter Gluck & Bressman, *Part I*] (collecting cases and stating that “[t]he other primary interpretive source that courts consider—and the one whose use is most hotly contested—is legislative history”); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005) (recognizing that “[t]extualists and intentionalists have a well-known disagreement about the proper use of internal legislative history”); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1833 (1998) (“Intentionalists and textualists have vigorously debated whether judges should consult legislative history in statutory interpretation cases.”).

15. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question . . . .”); KATZMANN, *supra* note 8, at 18 (“[B]eyond the work of their own committees, of which legislators have direct knowledge, members operate in a system in which they rely on the work of colleagues on other committees.”); *id.* at 19 (“Legislators and their staffs become educated about the bill by reading the materials produced by the committees and conference committees from which the proposed legislation emanates.”).

16. Nourse, *supra* note 1, at 143 (“Both textualists and purposivists have to understand how Congress really works.”); accord KATZMANN, *supra* note 8, at 8 (“[T]here has been scant consideration given to what I think is critical as courts discharge their interpretative task—an appreciation of how Congress actually functions . . . .”).

17. KATZMANN, *supra* note 8, at 54; see also Gluck & Bressman, *Part I*, *supra* note 14, at 989 (“[T]he real question about legislative history is not whether it should be consulted but, rather, how to separate the useful from the misleading.”); Nourse, *supra* note 1, at 72 (“Since neither scholars nor lawyers dispute that, as a matter of fact, legislative history is used, the question is how it is best used.”).

18. KATZMANN, *supra* note 8, at 19.

19. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 780 (2014) [hereinafter Bressman & Gluck, *Part II*].

20. See Gluck & Bressman, *Part I*, *supra* note 14, at 988–89.

to drafters. “[I]gnorance of how Congress works”<sup>21</sup> is lamentable for various reasons, but the nuances of the legislative process are largely irrelevant for the purpose of interpretation.

This Article has three Parts. Part I explains why claims about legislative intent are pervasive and unavoidable. It argues that, as with ordinary conversations, where recognition of a speaker’s intention is integral to efficient and effective communication, the same is true of statutory interpretation.

Part II argues that claims about legislative intent are reliably false if taken literally. On any tenable account of shared agency, Congress, lacking a delegatory structure, is incapable of forming collective intentions, other than the bare intention to enact text into law. Although recent scholarship urging greater attention to the legislative process insists that shared intentions are visible to the sophisticated eye, this Part argues that attention to process only supports skepticism about intent.

Part III urges that, to resolve the tension resulting from Parts I and II, interpreters should embrace fictionalism about legislative intent. Traditionally, the debate between textualists and purposivists has offered interpreters a choice between considering only formally adopted materials—like legislative text and prior judicial decisions—and considering such materials plus certain information of high salience to government officials—like committee reports and CBO scores. If one accepts fictionalism, by contrast, the choice is between considering just formally adopted materials—salient to all in virtue of their formal bindingness—and considering such materials along with an array of nontextual sources, including public speeches and popular media coverage.<sup>22</sup>

## I. CONGRESS MUST HAVE INTENTIONS

Claims about legislative intent are pervasive and unavoidable. Think about an ordinary conversation. There, recognizing a speaker’s intention is integral to efficient and effective communication. As this Part explains, communication via statute is, as practiced, no different.<sup>23</sup>

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21. Nourse, *supra* note 1, at 85; *see also* KATZMANN, *supra* note 8, at 49 (“The paucity of judicial knowledge about congressional rules and processes relating to the judicial process . . . is striking.”).

22. *See infra* notes 281–82 and accompanying text.

23. This Article assumes a standard Gricean account of communication according to which the meaning of words and sentences can be analyzed in terms of speaker intention, in particular



For that reason, to make sense of legislation in a way that is consistent with our positive law of interpretation, one must attribute intentions to authors of legislation with much the same frequency as one does to speakers in ordinary conversation. As this Part explains, attributing communicative intentions to Congress is part and parcel of identifying what Congress “means” when it speaks. More still, attributing practical intentions is necessary to determine both what statutes “say” and what they communicate indirectly—in other words, what they “imply” or “presuppose.”

#### A. *What Congress Means*

What an interlocutor cares about in ordinary conversation is a speaker’s communicative intention. Take a simple case: it is late morning and A says to B, “Would you like a bagel?” B responds, “No, thank you. I’ve had breakfast.” Philosophers of language disagree as to whether, in this context, the sentence “I’ve had breakfast” expresses the proposition that B has had breakfast at some point in the past or the proposition that B has had breakfast that morning.<sup>24</sup> Where

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the intention to communicate certain information through the utterance of sentences. *See generally* PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989). The Gricean framework differs from a semantic externalist framework, according to which the meaning of a term is determined—in whole or in part—by factors external to the speaker. *See generally* SAUL A. KRIPKE, *NAMING AND NECESSITY* (1980) (putting forth a semantic externalist framework). As even its critics acknowledge, the Gricean framework enjoys “almost universal acceptance” within legal interpretation. Marcin Matczak, *Does Legal Interpretation Need Paul Grice?: Reflections on Lepore and Stone’s Imagination and Convention 1* (Jan. 16, 2016) (unpublished manuscript) (on file with the *Duke Law Journal*) (defending an alternative, externalist account of statutory and constitutional interpretation); *see also* ERNIE LEPORE & MATTHEW STONE, *IMAGINATION AND CONVENTION: DISTINGUISHING GRAMMAR AND INFERENCE IN LANGUAGE* (2014) (defending an externalist account of communication generally). Courts in particular accept a broadly Gricean—or, in terms more familiar to legal scholarship, intentionalist—framework, more or less without exception. *See, e.g.*, *FAA v. Cooper*, 132 S. Ct. 1441, 1450 n.4 (2012) (“[O]ur task is to determine what Congress meant by ‘actual.’”); *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep’t of Educ.*, 550 U.S. 81, 93 (2007) (“Under this Court’s precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis.”); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (“In the Act, Congress has given a substantial indication of the intended meaning of the term [at issue.]”); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); *see also* Ryan D. Doerfler, *The Scrivener’s Error*, 110 NW. U. L. REV. 811, 826 (2016) (collecting cases and arguing that “it is well established as a matter of positive law that the object of inquiry in statutory interpretation is Congress’s communicative intention, appropriately conceived”).

24. Compare Bach, *Content ex Machina*, *supra* note 12, at 37 (“[T]he speaker . . . didn’t say that he hadn’t had breakfast that day. That’s because he left this for inference (notice that this inference is much harder to make if [the sentence] is uttered late in the day).”), *with* FRANCOIS

everyone agrees, of course, is that B intends to communicate the latter proposition.<sup>25</sup> Although the philosophical question regarding sentence meaning is interesting, what matters to A is that B's communicative intention is clear.

Likewise, the object of inquiry in statutory interpretation is communicative intent as opposed to something like sentence meaning. Consider the WPR, which states that the president shall "terminate any use of United States Armed Forces" within sixty days "unless," among other things, "the Congress . . . has declared war."<sup>26</sup> Again, philosophers dispute whether, as used, this sentence expresses the proposition that the president shall terminate any use of the Armed Forces within sixty days unless Congress has declared war at some point in the past or the proposition that she shall do so unless Congress has declared war since the initial use of the Armed Forces for the hostilities at issue.<sup>27</sup> Interpreters agree that the statute is correctly understood as communicating the latter proposition<sup>28</sup> because the (apparent) communicative intention behind the statute is clear.<sup>29</sup> As in ordinary conversation, what an interpreter cares about is what a speaker (here, Congress) "means" in a broad, pragmatic sense.<sup>30</sup>

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RECANATI, LITERAL MEANING 21 (2004) ("[B]y saying that she's had breakfast, the speaker implies that she is not hungry and does not want to be fed. . . . Now th[is] implicature[] can be worked out only if the speaker is recognized as expressing the (non-minimal) proposition that she's had breakfast *that morning* . . .").

25. See Bach, *Content ex Machina*, *supra* note 12, at 38–39.

26. 50 U.S.C. § 1544(b) (2012).

27. See *supra* note 24 and accompanying text.

28. See, e.g., Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 196 (1980) ("The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad.").

29. Interpreters assume that Congress would not intend to enact a requirement that would be satisfied in all future cases only by virtue of it having declared war a long time ago.

30. In other words, an interpreter is interested in what Professor Richard Fallon refers to as a statute's "contextual meaning." Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1235 (2015). Fallon argues that an interpreter might reasonably be interested in a variety of "meanings" when interpreting a statute (for example, "literal" meaning, "intended" meaning, "reasonable" meaning, or "interpreted" meaning). See *id.* For reasons articulated below, however, if fictionalism is correct, various candidate "meanings" collapse into one (for example, "intended" meaning and "reasonable" meaning become one and the same). See *infra* notes 223–72 and accompanying text.

### B. *What Congress Asserts*

Even when a speaker uses some sentence literally, one often must appeal to the practical context to determine what proposition that speaker intends to assert or claim.<sup>31</sup> Context, for these purposes, consists of the information that is salient to the conversational participants.<sup>32</sup> And what information is salient depends in part upon the shared or individual practical ends of the participants.<sup>33</sup> For that reason, to determine what a speaker intends to assert, one must determine what she and her interlocutors intend to do.

Courts too must appeal to context to determine what Congress (apparently) intends to assert even when they assume that Congress uses a sentence literally. As with ordinary conversation, such appeals to “context” involve an assessment of what practical ends are at issue. Often, courts appeal to context to determine Congress’s communicative intent in so-called “hard” cases.<sup>34</sup> As the discussion below illustrates, however, appeal to context is equally important, but often unnoticed, in “easy” cases. First, intent attributions are essential to resolving ambiguities that are, intuitively, easy to resolve. Second, such attributions help explain why statutes directly communicate more information than their bare words might suggest. Third, it is plausible that attributing intent is necessary to figure out what Congress means as a matter of course—even in cases in which the language Congress uses might seem utterly insensitive to context.

1. *Lexical and Structural Ambiguity.* First, appealing to a speaker’s practical ends can be necessary for an interlocutor to resolve lexical or structural ambiguities in a speaker’s words. Suppose that A says to B,

31. See Kent Bach, *You Don’t Say?*, 128 *SYNTHESE* 15, 28 (2001) (arguing that intuitions concerning the truth of a particular utterance pertain to “what the speaker is claiming,” as opposed to “what he is saying”).

32. Bach, *Content ex Machina*, *supra* note 12, at 21 (“What is loosely called ‘context’ is the conversational setting broadly construed. It is the mutual cognitive context, or salient common ground. It includes . . . salient mutual knowledge between the conversants, and relevant broader common knowledge.”).

33. See, e.g., Robert C. Stalnaker, *Assertion*, in *CONTEXT AND CONTENT* 78, 79 (1999) (“In particular inquiries, deliberations, and conversations, alternative states of the subject matter in question are conceived in various different ways *depending on the interests and attitudes* of the participants in those activities.” (emphasis added)); Stefano Predelli, *Painted Leaves, Context, and Semantic Analysis*, 28 *LINGUISTICS & PHIL.* 351, 365 (2005) (observing that one must take into account “what intuitively matters” in a conversational context to evaluate the truth of a claim).

34. Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1057 (1975) (“The problem of justifying judicial decisions is particularly acute in ‘hard cases,’ those cases in which the result is not clearly dictated by statute or precedent.”).

“I will be at the bank this afternoon.” To resolve the lexical ambiguity—that is, whether “bank,” as used, refers to a river side or a financial institution—B will appeal to what it is that A plans to do, for example, going fishing or completing a financial transaction. Similarly, suppose that A cautions B, “Flying planes can be dangerous.” To resolve the structural ambiguity—that is, whether the words form a sentence that expresses the proposition that the act of flying planes can be dangerous or a sentence that expresses the proposition that planes that are flying can be dangerous—B must discern A’s apparent end, for example, discouraging B from becoming a pilot or persuading B not to go skydiving near the airport.

Courts too must appeal to context to resolve lexical and structural ambiguities in Congress’s words. As to lexical ambiguity, appeal to context can be necessary when a statute contains a word or phrase that has two or more possible meanings. Title VII, for example, states that “[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>35</sup> Courts take it as obvious that “discharge,” as used, refers to terminating employment as opposed to shooting out of a cannon.<sup>36</sup> In so doing, courts attribute to Congress concern with discriminatory employment (as opposed to ammunition) decisions. As to structural ambiguity, courts often must appeal to context when a statute contains an adjective, adverb, or prepositional phrase adjacent to a list of nouns or verbs. For instance, the federal aggravated identity-theft statute mandates an additional term of imprisonment of two years for one who “knowingly transfers, possesses, or uses” a form of identification of another person without lawful authority during or in relation to a covered felony.<sup>37</sup> Courts rightly treat it as plain that, as used, “knowingly” modifies “transfers,” “possesses,” and “uses” instead of only “transfers.”<sup>38</sup> In so doing,

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35. 42 U.S.C. § 2000e-2(a) (2012).

36. *See, e.g.,* Pa. State Police v. Suders, 542 U.S. 129, 140 (2004); McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 354 (1995).

37. 18 U.S.C. § 1028A(a)(1) (2012).

38. *See* Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009) (“All parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using something.” (emphasis omitted)); *cf.* Liparota v. United States, 471 U.S. 419, 420, 426–27 (1985) (treating it as obvious that the federal statute governing food-stamp fraud, which criminalizes the knowing use, transfer, acquisition, alteration, or possession of coupons or authorization cards in a manner not authorized by the statute or regulation, applies only to knowing acquisition).

courts appeal to what it is that Congress is trying to do, namely to punish knowing misconduct.<sup>39</sup>

2. *Pragmatic Enrichment.* Second, appealing to a speaker's practical ends can be necessary in cases of what some philosophers of language call "expansion"<sup>40</sup> or "pragmatic enrichment."<sup>41</sup> If A says to B, "I'm ready," one must appeal to features of the practical context to determine whether A intends to assert that she is ready to leave for dinner, ready to enter the game, or ready to do something else.<sup>42</sup> Appealing to context is necessary to fill in the words the speaker omits.<sup>43</sup> One can accept this regardless of what proposition one understands the sentence "I'm ready" to express in context.<sup>44</sup>

Courts similarly must appeal to Congress's practical ends in such cases. Section 102(a) of the Americans with Disabilities Act, for example, makes it unlawful for an employer to "discriminate against a *qualified individual* on the basis of disability" with respect to hiring.<sup>45</sup> Courts take it as obvious that, as used, "qualified individual" refers to an individual qualified for the position for which she applied, as opposed to qualified to operate a motor vehicle or qualified to vote.<sup>46</sup> To arrive at this interpretation, however, one must attribute to Congress concern with a particular kind of discrimination, namely

39. A harder question is whether "knowingly" modifies "without lawful authority" in § 1028A(a)(1). Cf. *Liparota*, 471 U.S. at 433 (holding that the word "knowingly," as used in the statute governing food-stamp fraud, modified the phrase "in any manner not authorized by [law]").

40. Kent Bach, *Conversational Implicature*, 9 MIND & LANGUAGE 124, 125–26 (1994) [hereinafter Bach, *Conversational Implicature*].

41. See generally RECANATI, *supra* note 24 ("Various pragmatic processes come into play in the very determination of what is said . . . [such as] free enrichment and other processes which are not linguistically triggered but are pragmatic through and through.").

42. Other examples include sentences such as "Steel isn't strong enough" and "The princess is late." Bach, *Conversational Implicature*, *supra* note 40, at 127, 128.

43. See Kent Bach, *Speaking Loosely: Sentence Nonliterality*, 25 MIDWEST STUD. PHIL. 249, 250 (2001) ("[W]e commonly speak loosely, by omitting words that could have made what we meant more explicit, and we let our audience fill in the gaps. Language works far more efficiently when we do that.").

44. Compare, e.g., Bach, *Conversational Implicature*, *supra* note 40, at 127 (arguing that such sentences fail to express complete propositions), with HERMAN CAPPELEN & ERNIE LEPORE, *INSENSITIVE SEMANTICS: A DEFENSE OF SEMANTIC MINIMALISM AND SPEECH ACT PLURALISM* 168–69 (2005) (arguing that such sentences express minimal propositions, such as that A is just plain ready).

45. Americans with Disabilities Act § 102(a), 42 U.S.C. § 12112(a) (2012) (emphasis added).

46. *Larimer v. Int'l Bus. Machs. Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (Posner, J.) ("The term 'qualified individual' in that provision must simply mean qualified to do one's job, as assumed though nowhere discussed in the legislative history and the cases.").

hiring discrimination against persons with disabilities who have the requisite skills. Examples of this sort abound.<sup>47</sup>

3. *Radical Contextualism*. Third, appealing to a speaker's practical ends might be necessary as a matter of course.<sup>48</sup> Charles Travis has offered a variety of ingenious cases to suggest that the proposition expressed by a prima facie context-insensitive sentence nonetheless varies by context.<sup>49</sup> Travis observes, for instance, that whether a speaker says something true when uttering the sentence "The leaves are green" plausibly depends upon the practical interests at issue:

Pia's Japanese maple is full of russet leaves. Believing that green is the colour of leaves, she paints them. Returning, she reports, "That's better. The leaves are green now." She speaks truth. A botanist friend then phones, seeking green leaves for a study of green-leaf chemistry. "The leaves (on my tree) are green," Pia says. "You can have those." But now Pia speaks falsehood.<sup>50</sup>

One may or may not be convinced that so-called "Travis cases"<sup>51</sup> demonstrate global "semantic underdeterminacy" of sentences.<sup>52</sup> One must concede, however, that such cases show that appeal to context can be—and perhaps is always—necessary to determine what proposition

47. See, e.g., 49 U.S.C. § 60111(a) (2012) (authorizing the Secretary of Transportation to issue notice if an operator of a liquefied natural gas facility lacks "adequate financial responsibility for the facility [for safety purposes]").

48. Cf. Bach, *Content ex Machina*, *supra* note 12, at 27 ("Any sentence can be used in a nonliteral or indirect way. A speaker can always mean something distinct from the semantic content of the sentence he is uttering.").

49. Two examples of "Travis cases" are found in Charles Travis, *Meaning's Role in Truth*, 105 MIND 451 (1996) and Charles Travis, *On What Is Strictly Speaking True*, 15 CAN. J. PHIL. 187 (1985).

50. Charles Travis, *Pragmatics*, in A COMPANION TO THE PHILOSOPHY OF LANGUAGE 87, 89 (Bob Hale & Crispin Wright eds., 1997).

51. E.g., Agustin Vicente, *On Travis Cases*, 35 LINGUISTICS & PHIL. 3, 4 (2012).

52. See, e.g., Martin Montminy, *Two Contextualist Fallacies*, 173 SYNTHÈSE 317, 317 (2010) (arguing that radical contextualist arguments for global semantic underdeterminacy rest on two fallacies); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1120 (2008) ("[T]he ability to understand sentences we have never heard before . . . is [very] complex . . . . But anything even residing in the neighborhood of the 'meaning is use on a particular occasion' view of language fails even to address the compositional problem . . .").

a speaker intends to assert,<sup>53</sup> even if the sentence she utters contains no obviously context-sensitive component.<sup>54</sup>

Courts must also appeal to context even when Congress uses sentences that are *prima facie* context-insensitive. For example, imagine that, during a tour of the White House, A steals a pen from the President’s desk. About to exit the property, A is asked to stop by a Secret Service officer. A panics and fatally stabs the officer with the stolen pen. A then shoves the pen into her bag, jumps into a cab, and speeds to the airport. At the airport, A proceeds to the security check, when a TSA agent, invoking the federal law prohibiting carrying a concealed dangerous weapon on an aircraft, asks her, “Are you carrying a dangerous weapon?”<sup>55</sup> A says, “No,” speaking truthfully—as used, “dangerous weapon” refers only to a weapon “that is a ‘deadly and dangerous’ weapon per se or inherently so through its construction.”<sup>56</sup> A continues to the gate and is apprehended by the police. Invoking the enhanced-penalty provision of the federal statute prohibiting forcible assault on a federal officer, a police officer asks, “Are you carrying a dangerous weapon?”<sup>57</sup> A says, “No,” speaking falsely—as used, “dangerous weapon” refers not only to objects that are “inherently deadly” but also those that are “capable of causing serious bodily injury or death to another person and [which are] . . . use[d] . . . in that manner.”<sup>58</sup>

The above example is fantastical, but the principle it illustrates is straightforward. Even when a statute uses some *prima facie* context-

53. Or, perhaps, the truth conditions of what she asserts. *See* John MacFarlane, *Nonindexical Contextualism*, 166 *SYNTHESE* 231, 246 (2009) (hypothesizing a “‘counts-as’ parameter” that “settles what things have to be like to have various properties: e.g. the property of weighing 160 pounds, or of being tall”).

54. What is distinctive about Travis cases is that they generate intuitions about truth values that depend upon context even when the sentence contains no demonstrative, indexical, or other value.

55. *See* 49 U.S.C. § 46505(b)(1) (2012) (criminalizing an attempt to board an aircraft while concealing a “dangerous weapon” that would be accessible during flight).

56. *United States v. Dishman*, 486 F.2d 727, 730 (9th Cir. 1973) (holding that a starter pistol incapable of firing a projectile was not a “deadly or dangerous weapon” within the proscription of § 46505’s predecessor statute, and reasoning that “the proscribed weapon must be one that is a ‘deadly and dangerous’ weapon per se or inherently so through its construction”).

57. *See* 18 U.S.C. § 111(b) (2012) (providing for enhanced penalties where an individual uses a “deadly or dangerous weapon” in the course of forcibly assaulting a federal officer).

58. *United States v. Arrington*, 309 F.3d 40, 45 (D.C. Cir. 2002) (emphasis omitted) (holding that an automobile may qualify as a “deadly weapon” for purposes of § 111(b) if used as such, accepting that “[f]or an object that is not inherently deadly . . . the object must be capable of causing serious bodily injury or death to another person and the defendant must use it in that manner” (emphasis omitted)).

insensitive predicate F—for example, saying that F is a dangerous weapon—whether some object X “counts as”<sup>59</sup> F may depend upon the practical interests implicated by that legislation. So long as there exist two practical contexts, one in which “X is F” expresses a truth and one in which it expresses a falsehood, one must appeal to context to determine whether X “counts as” F for purposes of the statute at issue.

### C. *What Congress Implies or Presupposes*

Last, what a speaker intends to communicate often exceeds what she actually asserts, in that she intends to communicate multiple propositions by uttering a single sentence.<sup>60</sup> The most familiar cases here are those of “implicature,” a phenomenon famously explored by philosopher Paul Grice.<sup>61</sup> Implicature is a form of indirect communication. If A asks B, “Would you like coffee or tea?” and B responds, “I would like coffee,” all agree that B has not asserted the proposition that B would not like tea, although all agree that B intends to communicate that proposition.<sup>62</sup> Using implicature to communicate more than one asserts advances a variety of ends, including verbal efficiency.<sup>63</sup>

Courts likewise regularly attribute to Congress an intention to communicate more than it asserts. In particular, courts recognize many of the same sorts of Gricean implicatures as do interlocutors in ordinary conversation. When a statute contains a provision defining its preemptive reach, courts will assume that Congress does not intend to preempt matters outside that reach.<sup>64</sup> Or where a statute expressly

59. MacFarlane, *supra* note 53, at 246.

60. See STEPHEN C. LEVINSON, PRESUMPTIVE MEANINGS: THE THEORY OF GENERALIZED CONVERSATIONAL IMPLICATURE 28–31 (2000); cf. Elisabeth Camp, *Metaphor and That Certain ‘Je Ne Sais Quoi,’* 129 PHIL. STUD. 1, 3 (2006) (“Because metaphorical utterances . . . express such complex contents in so few words, they are highly efficient vehicles for communication.”).

61. See generally H.P. Grice, *Logic and Conversation*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41 (Peter Cole & Jerry L. Morgan eds., 1975) (exploring the phenomenon of “implicature”).

62. See *id.* at 45 (identifying the maxim of “quantity,” which maintains that one should “[m]ake [one’s] contribution as informative as is required (for the current purposes of the exchange)”).

63. See, e.g., PENELOPE BROWN & STEPHEN C. LEVINSON, POLITENESS: SOME UNIVERSALS IN LANGUAGE USAGE 132–44 (1987) (arguing that indirect speech can be used to promote the value of politeness).

64. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.”).



creates a right, courts will assume that Congress intends there to be a corresponding remedy.<sup>65</sup>

Scholars dispute whether Grice's account of implicature "readily translate[s] from the conversational setting to the complex, multilateral bargaining process of framing a statute."<sup>66</sup> All agree, however, that implicature does and should play some role in statutory interpretation—no one disputes that the application of the *expressio unius est exclusio alterius* canon is legitimate in some cases.<sup>67</sup> As in the conversational context, the use of implicature, however restricted, promotes verbal efficiency.<sup>68</sup> To require that legislation make explicit every proposition communicated would be cumbersome, if not practically impossible.

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Statutory interpretation as practiced involves widespread attribution of legislative intent. First, in all cases, what is of interest to an interpreter is the proposition that Congress (apparently) intends to

65. See *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39–40 (1916) (inferring a private right of action from a statutory requirement, reasoning that "[t]his is but an application of the maxim, *Ubi jus ibi remedium*," that is, where there is a right there is a remedy).

66. Manning, *supra* note 11, at 2462 n.274; see also Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 83, 83 (Andrei Marmor & Scott Soames eds., 2011) (arguing that, unlike ordinary conversation, conversation in the legal context is often strategic and so allows for only limited pragmatic inference); SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in 1 *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT* 403, 422 (2008) ("The legislative process is governed by purposes that transcend . . . the conversational ideal of the efficient and cooperative exchange of information. Consequently, the way in which conversational maxims . . . contribute to filling the gap between the meaning and content of legal texts may . . . differ from their contribution to . . . ordinary conversations.").

67. This canon of statutory interpretation is the principle that, when one or more things of a class are expressly mentioned, others of the same class which are not mentioned are excluded. For a discussion of the legitimacy of the maxim of negative implication, see John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 179. Manning writes:

Consider the once-dreaded maxim of negative implication, *expressio unius est exclusio alterius*. The specification of one thing surely does not always mean the exclusion of others. . . . Still, while there is no master rule that can tell us when the maxim applies, that does not mean that skilled users of language are utterly unable to identify when a speaker has used language in a way that creates a negative implication. We do so all the time. Sometimes the maxim's applicability is obvious; other times, it is subject to reasonable disagreement.

*Id.* at 179 (footnotes omitted).

68. Less clear is whether values such as politeness are implicated by the legislative context. See *supra* note 63 and accompanying text.

communicate as opposed to the proposition expressed by the sentence Congress used. Second, in most cases, an interpreter must attribute to Congress various practical intentions<sup>69</sup> to attribute to it a communicative intention. Attributions of practical intent are often latent. Such attributions are, however, necessary if one is to understand legislation as an effective means of communication, which, as a matter of positive law, courts plainly do.<sup>70</sup> It is possible—though, in the author’s view, highly doubtful—that courts are mistaken in thinking of legislation as a means of communication.<sup>71</sup> “Legislation as communication” has intuitive appeal, however, and is, for that reason, the “standard picture” among legal theorists.<sup>72</sup> In addition, it is the “law

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69. This Article uses the phrase “practical intention” to refer to both general and specific practical aims. As used, the phrase encompasses what Professor Mark Greenberg and others refer to as “legal intention,” which is the intention to alter legal rights or obligations in a particular way. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 66, at 217, 242. To go back to the WPR example, the intention that one attributes to Congress to limit the president’s authority to use the Armed Forces in certain circumstances without congressional approval is plausibly a legal intention in Greenberg’s sense. Nonetheless, this Article characterizes it as a practical intention for the reason that it is intuitively glossed as what Congress is trying to do, as opposed to what Congress is attempting to say. Of course, one could attribute to Congress, on the basis of its enacting the WPR, the more general practical intention of maintaining the separation of powers or reducing the frequency of significant military intervention. The point here is just that the phrase “practical intention,” as used, is not limited to such general aims or purposes.

70. See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2494 n.4 (2015) (“Congress said expressly that it wanted to avoid adverse selection in the health insurance markets.” (emphasis omitted)); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014) (“Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.”); *Jones v. United States*, 529 U.S. 848, 858 (2000) (“Congress should have spoken in language that is clear and definite . . . .” (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952))); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .”); *United States v. Nat’l City Lines, Inc.*, 337 U.S. 78, 84 (1949) (“Congress indeed meant what it said.”); *United States v. Am. Sugar Ref. Co.*, 202 U.S. 563, 577 (1906) (“[I]t is the meaning of Congress . . . we are to ascertain.”); *The Kensington*, 183 U.S. 263, 274 (1902) (“Congress meant by the[se] words . . . but one thing . . . .”).

71. For arguments that legislation should not be regarded as a means of communication, see generally Greenberg, *supra* note 69; Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990). Assessing the merits of these arguments goes beyond the scope of this Article.

72. Mark Greenberg, *The Moral Impact Theory of the Law*, 123 YALE L.J. 1288, 1296–97 (2014) (describing the “standard picture” as the view that “the content of the law is primarily constituted by linguistic (or mental) contents associated with the authoritative legal texts,” and observing that the picture “has deep roots in ordinary thought about the law” and is “encapsulated in the layperson’s idea that the law is what the code or law books say”).

of interpretation” within our federal system<sup>73</sup> or the positive law of “what the [statutory] law is.”<sup>74</sup> For these reasons, this Article assumes *arguendo* the picture of legislation as communication. And, given that picture, attributions of legislative intent, both communicative and practical, are to a large degree unavoidable.

Among other things, the above-identified need to attribute to Congress practical intentions calls into question the textualist claim that, when interpreting a statute, one should prioritize so-called “semantic context” over “policy context.”<sup>75</sup> According to Professor John Manning, semantic context consists of “evidence that goes to the way a reasonable person would use language under the circumstances.”<sup>76</sup> Included in semantic context are such things as “dictionary definitions,” “specialized trade usage,” and “colloquial nuances that may be widely understood but that are unrecorded in standard dictionaries.”<sup>77</sup> Policy context, by contrast, consists of “evidence that suggests the way a reasonable person would address the mischief being remedied.”<sup>78</sup> Within the ambit of “policy context” are

matters such as public knowledge of the mischief the lawmakers sought to address; the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute’s preamble, title, or overall structure; and the way alternative readings of the statute fit with the policy expressed in similar statutes.<sup>79</sup>

Manning argues, “When contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over

73. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. (forthcoming 2017) (manuscript at 56) (on file with the *Duke Law Journal*); see generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (articulating a positive-law argument for originalism about constitutional interpretation); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2015) (same).

74. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 32 (2009) (noting the distinction “between what the law is and what judges should do” when interpreting a legal text).

75. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) (“Textualists give precedence to *semantic context* . . . Purposivists give priority to *policy context* . . .”); see also Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 693 (2014) (observing that “Professor Manning’s distinction between semantic contexts and policy contexts ha[s] achieved broad acceptance”).

76. Manning, *supra* note 75, at 76.

77. *Id.* at 92.

78. *Id.* at 76.

79. *Id.* at 93.

contextual evidence that relates to questions of policy.”<sup>80</sup> But what Travis cases suggest is that one must, in nearly all cases, determine what a speaker intends to do in order to determine what she intends to say.<sup>81</sup> In most cases, what a speaker intends to do is obvious, making the corresponding determination unthinking or automatic. Nonetheless, it is a determination a listener must make.

With respect to statutes, the arguments above suggest that “evidence of semantic usage”<sup>82</sup> is rarely clear when considered apart from evidence of “the mischief being remedied.”<sup>83</sup> Often, that mischief will be apparent and will not require conscious consideration, but even in easy cases, a listener must still consider what the legislature intends to do. The question remains what *sources* an interpreter should consider to make sense of a statute. The claim in this Part is that, in most cases, one cannot determine how “a reasonable person would use language under the circumstances” apart from evidence of purpose, whatever the source.

## II. CONGRESS HAS NO INTENTIONS

Part I argues that attributions of legislative intent are widespread and seemingly unavoidable. As this Part explains, the problem is that the U.S. Congress reliably has no intentions. The Constitution vests the legislative power in Congress as a single body. And on any plausible account of shared agency, Congress as structured is reliably incapable of forming collective intentions other than the bare intention to enact text into law. As a consequence, attributions to Congress of legislative intent are reliably false.

This Part starts by explaining that, for constitutional purposes, Congress is an “it,” not a “they.” Next, it briefly surveys traditional, public-choice-theory arguments for skepticism about legislative intent. It then goes on to argue that a basic premise of those traditional skeptical arguments is at odds with contemporary philosophical work

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80. *Id.* at 92–93.

81. This need cuts against the argument voiced by Professor Joseph Raz, that legislative intent “plays no real role” in interpretation because, barring specific exceptions, “one means what one says.” RAZ, *supra* note 7, at 286–87; *see also id.* at 287 (“[T]he normal way of finding out what a person intended to say is to establish what he said. The thought that the process can be reversed mistakes the exceptional case . . . for the normal case.”). If determining what a speaker “says” requires attention to the practical circumstances in most cases, Congress’s practical ends have an important role in interpretation most of the time.

82. Manning, *supra* note 75, at 92–93.

83. *Id.* at 76.

on collective intention. Finally, it argues that recent efforts to rehabilitate legislative intent—efforts attentive to the philosophical work just mentioned—also fail because of structural dissimilarities between Congress and other actors, like corporations.

#### A. *Congress Is an “It,” Not a “They”*

As far as the Constitution is concerned, Congress is an “it,” not a “they.” Article I, Section 1 vests all granted legislative powers in “a Congress.”<sup>84</sup> The Constitution also specifies various things that “the Congress” may or shall do.<sup>85</sup> In each instance, the Constitution refers to Congress as a *single body* as opposed to a collection of individuals. These uses of “Congress” thus contrast with familiar cases in which “Congress” is used to make generalizations about the individuals who make up that body.

To illustrate, when a disgruntled citizen says, “Congress is out of touch,”<sup>86</sup> her claim is best understood as stating that most members of Congress are out of touch.<sup>87</sup> So taken, the claim that Congress is corrupt is akin to the claim that ravens are black or that the Twelfth Man cheers the Seattle Seahawks; it is a generic ascription of a trait to the individuals that constitute the referenced set.<sup>88</sup> By contrast, when the Constitution says that “the Congress may . . . establish [inferior courts],”<sup>89</sup> the takeaway is not that a generic member of Congress may establish such a court on her own. Rather, it is that Congress may do so as a body, much in the same way that the Villanova Wildcats may win the NCAA championship or the Supreme Court may grant certiorari.

84. U.S. CONST. art. I, § 1.

85. See, e.g., *id.* § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes . . .”); *id.* cl. 8 (“The Congress shall have the Power . . . [t]o establish Post Offices and post Roads . . .”); *id.* art. II, § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

86. Luellen Matthews, Letter to the Editor, *A Congress Out of Touch with America*, WASH. POST (June 24, 2014), [http://www.washingtonpost.com/opinions/a-congress-out-of-touch-with-america/2014/06/24/4b1a8fae-fadb-11e3-9f27-09f20b8bfd1a\\_atory.html](http://www.washingtonpost.com/opinions/a-congress-out-of-touch-with-america/2014/06/24/4b1a8fae-fadb-11e3-9f27-09f20b8bfd1a_atory.html) [https://perma.cc/P85V-925Z].

87. See *id.* (supporting the claim that Congress is out of touch with the assertion that “House Majority Leader Eric Cantor (Va.) is so out of touch that he lost in the Republican primary and did not even get to the general election”).

88. See Sarah-Jane Leslie, *Generics*, ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 2011), <http://www.rep.routledge.com/artciel/U059> [https://perma.cc/489M-DGV3].

89. U.S. CONST. art. III, § 1.

The above might seem obvious. One must bear it in mind, however, when thinking about the slogan that Congress is a “they,” not an “it.”<sup>90</sup> As discussed below, that slogan was introduced as a banner for skepticism about legislative intent. But as this slogan has come to be a truism that is accepted even by many who find the ability to attribute legislative intent unproblematic, the thesis that Congress is a “they” makes little sense.<sup>91</sup> If the legislative power belongs to Congress as a single body, the choice is stark: either Congress forms intentions *qua* “it” or there is no legislative intent.

### B. Traditional Skepticism About Legislative Intent

Traditional skepticism about legislative intent is rooted in skepticism about the aggregability of individual legislators’ attitudes.<sup>92</sup> In one form, this skepticism fixes on legislator preference within the limited realm of the options presented to them. As public-choice theorists observe, majority preference of a legislative body need not be transitive—that is, a majority of legislators might prefer X to Y, Y to Z, and Z to X all at the same time.<sup>93</sup> For this reason, the legislative process is susceptible to “cycling”—a vote for X over Y, followed by a vote for Z over X, followed by a vote for Y over Z, followed by a vote for X over Y—unless structured to produce a final vote.<sup>94</sup> But this process means that legislative outcomes might be owed to agenda setting,<sup>95</sup> making it impossible to “differentiate” in any given case “the

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90. Shepsle, *supra* note 6.

91. See, e.g., Bressman & Gluck, *Part II, supra* note 19, at 737 (acknowledging “Kenneth Shepsle’s famous insight that ‘Congress is a they, not an it’” (quoting Shepsle, *supra* note 6, at 239)); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711 (1992) (“As Kenneth Shepsle reminds us, ‘Congress is a they, not an it.’” (quoting Shepsle, *supra* note 6, at 239)).

92. In other words, skepticism about the possibility of summing up the attitudes of individual legislators for purposes of identifying a consensus or majority attitude. Traditional skepticism has historical roots in an influential article written by Professor Max Radin. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).

93. See Shepsle, *supra* note 6, at 241–44; see also Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1, 11–12 (2010) (providing an illustration).

94. Shepsle, *supra* note 6, at 241–44.

95. *Id.* at 246 (noting the “structural advantages of agenda setters, both in determining what the full chamber may vote on and when (*proposal power*), and more subtly on what the full chamber may *not* vote on (*veto power*)”); see also Easterbrook, *supra* note 11, at 547–48 (“Legislatures customarily consider proposals one at a time . . . . Additional options can be considered only in sequence, and this makes the order of decision vital.”).

‘will of the majority’ from the machinations . . . of agenda setters.”<sup>96</sup> Additionally, legislative outcomes might be owed to “logrolling,” which is the strategic trading of votes between legislators.<sup>97</sup> By design, logrolling “yields unanimity on every recorded vote,” thereby masking substantive policy disagreement.<sup>98</sup> “[T]he legislative process is submerged and courts lose the information they need to divine the body’s design.”<sup>99</sup> Or so the argument goes.

In its other form, traditional skepticism about the aggregability of attitudes of individual legislators fixes on legislator intention. The legislative process does not require legislators to prefer one policy to another for the same reasons.<sup>100</sup> Even when substantive policy preferences align, different legislators might have different ends in mind—for instance, Legislator A might prefer policy X to policy Y because she believes policy X will be more effective, although Legislator B might do so because she believes that policy X will be less effective but an adequate fig leaf.<sup>101</sup> In such a scenario, “there is not a single legislative intent, but rather many legislators’ intents.”<sup>102</sup> And one simply has no way of ensuring that such a scenario does not obtain.<sup>103</sup>

96. Shepsle, *supra* note 6, at 248.

97. Easterbrook, *supra* note 11, at 548.

98. *Id.*

99. *Id.*

100. See Shepsle, *supra* note 6, at 244 (“[T]he winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number.”); see also Timothy W. Grinsell, *Linguistics and Legislative Intent* 8 (July 24, 2014) (unpublished manuscript), [http://ssrn.com/abstract\\_id=2471026](http://ssrn.com/abstract_id=2471026) [<https://perma.cc/6CZL-YQ82>] (“Shepsle and Easterbrook both treat the problem of ‘many intents’ as independent of the Arrowian-based argument. To some degree, it is: individual legislators may have the same ranking of proposals for entirely different reasons.” (footnote omitted)).

101. See, e.g., Steve Levine & Esmé E. Deprez, *Health-Care Cooperatives: Fig Leaf or Fix?*, BLOOMBERG (Aug. 18, 2009), <http://www.businessweek.com/stories/2009-08-18/health-care-cooperatives-fig-leaf-or-fix-businessweek-business-news-stock-market-and-financial-advice> [<https://perma.cc/Y8QC-MSZC>] (discussing, in the context of the Affordable Care Act (ACA), whether proposed healthcare cooperatives are an effective substitute for previously advocated public-insurance options).

102. Shepsle, *supra* note 6, at 244 (emphasis omitted).

103. For an example, see *id.* Shepsle states:

When a bill passes the House and Senate in the same form, and is signed by the president, there are only limited inferences to be drawn. We know that one majority in each chamber has revealed a “preference” for the bill over  $x^0$ . We do not know why, and it is likely that each legislator has a mix of different reasons.

*Id.*

Traditional skepticism has drawn various responses. Some have questioned the frequency with which cycling occurs in practice. Professors Daniel Farber and Philip Frickey, for example, maintain that social-choice theory's predictions of arbitrariness and instability are "markedly inconsistent with our empirical knowledge of legislatures such as the U.S. Congress."<sup>104</sup> Others, such as Justice Stephen Breyer, have insisted that fears ought to be dispelled simply by the familiar practice of attributing intentions to multimember bodies such as corporations.<sup>105</sup>

Still others have observed that the possibility of cycling is not unique to the decisions of multimember bodies. Linguist Timothy Grinsell explains that cycling can occur when individuals apply multicriterial predicates—predicates that denote a decision function aggregating multiple criteria into a single judgment, such as "healthy" or "nice."<sup>106</sup> Because we have no difficulty attributing coherent intentions to individuals who apply such predicates, Grinsell argues, the mere possibility of cycling cannot be enough to render problematic attributions of intentions to legislatures.<sup>107</sup>

The above responses have drawn their own responses.<sup>108</sup> What this Part suggests, however, is that this whole dialectic misses the fundamental problem with attributions of legislative intent. A premise of traditional skepticism about legislative intent that has gone unquestioned by the abovementioned respondents is that the aggregability of legislator attitudes is a necessary—and perhaps sufficient—condition for legislative intent. That premise is squarely at odds with philosophical accounts of shared agency, which recognize

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104. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 429 (1988) (quoting William H. Panning, *Formal Models of Legislative Processes*, in HANDBOOK OF LEGISLATIVE RESEARCH 680, 689 (Gernard Loewenberg, Samuel C. Patterson & Malcolm E. Jewell eds., 1985)).

105. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 99 (2010) (reasoning that "[c]orporations, companies, partnerships, municipalities, states, nations, armies, bar associations, and legislatures engage in intentional activities, such as buying, selling, promising, endorsing, questioning, undertaking, repudiating, and legislating").

106. Grinsell, *supra* note 100, at 14–15.

107. *See id.* at 3 ("Since . . . the public choice argument applies with equal force to decisions made by legislatures and to decisions made by individuals, the notions of legislative intent and individual intent stand or fall together. And we should let them stand." (footnote omitted)).

108. *See, e.g.*, Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 789–93 (2005) (arguing that cycling can be common and is often unseen because it is pushed back in the legislative process); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 504, 516–17 (1981) (arguing that the absence of apparent cycling does not imply the absence of preferences that induce cycling).



that aggregability is neither necessary nor sufficient for there to be shared intentions.

### C. *Accounts of Shared Agency*

Sometimes we act side by side. Other times we act together. Philosophical accounts of shared agency try to make sense of the difference.

Take philosopher Margaret Gilbert's example of taking a walk.<sup>109</sup> Suppose that you and I walk next to each other through the park but each of us is unaware of or indifferent to the other, making it so we each walk alone in some sense.<sup>110</sup> Suppose now that you and I each walk the same path but do so as part of a date. In this case, you and I walk *together* in the sense that we are engaged in a "shared cooperative activity."<sup>111</sup> In each case, our external behavior is the same. Yet our respective intentions differ.<sup>112</sup> In the first case, I intend that I walk through the park and you intend that you do the same. In the second case, each of us intends that we walk through the park. It is this "we-intention,"<sup>113</sup> philosophers suggest, that distinguishes our shared cooperative activity from a "mere summation or heap of individual acts."<sup>114</sup>

109. See generally Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, 15 *MIDWEST STUD. PHIL.* 1 (1990) (using the example of taking a walk to explore shared action).

110. Margaret Gilbert provides an example of this phenomenon:

Imagine that Sue Jones is out for a walk along Horsebarn Road on her own. Suddenly she realizes that someone else—a man in a black cloak—has begun to walk alongside her, about a foot away. His physical proximity is clearly not enough to make it the case that they are going for a walk together. It may disturb Sue precisely because they are not going for a walk together.

*Id.* at 2 (emphasis omitted).

111. See generally Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327 (1992) (discussing shared cooperative activity).

112. See Searle, *supra* note 5, at 402–03 (discussing analogous examples and saying that "[e]xternally observed the two cases are [indistinguishable], but they are clearly different internally").

113. *Id.* at 404.

114. Abraham S. Roth, *Shared Agency*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2011), <http://plato.stanford.edu/archives/spr2011/entries/shared-agency> [<https://perma.cc/5SNM-P7NR>]. Philosophers disagree about whether we-intentions can be reduced to ordinary individual intentions. Compare, e.g., BRATMAN, *supra* note 5, at 4 ("[I]ndividual planning agency brings with it sufficiently rich structures—conceptual, metaphysical, and normative—that the further step to basic forms of sociality, while significant and demanding, need not involve fundamentally new elements."), with Searle, *supra* note 5, at 406–07 (arguing that "we-intentions are a primitive phenomenon" and that we-intentions are "not reducible to I-intentions plus mutual beliefs"). Where philosophers agree is that some sort of "participatory intention" is a necessary condition

For there to be shared cooperative activity, we-intentions must be shared. At a minimum,<sup>115</sup> for a single body as such to  $\phi$ ,<sup>116</sup> its members—either all or sufficiently many<sup>117</sup>—must each intend that “we”  $\phi$ .<sup>118</sup> In addition, each member’s intention that “we”  $\phi$  must be transparent, so each member must recognize that every other member also intends that “we”  $\phi$ .<sup>119</sup> Hence, if each of us intends that we walk through the park but each keeps that intention a secret, we do not walk as a joint venture. Last, members must intend to coordinate their efforts toward  $\phi$ ing.<sup>120</sup> We do not share an intention that we walk through the park if we make no effort to walk at the same pace. Nor, to use a legislative example, do we share an intention to improve the healthcare system if we do not even try to coordinate our efforts.

of shared agency. Christopher Kutz, *Acting Together*, 61 PHIL. & PHENOMENOLOGICAL RES. 1, 3 (2000).

115. This Article identifies only certain necessary conditions of shared agency. What conditions suffice for shared agency goes beyond the scope of this Article and is a matter of philosophical dispute.

116. As used here,  $\phi$  denotes some action—for example, to walk, to talk, or to enact legislation.

117. Whether an intention need be shared by all or sufficiently many members to be attributed to a group plausibly depends upon whether that group is “ephemeral” or “institutional.” See Kutz, *supra* note 114, at 28. Ephemeral groups, according to Professor Christopher Kutz, “are groups whose identity as a group consists just in the fact that a set of persons is acting jointly,” like a group pushing a car. *Id.* Institutional groups, by contrast, have additional identity criteria (for example, to be a member of the U.S. Senate, it is not enough for one to “intentionally participat[e] in its deliberations”; one must instead be elected in accordance with the operative elections procedures). *Id.* at 28–29. In the case of ephemeral groups, it seems straightforward that all members of a group must share an intention to  $\phi$  for that intention to be attributed to the group. What makes that group a group, after all, is just its shared intention to  $\phi$ . Compare this to institutional groups like the U.S. Senate. Because the Senate exists as a group for reasons apart from its members’ shared intention to  $\phi$ , it is at least plausible that one could attribute to the Senate an intention to  $\phi$  if a large enough subset of senators shared that intention. This Article need not answer this question.

118. See BRATMAN, *supra* note 5, at 152 (identifying as a sufficient condition of shared agency that “[w]e each have intentions that we *J*”); GILBERT, *supra* note 5, at 7 (“[I]n the process of joint commitment, two or more people jointly commit the same two or more people.” (emphasis omitted)).

119. See, e.g., GILBERT, *supra* note 5, at 7 (“In the basic case [of joint commitment], . . . each makes clear to each his personal readiness to contribute to it, in a way that is entirely out in the open to all.”); Michael E. Bratman, *Shared Intention*, 104 ETHICS 97, 99 n.8 (1993) (identifying “common knowledge” as a necessary condition of shared agency).

120. Bratman posits the following scenario in BRATMAN, *supra* note 5:

If we share an intention to go to NYC, and if you intend that we go to NYC by taking the New Jersey local train while I intend that we go by taking the Amtrak train, we have a problem. In a case of shared intention we will normally try to resolve that problem by making adjustments in one or both of these sub-plans, perhaps by the way of bargaining, in the direction of co-possibility.

*Id.* at 53.

Whenever there is an instance of shared cooperative activity, one can, in a minimal sense, correctly attribute an intentional action to a single body. When you and I walk through the park together, one can truthfully say that we walk through the park in a way that one cannot when you and I merely walk side by side. Likewise, whenever one can correctly attribute an intentional action to a single body, one can, again, in a minimal sense, correctly attribute *an intention* to that single body. Hence, when we walk through the park, one can ascribe to us the intention to do so in a way that one cannot when you and I each walk alone.

Philosophers disagree as to whether and to what extent collective action must involve collective agents,<sup>121</sup> as well as to whether and under what conditions it makes sense to regard a single body as constituting a “group mind” to which one can reasonably attribute cognitive attitudes.<sup>122</sup> This Article need not wade into these discussions. For present purposes, to say that a single body as such  $\phi$ s is just to say that its members  $\phi$  as a shared cooperative activity. In turn, to say that a single body intends to  $\phi$  is just to say that its members share an intention to  $\phi$  as a single body, that its members share a we-intention to  $\phi$ . If one accepts that there is such a thing as shared cooperative activity,<sup>123</sup> one can and should accept such minimal claims.

121. Compare Philip Pettit & David Schweikard, *Joint Actions and Group Agents*, 36 PHIL. SOC. SCI. 18, 30 (2006) (seeing “no metaphysical reason why a joint intentional action has to be the product of a single agent”), with MARGARET GILBERT, *What Is It for Us to Intend?*, in SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY 14, 22 (2000) (reasoning that, if there is shared intentional activity, there is a “plural subject” of that shared intention).

122. Compare BRATMAN, *supra* note 5:

Should we say . . . that the group agent of the shared intentional action is the *subject* of this intention?

I think that this is not in general true: in modest sociality there need not be a group subject who has the shared intention. To talk of a *subject* who intends is to see that subject as a center of a more or less coherent mental web of, at the least, intentions and cognitions. The idea of a subject who intends *X* but has few other intentional attitudes—who intends *X* in the absence of a mental web of that subject in which this intention is located—seems a mistake.

*Id.* at 127, with GILBERT, *supra* note 121, at 14 (articulating “an account of a shared intention as *the intention of a plural subject*” (first emphasis added)).

123. As opposed to, say, mere “strategic interaction.” BRATMAN, *supra* note 5, at 92 (“A central thought of this discussion is that modest sociality, while consisting in appropriate forms of interconnected planning agency, is not merely strategic interaction within a context of common knowledge.”); see also Natalie Gold & Robert Sugden, *Collective Intentions and Team Agency*, 66 J. PHIL. 109, 109 (2007) (“A general problem for . . . accounts [of shared agency] is how to differentiate collective intentions from the mutually-consistent individual intentions that lie behind Nash equilibrium behavior in games.”).

Questioning the applicability of the above model of shared agency to large groups, Professor Christopher Kutz argues that a shared intention to  $\phi$  is too strong a condition for a single body to  $\phi$  in the case of an orchestra. Kutz reasons that, because the contribution of an individual member to the group's  $\phi$ ing is minimal, it makes no sense for her to intend to make it the case that the group  $\phi$ s.<sup>124</sup> As a weaker alternative, Kutz proposes that members need to share an intention to do their respective parts in  $\phi$ ing for the single body to  $\phi$ .<sup>125</sup> Kutz's argument rests on disputable linguistic intuitions.<sup>126</sup> Regardless, Kutz's "minimal contribution" concern<sup>127</sup> has little purchase as to legislation, where each member's "contribution," or vote, is conditional on enough other members contributing to the same cause.

Professor Scott Shapiro similarly contends that a shared intention to  $\phi$  is too strong a condition for large groups because single body  $\phi$ ing can occur even when some members of a single body are "alienated," in the sense of doing their part despite being apathetic or even hostile to the project of  $\phi$ ing.<sup>128</sup> As a motivating example, Shapiro imagines two unaffiliated contractors each being paid \$1,000 to do "what [the hiring party] tells him to do."<sup>129</sup> The hiring party tells one contractor to scrape the old paint off his house and the other to paint a new coat on the scraped surface.<sup>130</sup> Each does as he is told. From this conduct, Shapiro infers that the contractors "have intentionally painted the house together."<sup>131</sup> This is the case, Shapiro continues, even though the contractor scraping the paint was indifferent to whether the other contractor applied the paint.<sup>132</sup>

The problem with Shapiro's example is that it conflates "intentionally brought about" with "brought about by intentional

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124. See CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE* AGE 98 (Gerald Postema ed., 2000) (claiming that for "an individual cellist" to intend that "[the orchestra] play the *Eroica*" would be for the cellist to "take too grandiose a view of his or her role").

125. *Id.* at 98–99.

126. See *id.* at 98 (claiming that it would "ring false" to attribute to an individual cellist the intention that "we play the *Eroica*").

127. *Id.*

128. Scott J. Shapiro, *Massively Shared Agency*, in *RATIONAL AND SOCIAL AGENCY: ESSAYS ON THE PHILOSOPHY OF MICHAEL BRATMAN* 257, 270 (Manuel Vargas & Gideon Yaffe eds., 2014).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 271 ("[The contractor] do[es]n't care a wit about painting the house, only [about] getting [his] money.").

activity.” In the example, each contractor acts intentionally: the first contractor intentionally scrapes off the old paint and the second contractor intentionally applies the new. What results is a newly painted house with an old coat properly removed and a new coat applied. That result was reasonably foreseeable to each. But the newly painted house was not brought about intentionally, at least not as far as the first contractor is concerned. Rather, the newly painted house is merely the foreseeable result of the two contractors’ strategic interaction.<sup>133</sup>

There is, though, some truth to Shapiro’s more general observation. It is plausible to attribute to an institutional group an intention to  $\phi$  despite some members of that group failing to intend that “we”  $\phi$ .<sup>134</sup> One can imagine scenarios in which an institutional group might intend to  $\phi$  despite some of its members being “alienated” from the project of  $\phi$ ing. If most members of Congress were to vote for a gun bill with the intention that “we” facilitate the purchase of assault rifles, it would be plausible to attribute to Congress the intention to facilitate the purchase of assault rifles even if a handful of members instead begrudgingly voted in favor to preserve their National Rifle Association “grades.”<sup>135</sup>

Return now to traditional skepticism about legislative intent. As noted in the above discussion of shared agency, neither preference nor intention aggregability is a sufficient condition for there to be legislative intent. Consider the motivating example of taking a walk. If you and I walk through the park side by side but are unaware of the other, each of us prefers walking to other activities (assume for the sake of argument that our alternatives are the same). More to the point,<sup>136</sup> each of us intends to walk through the park. As such, both our preferences and intentions are aggregable in the way that the traditional skeptic demands.<sup>137</sup> In this case, however, we do not intend to walk through the park *together*—even if you and I each do indeed intend to walk through the park.

133. See *supra* note 123.

134. See *supra* note 117.

135. See Matthew Bloch, Hannah Fairfield, Jacob Harris, Josh Keller & Derek Willis, *How the N.R.A. Rates Lawmakers*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/interactive/2012/12/19/us/politics/nra.html> [<https://perma.cc/QU5T-JDFL>].

136. See *supra* notes 109–15 and accompanying text.

137. That is, aggregable in terms of the activity preferred or intended, without regard to whether that activity is conceived of as individual or joint. See Shepsle, *supra* note 6, at 244–45.

What of necessity? At one level, the aggregability of legislator intention is, by definition, a necessary condition of legislative intent on the account of shared agency just discussed: if a single body intends to  $\phi$  only if its members share an intention that “we”  $\phi$ , then, for all cases in which Congress intends to  $\phi$ , its members’ respective intentions to  $\phi$  will be aggregable. In relation to traditional skepticism of legislative intent, however, saying that shared agency entails intention aggregability is misleading. Traditional skeptical arguments all have to do with the aggregability of substantive policy preferences or intentions.<sup>138</sup> But, for reasons touched on by Professor Lawrence Solan, a legislature might intend a substantive policy without all or even a majority of legislators ever having seriously considered that policy.<sup>139</sup> Solan observes that members of Congress might share an intention to enact some policy X with the policy’s details to be determined by a specific member, subset of members, or, conceivably, nonmember third party—for example, an executive branch official or a lobbyist.<sup>140</sup> In so doing, Congress would exercise shared agency in much the same way as you and I do if each of us intends that we take a trip but I leave to you the choice of destination.<sup>141</sup> In either case, members of the single body share a we-intention that commits them to something specific without ever having to contemplate—let alone prefer or intend—that specific thing.

#### *D. New Skepticism About Shared Legislative Intent*

Congress does sometimes act as an “it.” When Congress takes an up-or-down vote on a particular bill, its members share a conditional intention that “we” approve the bill if it receives the requisite number of votes. Casting a vote with this intention is the same as casting a vote

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138. See *id.* at 241–44 (constructing an Arrowian dilemma around intransitivity of substantive policy preferences).

139. See Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 437–49 (2005).

140. Solan explains:

While committees will often be at the center of this inquiry, this will not always be the case. Sometimes, for example, the administration may propose legislation through members of Congress. When that happens, the relevant committees may adopt statements from the executive branch as reflecting the bill’s purpose. In other instances, the bill’s journey through committees, floor debate and conference is complicated, with particular moments in the process being crucial to passage of the bill.

*Id.* at 447 (footnotes omitted).

141. See *id.* at 439–40.

intentionally.<sup>142</sup> Likewise, when the House or the Senate votes on a proposed rule of legislative procedure, its members share an intention that “we” adopt the rule if sufficiently many members vote in favor. Less clear is whether Congress, *qua* “it,” sometimes enacts a bill for some purpose or intends that a textual provision have some specific meaning. This Part suggests that Congress rarely if ever acts with such intentions.

Again, on the account of shared agency just discussed, to say that Congress intends to  $\phi$  is just to say that its members share an intention that “we”  $\phi$ . As that account suggests, this intention can come about in one of two ways. First, members can share a direct intention that “we”  $\phi$ . Second, members can share a direct intention that “we”  $\theta$  that commits them indirectly to an intention that “we”  $\phi$ .

Consider the recent dispute in *King v. Burwell*<sup>143</sup> over the phrase “Exchange established by the State” as used in § 36B of the Internal Revenue Code (IRC), which was enacted as part of the Patient Protection and Affordable Care Act (ACA).<sup>144</sup> Opponents of the ACA argued that “Exchange established by the State” could only be read to refer to healthcare exchanges established by one of the fifty states or the District of Columbia.<sup>145</sup> In response, the government argued that “the ACA’s structure and purpose all evince[d] Congress’s intent” that the phrase refer to “both state-run and federally-facilitated Exchanges.”<sup>146</sup> Per the above, for the government’s claim to have been true, one of two conditions would also have had to obtain: (1) when enacting the ACA, members of Congress shared a direct intention that, by “Exchange established by the State,” “we” meant exchanges established by the states or the federal government; or (2) members shared some other direct intention, like an intention that the ACA be interpreted in a manner consistent with the assumptions underlying the

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142. Put another way, casting one’s vote without this intention would evince a basic misunderstanding of voting procedure.

143. *King v. Burwell*, 135 S. Ct. 2480 (2015).

144. I.R.C. § 36B (2012).

145. *King*, 135 S. Ct. at 2488.

146. Brief for the Appellees at 13, *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014) (No. 14–1158) (quoting *Halbig v. Sebelius*, 27 F. Supp. 3d 1, 23 (D.D.C. 2014), *rev’d*, 758 F.3d 390 (D.C. Cir. 2014), *reh’g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014)).

corresponding CBO score,<sup>147</sup> that committed them indirectly to this reading.<sup>148</sup>

Appeal to direct intention is, as a rule, hopeless for purposes of substantiating an attribution of legislative intent. As an empirical matter, members of Congress “don’t read text,”<sup>149</sup> let alone form communicative intentions as to specific textual provisions. Further, because members act at the behest of different constituencies, it is rare for members to agree<sup>150</sup> upon reasons for action outside of statutes’ preambles.<sup>151</sup>

This leaves appeal to indirect commitment. The various scholars who have pursued this approach in recent years are largely those who have urged courts to pay greater attention to “how Congress really works” when engaging in statutory interpretation.<sup>152</sup> Such scholars appeal to indirect commitments of one of two sorts. The first is a commitment resulting from members’ acceptance of formal norms. The second is a commitment resulting from members’ adherence to informal norms.

As explained below, both approaches to indirect commitment fail. Although appealing to formal norms is a plausible strategy for attributing intentions to Congress, the intentions one can attribute on that basis are exceedingly few. Appealing to informal norms, by contrast, promises to ground a whole array of intent attributions, but these types of norms either do not exist or are, by their secretive nature, inconsistent with fair notice.

1. *Formal Norms.* On occasion, Congress plausibly commits itself indirectly to a communicative intention by adopting some formal norm such as an enacted procedural rule. For example, as Professor Victoria Nourse observes, both the House and the Senate have a rule that prohibits conference committees from altering the text of a bill when

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147. See Bressman & Gluck, *Part II, supra* note 19, at 782.

148. For a discussion of how a court would go about resolving the dispute in *King* absent an appeal to actual, historical legislative intent, see *infra* notes 258–69 and accompanying text.

149. Gluck & Bressman, *Part I, supra* note 14, at 972.

150. That is, to coordinate.

151. See *infra* notes 164–69 and accompanying text.

152. Nourse, *supra* note 1, at 143; accord KATZMANN, *supra* note 8, at 8 (“[S]cant consideration [has been] given to what I think is critical for courts discharging their interpretive task—an appreciation of Congress actually functions, how Congress signals its meaning, and what Congress expects of those interpreting its laws.”); Gluck & Bressman, *Part I, supra* note 14, at 909 (“[W]ithout a link to congressional practice, it becomes clear that [interpretive] canons allow judges to shape statutes in ways that may diverge from congressional expectations . . .”).



the two chambers have agreed to the same language.<sup>153</sup> From this procedural rule, Nourse rightly infers that, when postconference language differs from agreed upon preconference language, Congress is committed—where plausible<sup>154</sup>—to the intention that the former communicate something substantially similar to that which was communicated by the latter.<sup>155</sup> This commitment to preconference or postconference consistency entails a commitment to a discernable communicative intention if the intention expressed by preconference language is itself discernable—for example, when one can tell what Congress meant, or at least did not mean,<sup>156</sup> with that language.<sup>157</sup>

Although Nourse suggests that attention to the formal norms of legislative procedure renders both unmysterious and unproblematic the search for legislative intent,<sup>158</sup> none of Nourse’s other examples support that generalization. Nourse argues that various procedural rules dictate which stages of the legislative process are “important point[s] of textual decision.”<sup>159</sup> From this “importan[ce],” Nourse infers that the legislative history most proximate to some such decision will shed the most light on legislative intent as it pertains to that decision.<sup>160</sup> Legislative history, however, consists only of nonbinding statements or

153. See Nourse, *supra* note 1, at 94 & n.97 (“Conference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language.” (emphasis omitted) (citing Rules of the House of Representatives, H.R. Doc. No. 111-157, R. XXII (9), at 37 (2011); Standing Rules of the Senate, S. Doc. No. 112-1, R. XXVIII (2a), at 52 (2011))).

154. In cases where the rule was plainly violated, one cannot plausibly attribute to Congress such an intention.

155. See Nourse, *supra* note 1, at 96 (“A faithful member of Congress would assume that, when both houses pass the same language, any added language must be read as making no substantive change in the bill.”).

156. If preconference language plainly precluded a particular reading, one could infer that Congress did not intend that reading post conference. This would be true regardless of whether preconference language was in some other way unclear.

157. See Nourse, *supra* note 1, at 96 (“If the ambiguity is created in conference committee, . . . then the court may resolve the ambiguity by conforming to Congress’s own rules.” (emphasis added) (footnote omitted)).

158. See *id.* at 72.

159. *Id.* at 98. Here, Nourse builds upon prior work in positive political science. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 3 (1994) (purporting to “identify aspects of the legislative history that are more reliably informative about the intent of the majority coalition that enacted a statute” through the identification of “veto gates”); McNollgast, *supra* note 91, at 720 (“The single most important feature of the legislative process is that, to succeed, a bill must survive a gauntlet of veto gates in both the House and Senate . . .”).

160. See Nourse, *supra* note 1, at 110 (“[T]he best legislative history is the history most proximate to text, rather than a particular type of report or statement . . .”).

reports prepared by some individual member or subset of members. By assuming uncritically that legislative history is probative of legislative intent, Nourse shifts without remark from intent *qua* shared indirect commitment to intent *qua* what was likely in the head of a member at the time of decision to the extent she was paying attention.<sup>161</sup> There is, of course, no guarantee—and strong reason to doubt—that all or a majority of members are paying attention to any given decision at any given time.<sup>162</sup> Absent some novel and unmentioned shared informal commitment to treating as authoritative the view of some individual member or set of members, Nourse offers no reason to share her confidence that attention to cloture rules will reveal shared intentions. Each of Nourse’s additional arguments suffers from this defect.<sup>163</sup>

Congress also commits itself to communicative intentions via statute. The Dictionary Act, for example, contains various rules of construction that inform “the meaning of any Act of Congress.”<sup>164</sup> Because Congress has committed itself to these rules, one can attribute to it, all other things being equal,<sup>165</sup> the intention to refer to “the future as well as the present” when it uses the present tense.<sup>166</sup> So too, when Congress uses the term “person,” one can attribute to Congress the intention to refer to things that “include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>167</sup>

In addition to its use of the Dictionary Act, Congress makes use of definitions sections within specific statutes. Hence, when interpreting Title 18, one can attribute to Congress, where it uses the term “United States” in a “territorial sense,” the intention to refer to “all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone,” as it is defined for that title.<sup>168</sup> Last, Congress sometimes commits itself to broader practical intentions via preamble. When interpreting some provision of the

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161. To the extent that committee reports and other legislative history are nonbinding, such sources are, at best, probative of how a given member understood the corresponding text as a historical matter.

162. See *supra* notes 149–52 and accompanying text.

163. Nourse, *supra* note 1, at 118–19 (claiming that statements by legislative “winners” are more probative than statements by “losers”).

164. 1 U.S.C. § 1 (2012).

165. The Dictionary Act’s rules of construction are framed as default rules, meaning that they are rules that apply “unless the context indicates otherwise.” *Id.*

166. *Id.*

167. *Id.*

168. 18 U.S.C. § 5 (2012).

Animal Welfare Act, for example, one can attribute to Congress the intent of “[e]nsur[ing] that animals intended for use in research facilities . . . are provided humane care and treatment.”<sup>169</sup>

Unfortunately, definitions sections<sup>170</sup> and preambles only get one so far. Setting aside the problem that definitions sections and preambles themselves require interpretation,<sup>171</sup> such provisions plainly do not—and could not plausibly—ground the array of intent attributions described in Part I.

In sum, appealing to formal norms adopted by Congress fails as a general method for substantiating attributions of legislative intent.

2. *Informal Norms.* Appealing to informal legislative norms fares no better as a method for indirectly attributing legislative intent to Congress. First, recent empirical studies of the legislative drafting process support skepticism about the ability to attribute intent to Congress via informal norms. Second, judicial recognition of nonobvious legislative norms, such as informal norms alleged by those urging greater attention by interpreters to legislative process, plausibly conflicts with fair notice.

What is an informal legislative norm?<sup>172</sup> Consider the norm in soccer that a player kicks the ball out of bounds if a player from the opposing team is injured. This norm appears nowhere in the FIFA rulebook but is widely recognized by both players and fans. It is, therefore, an informal norm of the sport.<sup>173</sup> An informal legislative norm is just a norm recognized but not formally adopted by Congress.

169. 7 U.S.C. § 2131 (2012).

170. In effect, the Dictionary Act is a definitions section for the entire U.S. Code.

171. Cf. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 217 (G.E.M. Anscombe trans., Blackwell Publishers 2d ed. 1997) (1953). Wittgenstein states:

“How am I able to obey a rule?”—if this is not a question about causes, then it is about the justification for my following the rule in the way I do.

If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”

*Id.*; cf. Fallon, *supra* note 75, at 711 (observing that “if a theory . . . tried to incorporate within itself rules for its own application, then someone could always demand to see the principles specifying how those prescriptions should in turn be interpreted”).

172. Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 *COLUM. L. REV.* 1163, 1181 (2013) (contrasting informal “conventions” with “formal legal rules”).

173. See, e.g., Nate Scott, *Italian Soccer Game Has Heartwarming Display of Sportsmanship*, *USA TODAY: SPORTS* (Mar. 20, 2014), <http://ftw.usatoday.com/2014/03/soccer-game-italian-serie-d-sportmanship> [<https://perma.cc/4AEU-W8KT>] (“A player for [Team A] was injured, so [Team B] kicked the ball out of bounds to allow him to get treatment. As is customary in soccer, [Team A] then threw the ball in and gave the ball back to [Team B]’s goalkeeper.”).

The norm that a home-state senator retains veto power over a judicial nominee, for example, has no basis in statute or formal procedural rule. It is nonetheless recognized by members as binding.<sup>174</sup>

Various accounts of legislative intent are built upon appealing to informal legislative norms. Some accounts claim that members of Congress share intentions to delegate the task of authoring legislation. In turn, members are alleged to have committed, albeit informally, to recognizing the intentions of their delegates as authoritative for the group. Solan, for example, claims that Congress delegates to “subplanners” the task of giving “content” to particular bills.<sup>175</sup> Often the subplanners in question are originating congressional committees.<sup>176</sup> According to Solan, members of Congress share a “*general recognition* that those who ushered [a] bill through the process did so with particular [intentions] that deserve to be honored.”<sup>177</sup> From this general recognition, Solan infers that “the historical record of a committee . . . that developed the details of a statute is typically useful evidence of that subgroup’s, and thus the *entire group’s*, intent.”<sup>178</sup>

Similarly, Judge Katzmann reasons that courts should consider legislative history because it “can aid the judge in understanding how the legislation’s congressional *proponents* wanted the statute to work, what problems they sought to address, what purposes they sought to achieve, and what methods they employed to secure those purposes.”<sup>179</sup> As he writes, “When Congress passes a law, it can be said to incorporate the materials that it or at least the law’s *principal sponsors* (and others who worked to secure enactment) deem useful in interpreting the law.”<sup>180</sup> Judge Katzmann infers the informal commitment to incorporation from the “substantial control” over the legislative process afforded to “particular legislators,” including “committee chairs, floor managers, and party leaders.”<sup>181</sup> Gluck and Bressman likewise argue that “faithful-agent judges” should use

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174. See MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT at 24–25(2003).

175. Solan, *supra* note 139, at 448–49.

176. *See id.* at 447.

177. *Id.* (emphasis added).

178. *Id.* (emphasis added).

179. KATZMANN, *supra* note 8, at 35 (emphasis added).

180. *Id.* at 48; *see also id.* at 38 (characterizing committee reports and conference committee reports as “authoritative materials”).

181. *Id.* at 48–49.

legislative history to discern the intentions of “legislative drafters,” those members and staffers most responsible for drafting a particular bill.<sup>182</sup> They advocate for various interpretive rules<sup>183</sup> that are assumed to approximate the intentions of those “doing the drafting,”<sup>184</sup> equating, without argument, the intentions of drafters with those of Congress as such.

The above accounts give rise to two concerns.<sup>185</sup> First, greater attention to “how Congress really works” supports *skepticism* about legislative intent via delegation. Assume that Congress intends to delegate authorship to “drafters.” In the simple case, a committee drafts a bill. Both chambers then adopt that bill without amendment. Here, whatever intentions are attributable to the committee are attributable to Congress as such. But how is one to determine what intentions are attributable to the committee? Beyond looking at the

182. See, e.g., Gluck & Bressman, *Part I, supra* note 14, at 959.

183. For example, that statutes should be interpreted in accordance with the assumptions underlying the corresponding CBO score, and that statutes drafted by a committee should be construed to preserve that committee’s jurisdiction. See Bressman & Gluck, *Part II, supra* note 19, at 781–82.

184. Gluck & Bressman, *Part I, supra* note 14, at 946–47. Gluck and Bressman also argue:

Courts rather easily might implement many of our respondents’ insights related to the different types of legislative history, for example: distinguish between omnibus and appropriations legislative history; entrench the inconsistently applied doctrine that committee reports are the most reliable history; pay more attention to markups; and place more weight on scripted colloquies or other documents issued jointly by committee leaders of opposing parties.

*Id.* at 989.

185. In addition to the concerns voiced here, delegation-based accounts of legislative intent have been subject to nondelegation critique. Article I, Section 1 vests all legislative power in Congress as such. See *supra* notes 84–89 and accompanying text. According to Justice Scalia, “It has always been assumed that these powers are nondelegable—or, as John Locke put it, that legislative power consists of the power ‘to make laws, . . . not to make legislators.’” *Bank One Chi. N.A. v. Midwest Bank & Tr. Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 87 (R. Cox ed., 1982) (1690)). Sharpening the critique, Manning argues that “legislative *self*-delegation poses a particularly acute danger to [the Article I, Section 7 requirements of] bicameralism and presentment and is unconstitutional per se.” John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997) (emphasis added). Manning reasons that when a court “gives authoritative weight to,” say, “a committee’s subjective understanding of statutory meaning (announced outside the statutory text), it empowers Congress to specify statutory details—without the structurally-mandated cost of getting two Houses of Congress and the President to approve them.” *Id.* at 707.

This nondelegation critique, however, rests on the premise that Congress votes on legislative text, not drafters’ understanding thereof. But to the extent that the “drafter’s understanding” is just something like speaker meaning, the contrast is difficult to sustain for the reasons articulated in Part I.

statutory text, the traditional answer is to read the committee report.<sup>186</sup> This answer is difficult to square, however, with survey responses showing differences of opinion amongst drafters as to whether such reports are reliable.<sup>187</sup> So too with the concession by drafters in those same surveys that committee reports are used sometimes “to include ‘something we couldn’t get in the statute’ in order ‘to make key stakeholders happy.’”<sup>188</sup> Further, because the majority party drafts the report, “[t]his puts [it] in a position to be able to use [its] control of legislative history to sneak in [its] preferred interpretation even if it goes against the bargains that [it] made with the minority party to achieve passage.”<sup>189</sup>

Consider next a more complex and realistic case. Some committee drafts a bill. Prior to adoption, various amendments are made on the floor. Whose intentions are attributable to Congress? The naive response is that the committee’s intentions are attributable to the unamended portions of the bill and that the intentions of the amendment authors are attributable to the portions amended.<sup>190</sup> This

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186. See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“[T]he authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represent [t]he considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.’” (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))).

187. Perhaps unsurprisingly, drafters responsible for committee reports hold the reports in a higher regard than those who were not responsible for the drafting. Compare Gluck & Bressman, *Part I*, *supra* note 14, at 977–78 (reporting that most committee staffers regard committee reports as either “very reliable” or “reliable”), with Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 848 (2014) (reporting that legislative counsel—responsible for statutory text but not legislative history—regard committee staffers as having difficulty articulating policy goals clearly); see also Gluck & Bressman, *Part I*, *supra* note 14, at 978 (recognizing the “potential bias” of committee staffers in favor of committee work product).

188. Gluck & Bressman, *Part I*, *supra* note 14, at 973; see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 607 (2002) (“As one staffer put it: ‘[T]o maintain agreement, people often prefer to leave language ambiguous and put things in legislative history.’”); Cf. Shobe, *supra* note 187, at 870 (observing problems of “strategic ambiguity”).

189. Shobe, *supra* note 187, at 870. As Professor Jarrod Shobe explains, “While [the majority party’s] duplicity could cost them credibility, it will often not be revealed until many years later—if at all—when the case is litigated.” *Id.* Gluck and Bressman anticipate this concern, emphasizing that committee reports and other group-produced legislative history materials “often convey bipartisan, multimember understandings.” See Gluck & Bressman, *Part I*, *supra* note 14, at 978. For the reasons explained below, however, even in cases where a committee report reflects a bipartisan consensus among committee members, the question of how to integrate that consensus with the attitudes of noncommittee members remains.

190. Because the amendments occur after committee, the committee does not need to form intentions as to their purpose or meaning. Nor is there an apparent reason to privilege committee intentions formed after a bill reaches the floor.

response is too quick. Because a bill is read as a whole, amended portions shape one's reading of unamended portions and vice versa.<sup>191</sup> For this reason, one must attribute a coherent set of practical and communicative intentions to the bill's authors to make sense of the whole. But how? Committee member and amendment authors do not need to coordinate intentions. And how to reconcile conflicting, uncoordinated intentions—whether policy or communicative—is unclear.<sup>192</sup>

Return now to the initial assumption that members share an intention to delegate. What is clear is that members share an intention to delegate to other members and staffers the drafting of proposed legislation—that is, the putting of finger to keyboard.<sup>193</sup> Members also depend on other members and staff for information about what the proposed legislation does.<sup>194</sup> Less clear is whether members share an intention to delegate to other members or staffers authorship of proposed legislation in the sense of an authoritative understanding of it. For example, in arguing against a “text-focused approach” to interpretation,<sup>195</sup> Gluck and Bressman claim, “It is not uncommon to hear that a group of elected officials has reached a ‘deal’ before pen is put to paper.”<sup>196</sup> As evidence, Gluck and Bressman cite a complaint by Senator Mike Lee, a Republican from Utah, that “a gun bill was being debated even as ‘not a single senator ha[d] been provided the

191. By analogy, suppose a studio contracts with A to write a screenplay. Dissatisfied, the studio then contracts with B to rewrite the ending. B's new ending will influence the audience's interpretation of early scenes despite having left those scenes unaltered. Likewise, the early scenes will influence the audience's interpretation of the new ending.

192. Add to this difficulty the practical complication that the legislative history generated with respect to floor amendments is alleged to be poor.

193. See Shobe, *supra* note 187, at 826–30 (discussing the role of legislative counsel in the drafting of legislative language).

194. See, e.g., *id.* at 834–43 (discussing legislators' reliance on reports prepared by the Congressional Research Service).

195. In particular, Gluck and Bressman argue against an approach to interpretation that considers text at a “granular” level. Bressman & Gluck, *Part II, supra* note 19, at 743 (“This is not to say that members and staff do not care about text . . . . Rather, it is to say that micro-level legal disputes over what is often a single word in a lengthy statute may be improperly focused . . . .”); see also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015) [hereinafter Gluck, *Imperfect Statutes*] (arguing that, “[w]hereas the Court's recent statutory interpretation jurisprudence has been marked by a targeted focus on a few contested words, *King* responds by looking at the full picture, at Congress's ‘plan’”).

196. Bressman & Gluck, *Part II, supra* note 19, at 740.

legislative language.”<sup>197</sup> Senator Lee’s complaint only makes sense if proposed legislation consists of “legislative language” as opposed to some extratextual “deal.” Otherwise, why wait for the language? More to the point, it only makes sense if he regards himself as free to interpret that “language” himself. Again, this attitude is of a piece with members making floor statements that conflict with committee reports and the like.

Taken together, the above points provide ample reason for skepticism about intent via delegation. It is doubtful that members share an intention to delegate authorship, and even if Congress does share such an intention, the intentions of delegates are unknowable or unformed.

In the above respects, there is a stark difference between the governance structure of Congress and that of a typical corporation. Various scholars reason that attributing intentions to Congress is not a problem because we freely attribute intentions to corporations and other multimember bodies.<sup>198</sup> In the case of corporations, intent attribution is often unproblematic because corporations are, generally speaking, hierarchical organizations with clear allocations of decisionmaking authority. Because a corporation’s general counsel has decisionmaking authority with respect to the corporation’s legal strategy, the general counsel’s intentions with respect to legal strategy can be attributed to the corporation as a whole.<sup>199</sup> In this way, the typical corporation is unlike Congress, where a bill’s primary sponsors do not appear to enjoy the sort of widely recognized delegation of authority as a general counsel.

Second, judicial recognition of nonobvious informal legislative norms would plausibly conflict with fair notice. As a constitutional

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197. Jennifer Bendery, *Gun Bill Vote: Senate Overcomes GOP Filibuster Effort to Begin Debate*, HUFFINGTON POST (Apr. 11, 2013), [http://www.huffingtonpost.com/2013/04/11/gun-bill-vote\\_n\\_3061275.html](http://www.huffingtonpost.com/2013/04/11/gun-bill-vote_n_3061275.html) [<https://perma.cc/H5YP-RF66>].

198. See, e.g., BREYER, *supra* note 105, at 99 (“It is not conceptually difficult, however, to attribute a purpose to a corporate body such as Congress. Corporations, companies, partnerships, . . . and legislatures engage in intentional activities . . . .”); Nourse, *supra* note 1, at 86 (“If lawyers find no difficulty in understanding the complexities of other collective entities, such as corporations or administrative agencies, one wonders why it is too difficult to understand Congress.”).

199. Delegation also explains attributions of intent to judicial opinions of multimember courts. See Nourse, *supra* note 1, at 74 (“[Lawyers] do not charge the multimember Supreme Court with having no ‘intent’ and, from this premise, dismiss judicial opinions as if the Court had made no decision.”). Because courts delegate authorship of an opinion to a particular judge or justice in most cases, the intentions of the authoring judge or justice are attributable to the court as a whole.



matter, “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”<sup>200</sup> This recognition of a fair-notice requirement means, at a minimum, that information necessary to understanding a law must be publicly available<sup>201</sup> and that guidance concerning the content of the law must not be misleading.<sup>202</sup> As a normative matter, notice is required by “[e]lementary notions of fairness.”<sup>203</sup> It is also “recognized as an essential element of the rule of law.”<sup>204</sup> Quite plausibly, “blame and punishment *presuppose* that [an] agent had a fair opportunity to avoid wrongdoing.”<sup>205</sup> So does the rule of law, which ensures an “opportunity to know what the law is and to conform [one’s] conduct accordingly.”<sup>206</sup>

Recognition of obvious informal norms is plainly consistent with fair notice. The norm that legislation must be written in English has no formal basis but is widely recognized by members of Congress and by interpreters, both professional and lay.<sup>207</sup> Because this norm is so intuitive, one would be hard-pressed to say that a “person of ordinary

200. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

201. See Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 463 & n.44 (2005) (“There is a consensus, for instance, that the people subject to a statute should have fair notice of the law’s requirements; that is why even intentionalists restrict themselves to *publicly available* materials when trying to discern what the enacting legislature meant.” (emphasis added)).

202. See *Fox*, 132 S. Ct. at 2312–14, 2318 (holding that broadcasters lacked fair notice that the prohibition against broadcasting “obscene, indecent, or profane language” applied to “fleeting” expletives, where the agency policy at the time of broadcast indicated that the prohibition applied only to “repeated” expletives).

203. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment . . .”).

204. Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 543 (2009); accord *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))).

205. David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility*, in 1 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 284, 285 (David Shoemaker ed., 2013) (emphasis added).

206. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); accord Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 471 (1982) (“The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.”).

207. See Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 101 n.9 (2003) (“[T]extualists assume that . . . statutes are written in English. But no text by itself declares the language in which it is written. Rather, the context—English-speaking authors writing to direct an English-speaking audience—shows that English was the language *intended*.” (citations omitted)).

intelligence”<sup>208</sup> lacks notice of its operation.<sup>209</sup> Contrast this situation with the alleged norm that a statute is to be interpreted in accordance with the understanding of its principal sponsors. Members routinely make floor statements that “disavow[] the committee’s or sponsor’s interpretation.”<sup>210</sup> In so doing, those members implicitly repudiate the alleged norm of delegating authorship in a robust sense to the principal sponsors of a bill. Even if one proceeded on the assumption that these statements are subterfuge, it would still be troubling to say that citizens have notice of a norm that officials deny.<sup>211</sup> Add to this confusion the recent finding that a sponsor’s understanding is often informed by “‘inside information’ that may be unknowable to courts or litigants,”<sup>212</sup> and the fair-notice concern becomes greater still.<sup>213</sup>

### III. LEGISLATIVE INTENT AS FICTION, OR THE (RELATIVE) IRRELEVANCE OF LEGISLATIVE PROCESS

Part II argues that claims about legislative intent are reliably false if taken literally. This Part contends that such claims are, therefore,

208. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . .’” (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008))); *accord Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”).

209. The same can probably be said of the various “linguistic” canons that interpreting courts apply. *See generally, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–139 (2012) (discussing what the authors refer to as “semantic” and “syntactic” canons). Because those canons are just approximations of the usage norms of ordinary English, the general norm that statutes be written in English plausibly entails more specific norms that, for example, those same statutes conform to the principle of *expressio unius est exclusio alterius*. Gluck and Bressman observe that drafters report varying degrees of compliance with the linguistic canons. *See Gluck & Bressman, Part I, supra* note 14, at 932. But because such canons are best understood as rules of thumb, as opposed to rigid prescriptions, such varied compliance is compatible with the thesis that statutes conform to these canons generally.

210. Manning, *supra* note 185, at 721 & n.207 (collecting cases).

211. *Cf. id.* at 721 (expressing concern that, “because the Court has stated that it will treat committee reports and sponsor’s statements as more ‘authoritative’ than ordinary floor statements, individual legislators can even take to the floor and make statements disavowing the committee’s or sponsor’s interpretation, without precluding judicial reliance on the history produced by the more ‘authoritative’ legislative actors” (footnotes omitted)).

212. Gluck & Bressman, *Part I, supra* note 14, at 985.

213. *Cf. Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (“Indeed, it is not unlike the practice of Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’” (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*46)).

best understood as involving a useful fiction. The fiction this Part posits is that legislation is written by a generic author. So understood, a claim about legislative intent is apt if and only if one would make the claim about a generic author on the basis of her having written the legislation at issue in the context of enactment.

### A. *Fictionalism*

Fictionalism about a particular discourse is the thesis that claims within that discourse are best understood not as aiming at literal truth but rather as involving a useful pretense.<sup>214</sup> Fictionalism is often motivated by the concern that a discourse would suffer from a systematic defect if claims within it were aimed at literal truth.<sup>215</sup> That concern might be metaphysical or epistemological. In the case of cops and robbers, the concern is metaphysical. Within the discourse, children appear to refer to objects that do not exist. As such, claims within the discourse would be systematically false if they were aimed at literal truth. Contrast talk of cops and robbers with children discussing a plan to unearth buried treasure in a backyard. Here, if taken literally, claims within the discourse would be systematically unwarranted even if true: although the yard might contain buried treasure, the children have no way of knowing it.<sup>216</sup> In each case, appealing to pretense explains away the would-be defect.<sup>217</sup>

Fictionalism can be hermeneutic or revolutionary.<sup>218</sup> Hermeneutic fictionalism says that a discourse in fact involves a pretense.<sup>219</sup>

214. See Roth, *supra* note 114.

215. See Jason Stanley, *Hermeneutic Fictionalism*, in 25 *MIDWEST STUDIES IN PHILOSOPHY: FIGURATIVE LANGUAGE* 36, 36 (Peter A. French & Howard Wettstein eds., 2001) (“On a fictionalist view, engaging in discourse that involves apparent reference to a realm of problematic entities is best viewed as engaging in a *pretense*.”).

216. See, e.g., JOHN HAWTHORNE, *KNOWLEDGE AND LOTTERIES* 23 (2004) (“The practice of assertion is constituted by the rule/requirement that one assert something only if one knows it.”); TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 243 (2000) (defending the “knowledge rule,” i.e. the rule that “[o]ne must: assert *p* only if one knows *p*”). Although not all philosophers accept the knowledge norm of assertion, it is common ground that the norms of assertion relate to epistemic access to the proposition asserted. See, e.g., Jennifer Lackey, *Norms of Assertion*, 41 *NOÛS* 594, 595 (2007) (defending the “reasonable to believe” norm of assertion).

217. In other words, fictionalism is a charitable reconstruction of an otherwise defective discourse.

218. JOHN P. BURGESS & GIDEON ROSEN, *A SUBJECT WITH NO OBJECT: STRATEGIES FOR NOMINALISTIC INTERPRETATION OF MATHEMATICS* 6 (1999) (observing this distinction).

219. *Id.* (“On what may be called the hermeneutic conception, the claim is . . . [a]ll anyone really means—all the words really mean—is . . . .”) (emphasis omitted).

Revolutionary fictionalism says that it should.<sup>220</sup> In other words, hermeneutic fictionalism is a descriptive thesis and revolutionary fictionalism is a normative one. With cops and robbers, hermeneutic fictionalism is plainly true. Children do not mistake a twig for a gun once the game has come to an end. Contrast this scenario with a child's talk about her imaginary friend. Here, it might be unclear whether the child regards her friend as imaginary. If not, hermeneutic fictionalism as to her talk is false. Revolutionary fictionalism, however, is probably true. The child can (and should<sup>221</sup>) continue her friendship, and, in turn, her talk about that friendship as a game of make-believe.

*B. Fictionalism About Legislative Intent*

Fictionalism about legislative intent maintains that claims about intent are best understood as involving a pretense. As advocated in this Article, fictionalism about intent argues that intent claims involve the pretense that legislation is written by some author, that is, that intent claims should be evaluated for truth relative to that pretense.

As explained in Part I, intent attribution is necessary if legislation is to be an effective means of communication.<sup>222</sup> For that reason, simply abandoning discourse about legislative intent is not a serious option. As explained in Part II, the primary motivation for fictionalism is the metaphysical concern that legislation has no author.<sup>223</sup> If legislation has no author, then claims about legislative intent are systematically false if taken literally. Appealing to the pretense of a generic author explains away this defect.<sup>224</sup> Understood as involving this pretense, a claim about legislative intent is apt if and only if one would make the claim about a generic author on the basis of her having written the legislation at issue in the context of enactment.

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220. *Id.* (“On what may be called the revolutionary conception, the goal is reconstruction or revision.” (emphasis omitted)).

221. *See, e.g.*, Paige E. Davis, Elizabeth Meins & Charles Fernyhough, *Individual Differences in Children's Private Speech: The Role of Imaginary Companions*, 116 J. EXPERIMENTAL CHILD PSYCHOL. 561, 561 (2013) (finding that “[c]hildren who had imaginary companions were more likely to engage in covert private speech”).

222. *See supra* notes 23–78 and accompanying text.

223. A secondary motivation for fictionalism about legislative intent is the epistemological concern that, even if legislation has an author, its author's intentions are unknowable. *See supra* notes 186–89 and accompanying text. If an author's intentions are unknowable, then claims about legislative intent are systematically unwarranted if aimed at literal truth. *See supra* note 216.

224. Appeal to this pretense also explains away the above-mentioned epistemological defect because it renders legislative intent knowable by definition—that is, with a fictionalist approach, legislative intent simply is what one would have reason to believe it to be.

Why a generic author? Intent claims are made in relation to a context of enactment. That context consists of information from which one can draw inferences about an author about whom one otherwise knows nothing. Because one is interpreting a federal statute, for example, one can infer that its author has written legislation as opposed to satire. Likewise, one can infer that the statute's author has written in English.<sup>225</sup> More generally, the context of enactment provides enough information to make sense of what an author is doing. For this reason, appealing to the pretense of a generic author is enough to make sense of discourse about legislative intent. As such, appealing to the pretense of a "reasonable legislator" is unnecessary.<sup>226</sup> One can thus avoid the political–philosophical judgments such an appeal might entail.<sup>227</sup>

As conceived in this Article, fictionalism about intent is a refinement of "objectified intent" invoked by some textualists. According to Manning, "Legislative intent, to the extent textualists invoke it, is a framework of analysis designed to satisfy the minimum

225. See *supra* note 207 and accompanying text.

226. E.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 895 (2003) (observing that "[p]urposivism usually attributes goals or aims by envisioning reasonable legislators acting reasonably"); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (recommending that courts interpret statutes under the presumption that the legislature is "made of reasonable persons pursuing reasonable purposes, reasonably").

227. Given a minimalist gloss, the "reasonable legislator" collapses into the generic author. A generic author is presumptively reasonable in the sense that a listener assumes, all other things being equal, that a speaker has complied with the operative conversational norms. See Kent Bach, *Speech Acts and Pragmatics*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LANGUAGE* 147, 155 (Michael Devitt & Richard Hanley eds., 2006) ("The listener presumes that the speaker is being cooperative and is speaking truthfully, informatively, relevantly, perspicuously, and otherwise appropriately. If an utterance superficially appears not to conform to this presumption, the listener looks for a way of taking the utterance so that it does conform."). Given a nonminimalist gloss, however, the "reasonable legislator" can diverge from the generic author in one of two ways. First, one can apply a stronger presumption of reasonableness to the reasonable legislator than one would to a run-of-the-mill interlocutor. For example, for a very strong presumption against misstatement, see *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("[T]he *sine qua non* of any 'scrivener's error' doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be *absolutely clear*; otherwise we might be rewriting the statute rather than correcting a technical mistake." (emphasis added)); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 *FORDHAM L. REV.* 597, 604 (2013) ("When ordinary speakers leave crucial contingencies unaddressed, when they unwittingly undertake inconsistent commitments, or when what they advocate transparently defeats the goals of their advocacy, we do not pretend that Beneficent Providence has filled every gap, removed every contradiction, and rationalized every linguistic performance."). Second, one might build in to the idea a philosophically robust conception of "legislator" (for example, a delegate or a trustee conception).

conditions for meaningful communication by a multimember body without actual intentions to judges, administrators, and the public, who all form a community of shared conventions for decoding language in context.”<sup>228</sup> As Manning also explains, “[T]extualists focus on ‘objectified intent,’” that is, “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”<sup>229</sup> Textualists sometimes unreasonably restrict context to so-called “semantic context.”<sup>230</sup> And they sometimes misidentify the epistemic positions that determine what information context includes.<sup>231</sup> Still, the pretense of a generic author both captures and renders more precise the basic textualist insight that legislative intent is just the intent that one would attribute to the author of legislation as such.

Fictionalism is thus both similar to and different from the sort of minimalism about legislative intent defended by Professor Joseph Raz and others. Raz argues that, when a legislator votes on some text, she does so with the minimal—and presumably shared—intention that the text be read in accordance with “the [interpretive] conventions prevailing at the time.”<sup>232</sup> Professor Jeremy Waldron likewise assures that a legislator casts her vote “on the assumption that—to put it crudely—what the words mean to h[er] is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed).”<sup>233</sup>

Understood in one way, such claims are uncontroversial but uninformative: to say that a member intends a text to be read in accordance with “prevailing” conventions is like saying that the member regards the conventions she intends as prevailing. Likewise, to say that a member assumes a text will mean to its audience what it means to her is plausibly only to say that the member believes that her interpretation is correct. In other words, Raz and Waldron, read one way, claim only that a text’s meaning is assumed by all parties to be objective. By contrast, understood another, more ambitious way, such

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228. Manning, *supra* note 10, at 434.

229. *Id.* at 424.

230. See *supra* notes 78–85 and accompanying text.

231. See *infra* note 277 and accompanying text.

232. RAZ, *supra* note 7, at 286.

233. JEREMY WALDRON, *LAW AND DISAGREEMENT* 129 (1999); see also *id.* (“That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.”).

claims amount to an endorsement of fictionalism—or, to be more precise, a functional equivalent. On this understanding, to read a text in accordance with “prevailing” conventions is to attach to it the “import” that “a reasonable person conversant with applicable social and linguistic” norms would, or, in other words, understanding the text as expressing “objectified” intent.<sup>234</sup> Producing such an intent is the same as intending that a text be read as if written by a generic author.<sup>235</sup>

Professor Richard Ekins similarly argues that a reasonable legislator shares with her colleagues the intention that a legislative text have “the meaning that a reasonable sole legislator who attends to the context . . . would be likely to intend to convey in uttering” those words.<sup>236</sup> The reason, according to Ekins, is that the “object of legislative deliberation,” in a well-functioning legislature, must be a “proposal that is transparent to legislators and the community.”<sup>237</sup> By intending that the “content of the [legislative] proposal turn[] on how it is reasonably to be understood,” legislators ensure that “what interpreters say [the legislature] intended to do” is the same as “what was open to and thus chosen by the legislators.”<sup>238</sup>

The “reasonable sole legislator” that Ekins posits is potentially more robust and, hence, more contestable than the generic author posited here. Ekins insists, “The sole legislator has a duty to oversee the content of the law and to act to change the law when this serves the *common good*.”<sup>239</sup> Similarly, Ekins reasons that “proposals for action that are fit to be chosen by a reasonable sole legislator [are] *coherent*,

234. Manning, *supra* note 10, at 424.

235. Professor Andrei Marmor defends a similar view, arguing that legislators share an intention to enact as law the communicative content expressed by a legal text adopted through agreed-upon voting procedures. See ANDREI MARMOR, *THE LANGUAGE OF LAW* 17–18 (2014). In turn, Marmor identifies the communicative content expressed by some text as just the communicative intention a reader would attribute to its author on the basis of her having written that text in context. See *id.* at 21–22. According to Marmor, that legislators share the above-identified intention is crucial because, absent that intention, the enactment of legislation fails as a speech act. See *id.* at 111–12 (insisting that legislation must be viewed as a successful collective speech act if one is to “take the communicative aspect of lawmaking seriously”).

236. RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 236 (2012). Ekins observes rightly that “meaning” attribution of the sort he imagines involves attribution of both linguistic and practical intentions. See *id.* at 235–36 (“It is possible for drafters to convey more than the semantic content of the bill alone because legislators have good reason to understand proposals for action to be the choice that a rational legislator would be likely to make in enacting this text.”).

237. *Id.* at 231.

238. *Id.*

239. *Id.* at 128 (emphasis added).

*reasoned* plans to change the law.”<sup>240</sup> Whether those expectations are more demanding than the expectations one would have of a generic author depends upon just how robustly one interprets, for example, “coherence.”<sup>241</sup> Regardless, the “reasonable sole legislator” account that Ekins puts forward is functionally similar to the generic-author account defended here. The key difference is that Ekins purports to describe the way legislators actually think.

A potential problem with using anything like a generic-author account as an account of actual legislator intention is that it conflicts with the express position of numerous actual legislators. As Judge Katzmann and others note, many—though not all—legislators declare publicly that interpreters owe special attention to committee reports, statements by pivotal legislators, and other legislative history.<sup>242</sup> Such declarations are plainly incompatible with a generic-author account whereby facts about “the intentions of individual legislators” concerning “particular legislative acts” are, as Ekins observes, “irrelevant to the content of [such] act[s].”<sup>243</sup> As Ekins concedes, a “well-formed legislative assembly” cannot include members who publicly reject that legislation should be read as if written by a “reasonable sole legislator.”<sup>244</sup> Yet, by insisting publicly that the views of “pivotal legislators” should control, the legislators that Judge Katzmann and others identify do precisely that.<sup>245</sup> Ekins might be right that a *reasonable* legislator would intend that a statute be read as if

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240. *Id.* at 220 (emphasis added).

241. *Cf., e.g.,* Doerfler, *supra* note 23, at 812 (arguing that Congress, like ordinary speakers, “occasionally misspeak[s]”).

242. *See* KATZMANN, *supra* note 8, at 36 (observing that members of both parties “have consistently supported judicial resort to legislative history”).

243. *See* EKINS, *supra* note 236, at 231.

244. *See id.* at 221. Ekins allows that a well-functioning legislature might admit of silent dissenters. *See id.* at 222 (claiming that “secret defection need not frustrate joint action”).

245. *Id.* at 241 (“[W]ithout some reason for other legislators to accept that the text means what the pivotal legislators say it means, the public statements of those legislators cannot settle what the assembly enacts.”).



written by a generic author.<sup>246</sup> The trouble is that, as an empirical matter, numerous actual legislators appear unreasonable.<sup>247</sup>

Fictionalism also shares similarities with so-called “original public meaning” originalism in constitutional interpretation.<sup>248</sup> As characterized by Professor Lawrence Solum, “The original-meaning version of originalism emphasizes the meaning that the Constitution (or its amendments) would have had to the relevant audience at the time of its adoption[.]”<sup>249</sup> More precisely, original-public-meaning originalists inquire into the “conventional” meaning of constitutional language “in context” at the time of adoption and ratification.<sup>250</sup> Original-public-meaning originalism thus differs from so-called “original intention” originalism,<sup>251</sup> which has as its object of inquiry the

246. See *id.* at 235–36; see also RAZ, *supra* note 7, at 286 (arguing that a legislator must intend that a legislative text be read in accordance with prevailing conventions because to intend otherwise would be futile and therefore irrational); cf. Lawrence B. Solum, *Semantic Originalism* 5 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, Nov. 22, 2008), <http://ssrn.com/abstract=1120244> [<https://perma.cc/JV9H-QQ4E>] [hereinafter Solum, *Semantic Originalism*] (arguing that “under normal conditions successful constitutional communication requires reliance by the drafters, ratifiers, and interpreters on the original public meaning of the words and phrases”).

247. See, e.g., KATZMANN, *supra* note 8, at 36–37 (quoting various members of Congress as recommending careful attention to legislative history).

248. E.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011); Solum, *Semantic Originalism*, *supra* note 246, at 2.

249. Solum, *Semantic Originalism*, *supra* note 246, at 51; see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 926 (2009) [hereinafter Solum, *Heller and Originalism*] (characterizing “original public meaning originalism” as “the view that the original meaning of a constitutional provision is the conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified”).

250. Solum, *Semantic Originalism*, *supra* note 246, at 2.

251. See generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). Original-intention originalism “calls for judges to apply the rules . . . in the sense in which those rules were understood by the people who enacted them.” *Id.* at 230 (emphasis omitted). But it does not ask how “the framers would decide [a specific legal question] if they could somehow be asked.” *Id.* at 236. As Professor Richard Kay explains, original-intention originalism is not to be confused with originalism about expected application. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709–10 (2009) (characterizing “original intended meaning” as “the meaning that textual language had for the relevant enactors when they approved the text in question,” as contrasted with “the enactors’ expectations with respect to the particular instances that would come within the scope of the rules created”); see also Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 806 (1982) (arguing that originalism about expected application is “implausible precisely because [it] ignore[s] the distinction between the meaning of a rule (such as a constitutional provision) and the instances of its application”).

actual, historical intentions of the enactors of the Constitution.<sup>252</sup> Much like textualists,<sup>253</sup> original-public-meaning originalists tend to underestimate the role of pragmatics in communication.<sup>254</sup> For that reason, original-public-meaning originalists rely upon the notion of “conventional” meaning to a greater extent than is, perhaps, warranted.<sup>255</sup> Still, much like fictionalism, original-public-meaning originalism focuses on the communicative intentions one would attribute to the authors of the Constitution,<sup>256</sup> despite the reluctance of original-public-meaning originalists to talk in terms of “intent.”<sup>257</sup>

To illustrate the fictionalist approach, consider again the dispute in *King*.<sup>258</sup> As described above,<sup>259</sup> the government claimed that “Congress intended” that the phrase “Exchange established by the State,” as used in Internal Revenue Code § 36B, refer to “both state- and federally-facilitated Exchanges.”<sup>260</sup> How to evaluate this claim? Adhering to fictionalism as conceived in this Article, this claim is apt if and only if one would attribute to a generic author an intention to refer to “both state- and federally-facilitated Exchanges” on the basis of her having written the phrase “Exchanges established by the State” in the

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252. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (“The search is not for a subjective intention. . . . [W]hat counts is what the public understood.”).

253. See *supra* notes 78–85 and accompanying text.

254. Solum appears to regard pragmatics as limited to vagueness and ambiguity resolution. See Lawrence B. Solum, *Semantic and Normative Originalism: Comments on Brian Leiter’s “Justifying Originalism,”* LEGAL THEORY BLOG (Oct. 30, 2007, 1:30 AM), <http://solum.typepad.com/legaltheory/2007/10/semantic-and-no.html> [<https://perma.cc/8R6K-PTFA>].

255. To illustrate, Solum contrasts “conventional” meaning with “special or idiosyncratic” meaning based upon the “secret” intentions of authors. Solum, *Heller and Originalism*, *supra* note 249, at 951–52. Only to the extent that Solum has in mind intentions that are “special or idiosyncratic” given the practical context is the contrast tenable. See *supra* notes 34–59 and accompanying text.

256. Whether the same sorts of arguments against shared intentions in Congress raised in Part II apply to the Framers goes beyond the scope of this Article. There are, however, obvious disanalogies between the two settings. For example, it is far more likely that the Framers paid careful attention to constitutional text. Gluck & Bressman, *Part I*, *supra* note 14, at 972–73 (“Members [of Congress] don’t read text. . . . [T]hey all just read summaries.”).

257. Professor Steven Calabresi and attorney Julia Rickert use the phrase “objective social meaning.” Calabresi & Rickert, *supra* note 248, at 8. This general reluctance to talk of “intent” suggests that at least some original-public-meaning originalists regard intent as a dispensable metaphor. For citations to authors who describe intent as a “heuristic” and a “metaphor,” see *supra* note 1.

258. *King v. Burwell*, 135 S. Ct. 2480, 2490 (2015).

259. See *supra* notes 143–47 and accompanying text.

260. *King v. Burwell*, 759 F.3d 358, 369, 370 (4th Cir. 2014), *aff’d*, 135 S. Ct. 2480 (2015).

context of enactment. So understood, whether the government's claim is apt plausibly depends on what counts as the "context of enactment."

If context is limited to the operative and immediately surrounding statutory provisions, the government's claim appears somewhat implausible: § 36B refers to "Exchange[s] established by the State under section 1311 of the [ACA]"<sup>261</sup> and § 1311, in turn, encourages but does not require a state to "establish" an exchange.<sup>262</sup> Furthermore, § 1321 creates a backstop, directing the federal government, through the Secretary of Health and Human Services, to "establish and operate such Exchange within [a] State" if that state opts not to establish an exchange under section 1311.<sup>263</sup> Considering this explicit contrast between state and federal exchanges, one would likely take the author of § 36B to mean state by "state."

If, on the other hand, the context includes the ACA in its entirety, the government's position seems much more plausible. For one, consideration of the whole statute suggests that the narrow reading of § 36B would give rise to various anomalies throughout the ACA. Among other things, the ACA would require the creation of federally facilitated exchanges on which there would be no "qualified individuals" eligible to shop,<sup>264</sup> as well as the reporting of information for a reconciliation of tax credits that could never occur.<sup>265</sup>

The government's position appears even more plausible if the contextual backdrop is expanded further still to include public discussion of the ACA and its structure as a "three-legged stool."<sup>266</sup> The proposed healthcare reform was characterized repeatedly as having three basic elements:

First, people will be required to buy insurance, to spread costs among the sick and the healthy. Second, insurers will be prohibited from cherry-picking only the healthiest customers, again to spread

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261. I.R.C. § 36B (2012).

262. 42 U.S.C. § 18031 (2012).

263. *Id.* § 18041.

264. *King v. Burwell*, 135 S. Ct. 2480, 2490 (2015) (quoting 42 U.S.C. §§ 18031(d)(2)(A), 18032(f)(1)(A)).

265. *Id.* at 2492.

266. Jonathan Gruber, *Health Care Reform Is a "Three-Legged Stool": The Costs of Partially Repealing the Affordable Care Act*, CTR. FOR AM. PROGRESS 2 (Aug. 2010), [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing\\_reform.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf) [<https://perma.cc/2WS5-D5Q7>].

costs. Finally, the government will give subsidies to people, like McDonald's workers, who can't afford insurance on their own.<sup>267</sup>

It was emphasized that all three “legs” were necessary for the stool to stand. Against this backdrop, one would likely attribute to the author of § 36B the intention to refer to both state and federal exchanges. One would, in turn, understand her use of the phrase “Exchange established by the State” as a simple misstatement or a scrivener's error.<sup>268</sup>

Part III.C next explains how to determine what information should be considered as context. As a preview, the broader understanding of context would probably have been appropriate in *King*.<sup>269</sup> This Article need not take a position on whether fictionalism about legislative intent is hermeneutic or revolutionary.<sup>270</sup> At least some jurists are plausibly fictionalists.<sup>271</sup> Others, however, are plainly

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267. David Leonhardt, *Health Care's Uneven Road to a New Era*, N.Y. TIMES (Oct. 5, 2010), [www.nytimes.com/2010/10/06/business/economy/06leonhardt.html](http://www.nytimes.com/2010/10/06/business/economy/06leonhardt.html) [https://perma.cc/AQ4A-W6RB].

268. Doerfler, *supra* note 23, at 814; Gluck, *Imperfect Statutes*, *supra* note 195, at 64. As both of the cited articles suggest, so long as “context” includes the text of the ACA as a whole, the scrivener's-error reading is probably—though not certainly—the best one.

269. Adopting a broader understanding of context, *King* interestingly diverged from the previous ACA case, *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012). In *NFIB*, the Court considered a constitutional challenge to Congress's authority to impose an individual insurance mandate as part of the ACA. *Id.* at 2577. Famously, the Court rejected the government's argument that Congress was authorized to impose such a mandate under the Commerce Clause, but nonetheless upheld the mandate as a legitimate exercise of Congress's taxing power. *Id.* at 2608. The Court's classification of the mandate as a “tax,” as opposed to a “penalty,” for constitutional purposes was striking both because the ACA itself referred to the mandate as a “penalty,” *see id.* at 2582–83, and, as relevant here, because the political actors involved in the ACA's enactment emphasized to the public repeatedly that the mandate was not a “tax.” *See, e.g., Obama: Health Mandate Not a Tax Increase*, CBS NEWS (Sept. 20, 2009), <http://www.cbsnews.com/news/obama-health-mandate-not-a-tax-increase> [https://perma.cc/X2AA-RUU5]. As the Court insisted quite plausibly, whether something is a “tax” for constitutional (as opposed to statutory) purposes depends much more on how it functions than on how it is labeled. *See NFIB*, 132 S. Ct. at 2582–84, 2594–600. Considering the broader context, it does seem that the Court in *NFIB* should have strained to understand the mandate as functioning as a penalty as opposed to a tax, constitutional avoidance concerns notwithstanding. *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2137–49 (2015).

270. In other words, this Article does not need to take a position on whether fictionalism about legislative intent is an error theory. *Cf.* J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 35, 48–49 (1977) (defending an error theory about moral discourse). The only “error” to which this Article is committed is that of members of Congress, to the extent that members regard their individual intentions as attributable to Congress as such. *But see supra* notes 234–35 and accompanying text (considering the possibility that members share an intention that statutes be read as if written by a generic author).

271. *See, e.g., United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) (Easterbrook, J.) (“Congress is a ‘they’ and not an ‘it’; a committee lacks a brain (or, rather, has so many brains

not.<sup>272</sup> What matters for present purposes is that fictionalism is the best way to rationalize discourse about legislative intent. Whether some jurists are already fictionalists is a secondary concern.

### C. *The Context of Enactment and Legislative Process*

Context is the “mutually salient information” that an author exploits to make evident to her audience what she means.<sup>273</sup> Put another way, context is the information of which an author can reasonably expect her audience to be aware. Thus, to determine the context of enactment for some statute, one must determine that statute’s audience.

Conversely, because context is cognitive “common ground,”<sup>274</sup> there is no reason to privilege the epistemic position of an author over that of her audience. Suppose, for example, that certain information (a wedding anniversary) is of much higher salience to an author (a law professor) than to her audience (her students). Here, it would be unreasonable for that author to try to exploit that information to make her intentions known (a take-home exam prompt indicating that the exam is due on “the special day” at 5 PM). Because her audience would predictably fail to call that information to mind, such a communicative attempt by the author would predictably fail in turn.

Despite the above, much prior scholarship privileges the epistemic position of members of Congress when considering what information the context of enactment includes.<sup>275</sup> Adherence to this “eavesdropping” model is plainest in scholarship that urges greater attention to the legislative process.<sup>276</sup> Even those who oppose

with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity.”); *see also id.* (“Legislation is an objective text approved in constitutionally prescribed ways; its scope is not limited by the celebrations of those who voted for or signed it into law.”); Scalia, *supra* note 10, at 17 (“Government by unexpressed intent is simply tyrannical.”).

272. *See e.g.*, *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 143–44 (2d Cir. 2002) (Katzmann, J.) (“If the meaning of the statute is ambiguous, the court may resort to canons of statutory interpretation to help resolve the ambiguity. The court may also look at legislative history to determine the intent of Congress.” (citations omitted)).

273. Bach, *Content ex Machina*, *supra* note 12, at 19.

274. Robert Stalnaker, *Indicative Conditionals*, in *CONTEXT AND CONTENT: ESSAYS ON INTENTIONALITY IN SPEECH AND THOUGHT* 63, 67 (1999).

275. *See supra* notes 11–21 and accompanying text; *see also, e.g.*, Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423, 434 (2008) (“Judges and litigants are not parties to the legislative conversation, so to speak, and they have to rely on secondary sources to gather the relevant information.”).

276. *See supra* notes 16–21 and accompanying text.

consideration of extratextual sources such as legislative history, however, tend to accept the basic eavesdropping framework. Justice Scalia, for instance, characterized the role of an interpreter as “read[ing] the words of [a] text *as any ordinary Member of Congress* would have read them, and apply[ing] the meaning so determined.”<sup>277</sup>

As an alternative, this Article puts forward the “conversation” model of interpretation. Under this model, legislation is treated as having been written by legislators for those who administer the law (for example, courts and agencies) and for those on whom the law operates (for example, citizens). So understood, legislative text is to be read in light of information salient to legislators and citizens alike. For a given statute, the audience is, of course, diverse.<sup>278</sup> Nonetheless, because context consists of *mutually* salient information, one can start by identifying the least informed segment of the audience. When a statute operates on citizens, the context of enactment is limited to information of which citizens should be aware.<sup>279</sup> So much is required for a statute to have an accessible meaning that is constant across that statute’s audience.<sup>280</sup>

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277. *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (emphasis added) (citation omitted).

278. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 576 (1985) (observing that, in addition to the administering agency, “most regulatory statutes’ audiences also include private parties whose conduct or status is subject to regulation by the administering agency”); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1127 (2011) (“[S]tatutes are directed to multiple audiences, including courts and agencies.”).

279. By contrast, when a statute operates only upon sophisticated parties, the information that could plausibly be included in the context of enactment is much greater. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (exploring the “idea that a distinction can be drawn in the law between rules addressed to the general public and rules addressed to officials”); William N. Eskridge, Jr., *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 355 n.124 (1990) (“Highly technical statutes should not be read with the ‘common sense’ of the average person, but rather with the ‘common sense’ of the special audience to which the statute is addressed (such as gas and oil companies or tax lawyers).”). When a statute operates specifically upon financial institutions, an author can reasonably expect awareness of technical concepts in a way that she could not with respect to a general-conduct statute. See, e.g., 12 U.S.C. § 1851(a)(1)(A) (2012) (prohibiting a “banking entity” from engaging in “proprietary trading”). The regulation of sophisticated parties in particular is thus one means by which Congress can regulate subject matter that an ordinary citizen could not be expected reasonably to understand.

280. The legislative context differs from conversational contexts in which a speaker intends to communicate different things to different audience members. Suppose that A and B are planning a surprise birthday party for C. In that context, A might say to B, “I am looking forward to a quiet night in,” intending to communicate to B that the party is still on but to C that she is looking forward to a calm evening. For a partial dissent arguing that the same law can function

The conversation model of interpretation does not by itself dictate which sources of information an interpreter should consider in a particular case. Context consists of the information of which both speaker and audience should be aware. The model leaves open, however, just how large a set of informational sources to which citizens are expected to be attentive in any given case. By deemphasizing the epistemic position of legislators, the model alters the set of plausible answers to such questions. To see how, go back to legislative history. Different considerations speak for and against holding an audience accountable for nontextual, historical informational sources—such as legislative history—in different cases.<sup>281</sup> That said, it is hard to imagine a case in which it would be reasonable to hold an audience accountable for legislative history to the exclusion of other nontextual sources, like newspaper articles or television reports. Especially so if the case involves a law that operates upon citizens. With the ACA, can one seriously argue that a Senate Finance Committee report is of higher *mutual* salience than contemporaneous evening news reports featuring officials and experts discussing the proposed law? Or, for that matter, cotemporaneous front-page reporting from *The New York Times* or *The Wall Street Journal*?

In the conversation model, legislative history is just one nontextual, historical source among many. In response, one might object that popular sources are inherently less reliable than legislative history in its various forms. Public statements by officials are, after all, as much marketing as information conveyance, and news reports are produced by corporate entities with their own material and ideological interests. To this, there are various responses. First, like public statements, legislative history is often as much about marketing as anything else.<sup>282</sup> Second, both public statements and news reports are much more accessible to nongovernmental actors than legislative history. So those sources are, for better or for worse, ones upon which time- and resource-constrained individuals will predictably rely. If popular sources of information about legislation are unreliable, that is a serious problem for a democracy. But it is hard to see how any judicial-interpretive rule would render that problem any less serious.

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both as a “conduct” rule directed at citizens and as a “decision” rule directed at officials, see generally Dan-Cohen, *supra* note 279.

281. See *infra* notes 309–32 and accompanying text.

282. See Gluck & Bressman, *Part I, supra* note 14, at 973 (reporting that legislative history is used to include “‘something [legislators] couldn’t get in the statute’ in order ‘to make key stakeholders happy’” (quoting a congressional counsel survey respondent)).

Even less plausible than treating legislative history as special is the suggestion that an interpreter should sort carefully among different *kinds* of legislative history. Gluck and Bressman, for example, urge courts “to separate the useful from the misleading,” reasoning that attention to the legislative process reveals some kinds of legislative history as more “reliable” than others.<sup>283</sup> Gluck and Bressman base their comparative reliability assessments on the views of congressional staffers. Given this evidence, it is entirely plausible that committee reports are of much higher salience than floor statements to staffers.<sup>284</sup> Conceivably the same is true of agencies, given their “multilevel and ongoing relationship with Congress.”<sup>285</sup> And perhaps the same is (somewhat) true of courts, given their (uneven) history of privileging committee reports over other legislative historical sources.<sup>286</sup> Add ordinary citizens to the conversational mix, however, and any difference in mutual salience between committee reports and floor statements quickly becomes *de minimis*. If judicial understanding of the legislative process is considered lacking,<sup>287</sup> popular understanding is woeful. Further, as explained in Part II, committee reports and the like have no claim to authority.<sup>288</sup> It is thus hard to see why citizens would have an obligation to be privy to such distinctions.<sup>289</sup>

Privileging the epistemic position of members of Congress can suggest textual clarity when there is none. In *Zuber v. Allen*,<sup>290</sup> for example, the Supreme Court invalidated a U.S. Department of

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283. *Id.* at 977, 989.

284. *See id.*

285. Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 884 (2015) (observing that this relationship allows agencies “firsthand knowledge of the critical debates and the character of their resolution,” making them “more reliable readers of legislative history”); *see also* Bressman & Gluck, *Part II, supra* note 19, at 767 (noting that “drafters saw their primary interpretive relationship as one with agencies”).

286. *See 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 . . .”). *But see infra* notes 290–98 and accompanying text.

287. *See supra* note 21 and accompanying text.

288. Nourse argues that, owed to ignorance of the legislative process, interpreters routinely confuse the legislative history equivalents of “majority” and “dissenting” opinions. Nourse, *supra* note 1, at 73. As explained in Part II, Nourse is wrong to regard these alleged “majority opinions” (for example, statements by a bill’s primary sponsors) as “authoritative statements of meaning.” *Id.*

289. Any hierarchy of legislative history thus differs from statutory text or prior judicial decisions, both of which are formally binding on citizens and therefore more plausibly generate a duty of inquiry.

290. *Zuber v. Allen*, 396 U.S. 168 (1969).



Agriculture order requiring milk distributors within the Boston marketing area to pay premium prices to “nearby” milk producers.<sup>291</sup> The Court held that this “nearby” differential was inconsistent with a federal statute requiring that orders regulating the handling of milk provide for uniform prices to all producers within a given marketing area, subject to specific exceptions.<sup>292</sup> The Court rejected the government’s argument that the “nearby” differential fit within the exception for “market . . . differentials customarily applied” by distributors, appealing to the accompanying House Report.<sup>293</sup>

In dissent, Justice Black contended that the broader legislative history, in particular a colloquy on the Senate floor, “ma[de] it clear beyond any doubt that this provision was designed to allow the Secretary broad leeway in regulating the milk industry.”<sup>294</sup> This provision included leeway to preserve price advantages enjoyed by farmers near Boston prior to federal regulation.<sup>295</sup> The majority insisted that its “conclusions [were] in no way undermined by the colloquy on the floor,” reasoning that while “[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation,” “[f]loor debates reflect at best the understanding of individual Congressmen.”<sup>296</sup>

What the exchange between the majority and dissent in *Zuber* suggests is that the statute was simply “silent or ambiguous with respect to the specific issue” before the Court.<sup>297</sup> Read in isolation, the

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291. *Id.* at 170–71.

292. *Id.*

293. *Id.* at 181.

294. *Id.* at 202–03 (Black, J., dissenting).

295. *Id.*

296. *Id.* at 186 (majority opinion). *But see* Gluck & Bressman, *Part I, supra* note 14, at 986 (finding that drafters regard “‘staged’ colloquies between the chair and ranking member of the committee as reliably indicating the common understanding on both sides”).

297. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Although *Zuber* is a pre-*Chevron* case, courts continue to consult legislative history when determining whether an agency interpretation is “reasonable” and therefore authoritative under *Chevron*. *See id.* at 844 (“[A] court may not substitute its own construction of a statutory provision [sic] for a reasonable interpretation made by the administrator of an agency.”). Although courts disagree about whether it is appropriate to consult legislative history at step one or step two of the *Chevron* analysis, that distinction is likely irrelevant. *Compare* *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) (holding that “the lower court erred by failing to ‘exhaust the traditional tools of statutory construction,’” including consultation of legislative history, at *Chevron* step one (quoting *Nat. Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995))), *with* *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 122 (2d Cir. 2007). The court in *Cohen* noted:

language at issue admits of a broad or narrow reading. The same is true after taking into account information contained in available nontextual historical sources. The majority created an illusion of clarity by distinguishing “good” legislative history from “bad.” But the reality is that the text, read against the backdrop of conflicting legislative history, was unclear as to whether “market . . . differentials” included differentials that were “economically [un]sound.”<sup>298</sup>

In addition to legislative history, the conversation model also calls into question whether courts should pay special attention to customary legal usage. In *Morissette v. United States*,<sup>299</sup> Justice Jackson famously remarked:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>300</sup>

Justice Jackson appeared to understand legislation as communication between members of Congress and courts, which is to say communication between *lawyers*.<sup>301</sup>

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This court has generally been reluctant to employ legislative history at step one of *Chevron* analysis, mindful that the “interpretive clues” to be found in such history will rarely speak with sufficient clarity to permit us to conclude “beyond reasonable doubt” that Congress has directly spoken to the precise question at issue.

*Id.* (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586, 590 (2004) (citation omitted)); *see also* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009) (“[N]othing of consequence turns on whether the set of permissible interpretations has one element or more than one element; the only question is whether the agency’s interpretation is in that set or not.”). Courts likewise continue to privilege some kinds of legislative history over others, both in the administrative law context and elsewhere. *See, e.g.*, *Kenna v. U.S. Dist. Court*, 435 F.3d 1011, 1015 (9th Cir. 2006). The court in *Kenna* explained:

Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body. However, floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views.

*Id.* (citation omitted)).

298. *Zuber*, 396 U.S. at 210 (Black, J., dissenting).

299. *Morissette v. United States*, 342 U.S. 246 (1952).

300. *Id.* at 263.

301. *See* Manning, *supra* note 11, at 2464 (discussing *Morissette* and observing that, “[f]or statutes, the lawyer’s lexicon, of course, has particular relevance”).

If the statute at issue had been the Judiciary Act of 1789,<sup>302</sup> Justice Jackson's approach might have made sense. But in *Morissette*, the statute at issue was one governing general conduct, more specifically a criminal statute prohibiting the “embezzle[ment], steal[ing], purloin[ing], or knowing[] conver[sion]” of government property.<sup>303</sup> The question before the Court was whether that statute prohibited “embezzle[ment],” “steal[ing],” or “purloin[ing]” only if accompanied by criminal intent. The government argued that liability was not so restricted, contending that the express prohibition of “knowing[]” conversion implied the absence of an intent requirement for the other offenses.<sup>304</sup> Unconvinced, the Court reasoned that, at common law, intent was “inherent in the idea” of larceny and other such crimes whereas certain “unwitting acts” constituted conversion.<sup>305</sup> Thus, on the assumption that Congress intended to retain common-law usages, an express intent requirement would have been superfluous for the nonconversion offenses.

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302. Judiciary Act of 1789, 1 Stat. 73 (1790).

303. *Morissette*, 342 U.S. at 248 (quoting 18 U.S.C. § 641 (1948)).

304. *See id.* at 249–50.

305. *Id.* at 252–53.

Although the decision in *Morissette* was plausibly correct on rule-of-lenity<sup>306</sup> grounds,<sup>307</sup> Justice Jackson's general principle that statutes should be read through the eyes of a lawyer seems questionable. The principle is particularly dubious as applied to statutes speaking to an audience that includes ordinary citizens, who are presumably—and reasonably—not well versed in Blackstone.<sup>308</sup>

To be clear, one could have reason to pay special attention to committee reports and the like *if* Congress formed collective intentions. When an author's intentions are unclear after taking into account all mutually salient information, clarity will sometimes result from considering additional information salient to the author specifically. Suppose, for example, that a diplomat were to write an unclear note to her aide reading "Bring me the package" just days before being taken hostage. Here, the aide might try to resolve the unclarity by asking, "What package?" and considering sources of information that she ordinarily would not, such as the diplomat's private email. Because considering such sources is nonstandard—meaning that the information contained therein was not mutually salient at the time the note was written—it would have been

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306. In general, whether "substantive" canons of interpretation (for example, the canon of constitutional avoidance and the federalism canon) are compatible with the conversation model is an open question. See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 307–56 (2016) (discussing these and other substantive canons). To the extent that such canons are best understood as approximations of Congress's intent, they likely reflect the sort of undue attention to the epistemic position of members of Congress criticized above (for example, a special concern with maintaining the "usual constitutional balance of federal and state powers," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), is probably not shared by most citizens). On the other hand, if such canons are best understood as something like judge-made law, see generally Baude & Sachs, *supra* note 73, then those canons may be on par with other prior judicial decisions in terms of mutual salience. See *infra* note 317. The latter possibility assumes, of course, that judges have the authority to make interpretive law. Regardless, the rule of lenity demands less justification than other substantive canons because it acts like a doctrinal mechanism for enforcing the mutual-salience requirement imposed by the conversation model—or at least a greatly relaxed analogue. By prohibiting the enforcement of an uncertain interpretation against a criminal defendant, the rule of lenity in effect bars courts from giving legal effect to a reading of a criminal statute that is, from the epistemic perspective of the defendant, unduly esoteric. See, e.g., *United States v. Santos*, 553 U.S. 507, 515 (2008) ("When interpreting a criminal statute, we do not play the part of a mindreader."). But see *United States v. Muscarello*, 524 U.S. 125, 138 (1998) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997) (alteration in original))).

307. See, e.g., *Steal*, WEBSTER'S COLLEGIATE DICTIONARY (3d ed. 1916) (defining "steal" as "to take without right and *with intent to keep wrongfully*" (emphasis added)).

308. Important here is that the statute at issue in *Morissette* was enacted in 1948. Act of June 25, 1948, Pub. L. No. 80-772, 62 Stat. 725.

unreasonable for the diplomat to expect her aide to do so. Still, to the extent that the diplomat did not intend his message to be unclear, the aide might gain insight by considering those sources all the same. The same would be true with respect to unclear statutes if Congress formed collective intentions—but it does not. As such, there are no unexpressed intentions to discover in Congress’s personal effects.

The question remains about what sources a court should consider in a particular case. To the extent that legislation is understood as a means of communication between the legislator and the legislated upon, norms of statutory interpretation should promote two basic values.<sup>309</sup> The first is democracy: norms should make it feasible for a legislator to comprehend a bill at the time she casts her vote. The second is fair notice: norms should make it feasible for an individual on whom a statute operates to comprehend that statute once it is in effect.

So understood, democracy and fair notice work in tandem to facilitate communication between legislator and citizen. Democracy ensures that a legislator understands what she is saying. Fair notice ensures that a citizen understands what was said. Put another way, a commitment to the above values flows just from a commitment to legislation as an effective means of communication.<sup>310</sup> As Waldron explains, when attempting to communicate by statute, a legislator must assume that her words mean the same thing to her as they do to ordinary citizens.<sup>311</sup> Together, democracy and fair notice help make it possible for that assumption to be a reasonable one.

Prior scholarship assumes both of these values, though often without explicit discussion. Textualists stress, on the one hand, the preservation of legislative “bargains,”<sup>312</sup> and, on the other, the public

309. See Nelson, *supra* note 14, at 353 (“Textualists and intentionalists alike give every indication of caring *both* about the meaning intended by the enacting legislature *and* about the need for readers to have fair notice of that meaning . . . .”); see also John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1947 (2015) (arguing that the “construct” of legislative intent “necessarily depend[s] on normative” premises).

310. More specifically, it flows from a commitment to legislation as an effective means of communication between legislator and citizen, as opposed to other legislators or legal elites. Much is required by basic notions of fairness and the rule of law. See *supra* notes 200–06 and accompanying text.

311. WALDRON, *supra* note 233, at 129.

312. See, e.g., Easterbrook, *supra* note 11, at 541 (“[With] interest group legislation it is most likely that the extent of the bargain . . . is exhausted by the subjects of the express compromises . . . in the statute. The legislature ordinarily would rebuff any suggestion that judges be authorized to fill in blanks in the ‘spirit’ of the compromise.”); Manning, *supra* note 10, at 441 (“[Textualists] believe that smoothing over the rough edges in a statute threatens to upset whatever complicated bargaining led to its being cast in the terms that it was.”).

accessibility of the law.<sup>313</sup> What this shows is a commitment by textualists to both legislator (when she casts her vote) and citizen (postenactment) being able to know “what the law is”<sup>314</sup> when it matters. And this, in turn, shows a commitment to effective communication between legislator and citizen. Purposivists—perhaps unsurprisingly, given their friendliness to legislative history—place more emphasis on legislator understanding.<sup>315</sup> Still, even purposivists accept that courts should consider only publicly available materials when making sense of a statute.<sup>316</sup> This concession shows that, in addition to legislator understanding, purposivists are at least to some extent also committed to citizen understanding.

With respect to informational sources, both democracy and fair-notice support, all other things being equal, norms that minimize the epistemic burden for involved parties. By minimizing the epistemic burden, such norms increase the feasibility of comprehension at all stages—enactment, compliance, enforcement, and adjudication—for all interpreters, including members of Congress, citizens, agencies, and courts.

To illustrate, take a highly restrictive source norm prohibiting the consideration of nontextual, historical sources when interpreting a statute. Pursuant to this norm, one would interpret a legislative text with an eye to obvious conventions—like that Congress writes statutes in English—and to other formally binding instruments—like statutes, regulations, and judicial decisions.<sup>317</sup> In turn, one would attribute to Congress whatever intentions one would attribute to a generic author on the basis of her having written that text, given this limited additional contextual information. With this norm in place, the epistemic burden

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313. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

314. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

315. See Nelson, *supra* note 14, at 351–52 (observing that purposivists “emphasiz[e] that statutes are mechanisms to convey the policy decisions of the people whom we have elected to legislate for us,” and that courts should “try to enforce the directives that members of the enacting legislature understood themselves to be adopting”); see also, e.g., McNollgast, *supra* note 91, at 716 (emphasizing that “legislators do not want judicial interpretation of statutes to introduce randomness and unpredictability into policy outcomes”).

316. See Nelson, *supra* note 14, at 359 (observing that purposivists are “happy to treat committee reports and other publicly available materials as part of the context” but “reject other information that is probative of lawmakers’ actual intentions but not spread out on the public record”).

317. The reason for including other formally binding instruments is that their bindingness presumably generates a notice duty in the same way as the statutory text itself does.

on an interpreter would be minimal at each stage. The nonobvious information one would have to consider—such as the text of other formally binding instruments—would be of reasonably limited quantity, easy to access, and clearly designated.

What speaks against such a norm? As applied to existing legislation, one concern is that such a norm might conflict with legislator understanding at the time of enactment. Suppose that some legislator were to base her understanding of some statute—either directly or indirectly—on the assumption that the statute would be read with an eye to various nontextual, historical sources. Here, the application of a highly restrictive source norm might render that legislator’s understanding incorrect, and consequently might hinder democracy if that legislator’s understanding is representative. This sort of mismatch is, as Professor Jarrod Shobe has argued, more common with older statutes.<sup>318</sup> As Shobe explains, “Congress’s drafting process has become increasingly sophisticated over the last forty years,” with various reforms “allow[ing] professional drafters to be involved in virtually every legislative project.”<sup>319</sup> The result is increased attention to textual “clarity,”<sup>320</sup> which is just to say decreased reliance on nontextual, historical sources. But even with contemporary statutes, mismatch is possible. Increased “unorthodox lawmaking,”<sup>321</sup> lawmaking outside of the traditional committee structure, undermines efforts at clarity.<sup>322</sup> Further, the use of “professional drafters,” like legislative counsel, remains optional.<sup>323</sup>

The above suggests that application of a highly restrictive source norm to existing legislation would result in a sort of “democracy gap,” however minimal. For that reason, a less restrictive norm is plausibly appropriate with respect to such legislation, setting aside administrability concerns.<sup>324</sup> Application of a less restrictive norm would increase the epistemic burden on all participants, citizens in

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318. See Shobe, *supra* note 187, at 856–60.

319. *Id.* at 812, 815.

320. *Id.* at 831. *But see* Doerfler, *supra* note 23, at 815 (arguing that the size and complexity of contemporary statutes hinder efforts at textual precision); Gluck, *Imperfect Statutes*, *supra* note 195, at 97–103 (similar).

321. See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed. 1997) (using “unorthodox lawmaking” to “distinguish frequently employed contemporary procedures and practices from what is still often presented in textbooks as the standard [legislative] process”).

322. See Shobe, *supra* note 187, at 859.

323. *Id.* at 821–22.

324. See *infra* notes 329–32 and accompanying text.

particular. For that reason, application of such a norm would seem to impair fair notice to some degree.<sup>325</sup> Be that as it may, some tradeoff between fair notice and democracy is arguably unavoidable under current conditions.<sup>326</sup> On the other hand, as applied to future legislation, a highly restrictive source norm would seem straightforwardly appropriate if accompanied by reforms to the legislative process. If Congress were to mandate participation of legislative counsel at each stage of the drafting process, any democracy gap would close, at least in large part.

An additional concern with a highly restrictive source norm is that popular characterizations of formally binding instruments are plausibly more salient to citizens than the instruments themselves. This is especially so with contemporary statutes, which are exceedingly long and complex as well as exceptionally difficult to read.<sup>327</sup> Under current conditions, an instruction to citizens to consult only the text of formally binding instruments would likely be ignored. Indeed, rather than attending only to the text, citizens would, under such conditions, plausibly attend only to popular characterizations of the text, no matter the instruction. What this suggests is that asking interpreters to just consult the text would, under current conditions, also result in a “fair-notice gap.” Put differently, so long as formally binding instruments remain practically unreadable for ordinary readers, having courts consider popular characterizations of those instruments would plausibly increase citizen understanding of the law—again, setting aside administrability concerns. At the same time, it is conceivable that reforms to the legislative process could reduce any fair-notice gap that would result from a highly restrictive source norm, like stylistic reforms to improve readability.<sup>328</sup>

A further concern is that the analysis above attends to fair notice and democracy to the exclusion of other values relevant to the question of which sources courts should consider, like judicial administrability. To clarify, the argument here is that insofar as legislation is best understood as a means of communication; fair notice and democracy are of central importance. To promote democracy and fair notice in

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325. *But see infra* notes 327–28.

326. All the more so when a nontrivial number of legislators anticipate not only attention to nontextual sources but attention to nontextual sources highly salient to legislators in particular.

327. *See Doerfler, supra* note 23, at 815.

328. To be sure, any efforts in this direction would be constrained greatly by the size and complexity of the modern administrative state. Thanks to Abbe Gluck for emphasizing this concern more generally.



this context is, in effect, to reduce the burden on speaker and listener, respectively, and thereby to facilitate efficient communication between them. As noted above, that legislation is a means of communication is a near-universally shared premise by both courts and scholars.<sup>329</sup> Further, most of the discussion of which sources courts should consider is organized around the question of which sources are reliable evidence of what Congress meant by what it said.<sup>330</sup> For these reasons, it makes good sense to focus here on the values the promotion of which facilitate easy and effective communication between Congress, citizens, courts, and agencies.

Because interpretive norms must be implemented by nonideal judges, it is conceivable that attending to administrability or efficiency concerns would reshape the calculus somewhat (for example, following either might push one toward a highly restrictive source norm, democracy and fair-notice gaps notwithstanding).<sup>331</sup> What is hard to see, however, is how attending to additional values would lead one to advocate judicial consideration of sources that violate a mutual-salience constraint—at least as long as the aim of judicial interpretation is the faithful implementation of Congress’s instructions.<sup>332</sup>

## CONCLUSION

Legislative intent is a necessary fiction. One can make sense of federal statutes only if one attributes to Congress various intentions, both communicative and practical. As an empirical matter, however, Congress *qua* “it” intends very little. The solution this Article proposes is to understand intent attributions not as aiming at the literal truth but rather as involving a pretense. The pretense this Article offers is that federal statutes have some author. Taken to involve this pretense, an attribution of intent is apt if and only if one would make the claim about a generic author just on the basis of her having written the statute as enacted.

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329. *See supra* note 70.

330. *See supra* notes 281–308 and accompanying text.

331. *See generally* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (arguing for a highly restrictive source norm on administrability and efficiency grounds).

332. *But see, e.g.*, Richard A. Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 5 (1996) (describing the “pragmatist” judge who regards various legal sources “only as a means for bringing about the best results in the present case”).

Because legislative intent is a fiction, Congress has no actual but unexpressed intentions to discover. Often this will mean that federal statutes are less clear than one might have hoped. If Congress had “hidden” intentions, statutes that appear uncertain might become certain upon further investigation. And if statutes were uncertain less often, interpreting courts and agencies would have fewer policy decisions to make when resolving concrete disputes. The draw of positive-political-science accounts of legislative intent comes in no small part from the promise that, with enough data and methodological savvy, one could, when confronted with hard policy questions, identify answers laid down by Congress in advance. What this Article suggests, however, is that this promise is false. Quite often, text gives out, leaving a policy decision. Attention to the nuances of the legislative process does nothing to change this.