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CONGRESSIONAL COMMENTARY ON JUDICIAL INTERPRETATIONS OF STATUTES: IDLE CHATTER OR TELLING RESPONSE?

*James J. Brudney**

TABLE OF CONTENTS

INTRODUCTION	2
I. THE COST TO CONGRESS OF IGNORING OR DEVALUING LEGISLATIVE SIGNALS.....	9
A. <i>The Often-Inconclusive Quality of Text</i>	9
B. <i>The Meaning of Subterfuge Under the ADEA</i> ..	11
1. <i>The 1967 Statute</i>	11
2. <i>The McMann Decision</i>	11
3. <i>The 1978 Statute</i>	12
4. <i>The Betts Decision</i>	14
5. <i>The 1990 Statute</i>	15
6. <i>The Institutional Costs to Congress</i>	16
II. THE ISSUE OF OPPORTUNITY COSTS	20
A. <i>Finite Resources and Limited Windows of Opportunity</i>	21
B. <i>Legislative History and Limited Windows of Opportunity</i>	26
C. <i>Congressional Self-Governance</i>	32
D. <i>Valuing Legislative Efficiency</i>	37
III. THE PROBLEMS OF RELYING ON LEGISLATIVE SIGNALS	40

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A. <i>Constitutional Arguments for Disregarding or Devaluing Legislative History</i>	41
1. <i>Separation of Powers</i>	42
2. <i>Legislative Supremacy</i>	45
B. <i>Practical Arguments for Disregarding or Devaluing Legislative History</i>	47
1. <i>The Corruption Argument</i>	49
2. <i>The Unrepresentative Character Argument</i> ..	52
3. <i>Other Factors</i>	56
4. <i>Anecdotal Unreliability</i>	58
C. <i>Refusals to Credit Postenactment Legislative History</i>	61
D. <i>Refusals to Credit Legislative Inaction</i>	66
IV. A PROPOSAL FOR INTERPRETING LEGISLATIVE SIGNALS	69
A. <i>Examining the Issue of Reliability</i>	70
B. <i>Three Central Considerations in Determining Reliability</i>	75
C. <i>Corollaries to the Three Considerations</i>	82
1. <i>Approvals and Disapprovals</i>	82
2. <i>Lack of Foresight and Lack of Will</i>	86
D. <i>Specific Applications of the Considerations and Corollaries</i>	89
1. <i>Approvals: Comparing Reports from Two Statutes</i>	90
2. <i>Disapprovals: Three Distinct Settings</i>	94
CONCLUSION	104

INTRODUCTION

Recent debate about the propriety of relying on legislative history¹ in interpreting statutes has tended to focus on the landscape as a whole. Federal judges, writing both in opinions² and in schol-

1. I use the term *legislative history* to refer to assorted materials generated within Congress as part of the process of statutory enactment. These materials principally include committee reports, floor statements, and committee hearings. My primary focus is on committee reports. See *infra* note 298.

2. For disagreement at the Supreme Court level, see, for example, *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 n.12, 1567-72 (1993) (Stevens, J., writing for the Court, debating with Scalia, J., concurring); *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 n.8, 2111 (1992) (Souter, J., writing for the Court, debating with Scalia, J., concurring); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-12 n.4, 616-23 (1991) (White, J., writing for the Court, debating with Scalia, J., concurring); and *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 470-73 (1989) (Kennedy, J., concurring). See also *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 782 (1994) (Scalia & Thomas, JJ., joining some parts of majority opinion but not Part III-B) (rejecting the Court's use of legislative history as a tool

arly journals,³ have expressed spirited disagreement over whether to consult legislative history at all. Legal academics, in espousing divergent theories of statutory interpretation, have frequently illustrated and supported their theories by drawing on or referring to the broad corpus of legislative history.⁴

An alternative approach is to begin by examining a particular context in an effort to arrive at more general insights or conclusions. This article focuses on a certain type of legislative history, examining both when it *should* be relied on and how refusals to rely on it may entail substantial costs to the legislative process. At the same time, analysis of this particular type of history offers insights about the broader issue of whether — and when — it is appropriate for courts to credit legislative history. The article addresses that broader issue as well.

This article also departs from more traditional analysis by examining legislative history from a Congress-centered viewpoint. Much of the scholarly literature considers statutory interpretation from a judge-centered perspective, regarding statutes as one among the

for interpreting a Mine Safety and Health Act provision); *Darby v. Cisneros*, 113 S. Ct. 2539, 2540 n.* (1993) (Rehnquist, C.J., Scalia & Thomas, JJ., joining majority opinion except for Part III) (implicitly rejecting the Court's use of legislative history in Part III as a tool for interpreting an Administrative Procedure Act provision); *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1166 n.1 (1993) (Scalia & Thomas, JJ., joining majority opinion except for Part IV-A) (implicitly rejecting the Court's use of legislative history in Part IV-A as a tool for interpreting a RICO provision).

For similar concerns expressed by lower court judges, see, for example, *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.); *ACLU v. FCC*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr, J., dissenting in part), *cert. denied*, 485 U.S. 959 (1988); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring).

3. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY. 61 (1994); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983).

4. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 313-54 (1986) (describing a chain-novel approach that entails interpreting statutes by continuing to develop the statutory scheme begun by Congress); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1987) (defending the "nautical" approach in which interpretation of statutes is an ongoing process that requires Congress as "shipbuilder" and courts as "subsequent navigators" each to play roles); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (advocating a dynamic approach, interpreting statutes in light of their current social, political, and legal context); see also Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) (arguing that statutes be interpreted by "imaginatively reconstructing" the thoughts or perspectives of the enacting legislators).

There are, however, examples of more targeted analysis by legal scholars. See, e.g., T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687 (1992); William D. Popkin, *Foreword: Non-Judicial Statutory Interpretation*, 66 CHI.-KENT L. REV. 301 (1990).

various sources of law to be interpreted and applied to particular controversies.⁵ While such consideration is surely important, it does not reflect an adequate appreciation for the structure and operation of Congress's lawmaking enterprise. This article regards the legislative process as a distinctively complex participatory regime that requires, and rewards, an interpretive method different from that applied to judge-made law.

The category of legislative history I will examine involves a rather extended dialogue between Congress and the federal courts, particularly the Supreme Court.⁶ Federal legislation often includes language that is inconclusive on some important matter of public policy. The Supreme Court may resolve the uncertainty through an interpretation of the statutory language in the circumstance of a specific case. Congress, in turn, may emit either of two kinds of signals regarding its view of the Court's interpretation. On the one hand, Congress may, if it approves, incorporate the Court's conclusion into statutory text.⁷ Or Congress may, if it disapproves, ex-

5. This is true whether the scholar's view of legislative history as a source of possible meaning is inclined to be sympathetic or hostile. Compare DWORKIN, *supra* note 4, at 313-54 with Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544-52 (1983).

6. I devote most of my attention to congressional commentary on decisions by the Supreme Court, but I also address congressional review of decisions by lower federal courts. Relevant distinctions between the two are discussed *infra* at notes 325-26 and accompanying text and *infra* at notes 330-31 and accompanying text. Dialogue over statutory interpretation between Congress and federal agencies is *not* within the scope of this article; reasons for the exclusion are discussed *infra* at notes 202 and 217.

7. See, e.g., Futures Trading Act of 1982, Pub. L. No. 97-444, § 235, 96 Stat. 2294, 2322 (adding a private right of action, endorsing the holding in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982)); Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (amending the ADEA to include the right to a jury trial, endorsing the holding in *Lorillard, Inc. v. Pons*, 434 U.S. 575 (1978)). Often, the textual endorsement is accomplished in a less direct manner by building upon the Court's prior interpretation when amending related textual provisions. See, e.g., Labor-Management Relations Act of 1947, Pub. L. No. 80-101, § 9(c)(3), 61 Stat. 136, 144, and Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 702, 73 Stat. 519, 542 (first adding and then modifying 29 U.S.C. § 159(c)(3), which confirms the permanent replacement doctrine set forth in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)).

Congress also has endorsed Supreme Court conclusions in text by rejecting efforts to overturn the holding and then agreeing to adopt a "lesser" textual amendment that recognizes the holding as authoritative. See, e.g., Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 9, 102 Stat. 28, 31-32 (1988); S. REP. NO. 64, 100th Cong., 1st Sess. 27-28 (1987) (rejecting in committee an amendment aimed at overriding *School Bd. v. Arline*, 480 U.S. 273 (1987), which had held that individuals with contagious diseases may be considered handicapped under § 504 of Rehabilitation Act); 134 CONG. REC. 2924 (1988) (statement of Rep. Coelho) (approving a minor amendment that recognizes § 504 of the Rehabilitation Act as covering persons with contagious diseases); 134 CONG. REC. 383-84 (1988) (statements of Sens. Humphrey & Harkin).

pressly override the Court's decision and modify the statutory language in question.⁸

On the other hand, Congress often sends signals that, while clearly set forth in the legislative history accompanying a subsequent enactment,⁹ do not find their way into the statutory text. Thus, Congress regularly reauthorizes, updates, or modifies statutory schemes and — as part of its process — endorses through legislative history judicial interpretations of inconclusive provisions in those schemes without altering the language of the actual provisions.¹⁰ Similarly, there are numerous instances, though doubtless fewer in number, in which Congress — while reenacting or modifying a statute — has in legislative history expressed disapproval for a court's holding or reasoning without a complete textual analogue for that disapproval.¹¹ These expressions of approval or disap-

8. See, e.g., Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (1988) (overriding *McNally v. United States*, 483 U.S. 350 (1987)); Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1002, 96 Stat. 718, 730-35 (1982) (overriding *McCarty v. McCarty*, 453 U.S. 210 (1981)); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 7, 92 Stat. 3751, 3752-60 (overriding *TVA v. Hill*, 437 U.S. 153 (1978)). See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 YALE L.J. 331, 424-41 (1991).

9. My focus here is on legislative history accompanying a statutory enactment, as opposed to legislative history "in the air." The reasons for this distinction are set forth *infra* at text accompanying notes 171-73. I also refer here to "Congress" speaking through legislative history. I recognize, of course, that the attribution of any such legislative history to Congress as an institution is a central aspect of the issue I am exploring. But my references are made for convenience — to avoid cumbersome and lengthy language — at least until I have addressed the issue of collective intent.

10. For examples of endorsement of Supreme Court decisions, see S. REP. NO. 580, 95th Cong., 1st Sess. 10 (1977), reprinted in 1978 U.S.C.C.A.N. 109, 118 (accompanying Communications Act Amendments of 1978 and approving *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972)); H.R. CONF. REP. NO. 229, 94th Cong., 1st Sess. 111 (1975), reprinted in 1975 U.S.C.C.A.N. 321, 342 (accompanying Securities Act Amendments of 1975 and approving *Wilko v. Swan*, 346 U.S. 427 (1953)); H.R. REP. NO. 238, 92d Cong., 1st Sess. 21-22 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2156-57 (accompanying Equal Employment Opportunity Act of 1972 and approving *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); S. REP. NO. 415, 92d Cong., 1st Sess. 14-15 (1971) (same).

For examples of endorsement of lower court decisions, see S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913 (accompanying Civil Rights Attorney's Fees Award Act of 1976 and approving three district court decisions); H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 74, pt. 3, at 19 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856, 3042 (accompanying Superfund Amendments and Reauthorization Act of 1986 and approving a district court decision); H.R. REP. NO. 355, 98th Cong., 1st Sess. 10 (1983), reprinted in 1984 U.S.C.C.A.N. 2274, 2283 (accompanying Insider Trading Sanctions Act of 1984 and approving two appellate court decisions).

11. With respect to disapproval of decisions by the Supreme Court, the issue often arises when Congress has codified its disapproval but the scope of the disapproval is expressed more expansively in the legislative history than in the actual text. In recent years, the Court has had to decide whether Congress's overriding of an earlier decision should be limited to the specific language of the textual modifications, or whether it should have more far-reaching consequences as suggested by the legislative history accompanying the text. Compare, e.g., H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 8 (1978), reprinted in 1978 U.S.C.C.A.N.

proval in the legislative history, referred to herein as congressional reviews of, or commentaries on, judicial decisions, provide the focus for my analysis.

There is a conventional wisdom regarding the import of subsequent enactments — without regard to the presence or absence of legislative history — for intervening judicial decisions that have construed the now-reenacted text. Traditionally, courts consider the reenactment to constitute a ratification of any settled judicial interpretation;¹² it assuredly does *not* constitute a disapproval of prevailing case law.¹³ Indeed, given ample evidence that Congress today is more than willing to override Supreme Court decisions by enacting new or modified statutory language,¹⁴ one might question

528, 529 (accompanying Age Discrimination in Employment Act Amendments of 1978 and disapproving reasoning and holding of *United Airlines v. McMann*, 434 U.S. 192 (1977)) with *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989) (disregarding legislative history and following in part the holding of *McMann*); S. REP. NO. 1011, *supra* note 10, at 1, reprinted in 1976 U.S.C.C.A.N. at 5908-09 (disapproving decision in *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240 (1975)) with *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 97-101 (1991) (refusing to read Senate report as a reversal of *Alyeska* in all respects); H.R. REP. NO. 948, 95th Cong., 2d Sess. 2-3 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4750-51 (accompanying Pregnancy Discrimination Act of 1978 and disapproving reasoning and holding of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)) with *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-85 (1983) (construing Congress's rejection of *Gilbert* in broad terms); S. REP. NO. 388, 99th Cong., 2d Sess. 27-28 (1986) (accompanying Rehabilitation Act Amendments of 1986 and disapproving decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)) with *Dellmuth v. Muth*, 491 U.S. 223, 228-30 (1989) (construing disapproval in narrow terms).

With respect to lower court decisions, the issue frequently arises when Congress, through legislative history, recognizes a conflict in the circuits and expresses a preference for one line of cases while disapproving another. Compare, e.g., S. REP. NO. 493, 95th Cong., 1st Sess. 6-7 (1977), reprinted in 1978 U.S.C.C.A.N. 504, 509-10 (accompanying Age Discrimination in Employment Act Amendments of 1978 and disapproving numerous lower court decisions) with *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) (declining to follow reasoning of the Senate report); H.R. REP. NO. 120, 99th Cong., 1st Sess., pt. 1, at 9 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 137 (accompanying Equal Access to Justice Act of 1985 and disapproving lower court decisions) with *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988) (declining to follow reasoning of the House report); H.R. REP. NO. 426, 99th Cong., 1st Sess. 911 (1985) (accompanying Tax Reform Act of 1986 and disapproving a tax court decision) with *Landreth v. Commissioner*, 845 F.2d 828, 832-33 (9th Cir.) (declining to follow reasoning of House report), vacated on reh., 859 F.2d 643, 648 (9th Cir. 1988) (following reasoning of House report).

12. See, e.g., *Lorillard, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978); *Snyder v. Harris*, 394 U.S. 332, 338-39 (1969). See generally 2B SUTHERLAND STATUTORY CONSTRUCTION § 49.09 (Norman J. Singer ed., 5th ed. 1992) (citing cases). Recently, however, the Supreme Court has raised doubts about this conventional wisdom. See *Central Bank of Denver v. First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994) (Kennedy, J.) (declining, over Stevens's dissent, to credit a consistent lower court interpretation recognizing aider and abettor liability under § 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act, despite express approval of the lower court case law in a recent committee report accompanying modifications to the 1934 Act); see also 114 S. Ct. at 1458 (1994) (Stevens, J., dissenting).

13. See *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

14. Compare *Eskridge*, *supra* note 8, at 335-36 (noting that since 1975 an average of about a dozen Supreme Court decisions have been overridden in each Congress) with Note, *Congressional Reversal of Supreme Court Decisions, 1945-1957*, 71 HARV. L. REV. 1324,

how much weight, if any, should be given to an expression of disapproval from Congress other than an override contained in precise statutory text.

Although the traditional doctrine of ratification has much to recommend it, the issue of subsequent legislative signals requires further analysis. In particular, legislative history endorsing specific judicial decisions should be independently evaluated and not automatically credited. By the same token, recognition of Congress's increasing willingness in recent years to override judicial interpretations by changing statutory language also does not present an adequate picture. The override text itself may leave certain interpretive matters unresolved — matters that are referred to in the legislative history.¹⁵ Moreover, at least when lower court decisions are involved, Congress could not possibly modify or reject in text each statutory interpretation decision with which it has serious concerns and still have time to transact any other legislative business.¹⁶

There are two principal aspects of my thesis. First, it is *desirable* to consider seriously these legislative signals of approval and disapproval, because a blanket rejection, or even systematic hostility, imposes significant opportunity costs on Congress. If the judiciary refuses to consider these signals, Congress will have to expend extra resources to achieve the same ends. That expense will diminish the institution's ability to enact other laws and in some cases will alter the character of the other laws that it is able to enact. The consequent diminution or depletion of Congress's legislative authority is

1324-26 & nn.5-10 (1958) (reporting fewer than two overrides per Congress during a twelve-year period). See also Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMPLE L. REV. 425, 439-52 (1992) (examining overrides between 1968 and 1988). But cf. Beth Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441 (1983). According to Henschen, "Congress rarely responds to the statutory decisions of the Court in at least two substantive areas." *Id.* at 453. She notes that of 222 cases in which the Supreme Court interpreted labor and antitrust statutes between 1950 and 1972, Congress considered bills reacting to only 27 (12%); 176 bills were introduced to respond to these 27 decisions, and only nine of the decisions were successfully modified by enactment of a bill into law. *Id.*

15. See *supra* note 11.

16. Courts of appeals decide over 20,000 cases each year; in recent years, nearly 7000 of these decisions have been published and reported on an annual basis. See DIRECTOR OF THE ADMIN. OFF. OF THE U.S. CTS. ANN. REP. tbl. S-3 (1990, 1991, 1992, 1993). Over 7000 district court decisions also are reported each year. See Search of Westlaw, DCTR database (March 3, 1994) (search for decisions containing *is* and date equals 1991, 1992, and 1993 found 7159 decisions in 1991, 7329 decisions in 1992, and 7387 decisions in 1993). A substantial portion of these federal court decisions construe federal statutes. Even assuming that most statutory interpretation cases involve matters of low visibility, there may be scores if not hundreds of cases during each Congress about which substantial disagreement exists and comes to the attention of congressional members or committees.

unhealthy from a democratic perspective and reflects an unwarranted disrespect for Congress's chosen means of conducting its legislative business.

Second, it is *possible* to credit these signals in a manner that is limited to appropriate circumstances. Legislative history expressing approval or disapproval of judicial decisions is susceptible to manipulation and abuse. Accordingly, its interpreters need specific criteria that can separate the wheat — expression that can be fairly imputed to Congress — from the chaff — expression that reflects, at most, the commitment of individual members or their staff.

Part I sets forth an example of the extended dialogue between Congress and the Supreme Court. It illuminates the problem of assessing legislative signals in a given context and introduces the issue of opportunity costs for Congress. The example chosen involves signals of disapproval rather than approval, because crediting such signals is more difficult to defend under the traditional analysis.

Part II expands the discussion of opportunity costs by considering the legislative process from Congress's perspective. It describes Congress as a complex bureaucratic institution, seeking to manage limited resources while meeting public expectations for an expanded legislative presence. In this setting, it examines why — and how — Congress has chosen to rely on legislative history as an integral part of the lawmaking enterprise, as well as why judicial failure to recognize or credit legislative history can impede the operations of Congress.

Part III clears away obstacles presented by three interrelated arguments that are current in the field of statutory interpretation: (i) the argument by *textualists* that courts should give legislative history virtually no weight at all;¹⁷ (ii) the argument that even if legislative history may be credited in some instances, *subsequent* legislative history, commenting on earlier-enacted textual provisions, should never be given any weight;¹⁸ and (iii) the argument that *legislative inaction* — Congress's failure to alter or modify a particular statutory provision — should carry no weight notwithstanding later signals in the legislative history.¹⁹ Part III concludes that while each of these arguments counsels in favor of a careful approach, the legislative signals with which this article is concerned remain appropriate matters for judicial consideration.

17. See *infra* text accompanying notes 166-239.

18. See *infra* text accompanying notes 240-59.

19. See *infra* text accompanying notes 260-69.

Part IV seeks to develop a taxonomy that can assist courts in evaluating congressional commentary on judicial decisions. It contends that in reviewing the expression of approval or disapproval in legislative history, a court should ask whether this expression would have been (i) understood, (ii) noticed, and (iii) accepted by a reasonable member of the House or Senate. It then suggests why expressions of approval should be presumed valid, whereas expressions of disapproval should not, noting that either presumption can be overcome based on the three considerations just identified. Part IV further suggests that approvals or disapprovals that are politically controversial should be approached with special care. It concludes by applying these proposed variables to particular decided cases.

I. THE COST TO CONGRESS OF IGNORING OR DEVALUING LEGISLATIVE SIGNALS

A. *The Often-Inconclusive Quality of Text*

It is not surprising that the language of federal statutes is at times inconclusive on important public policy issues. A text will often be ambiguous or incomplete just because language itself is frequently imprecise, no matter how explicitly spoken or carefully drafted. Words are "inexact symbols"²⁰ of meaning and often cannot be fully or properly understood without reference to the context or community in which they were created.²¹

Thus, for instance, whether a party's position in court is "substantially justified"²² or a business transaction is entered into "for profit"²³ or a plant closing was "reasonably foreseeable"²⁴ are not matters that can be resolved solely by reference to common sense or ordinary meaning. Similarly, when a statutory scheme expressly covers some victims while ignoring others,²⁵ or when a statute imposes a severe penalty with no reference to ordinary mitigating cir-

20. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

21. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1988); Frederick Schauer, *Statutory Construction and the Coordination Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 251 & n.82.

22. Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1988); see *Pierce v. Underwood*, 487 U.S. 552 (1988).

23. I.R.C. § 165(c)(2) (1988); see *Miller v. Commissioner*, 836 F.2d 1274 (10th Cir. 1988).

24. Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2102(b)(2)(A) (1988).

25. Death on the High Seas Act, 46 U.S.C. § 761 (1988); Jones Act, 46 U.S.C. § 688 (1988); see *Moragne v. State Marine Lines*, 398 U.S. 375 (1970).

cumstances,²⁶ a prudent interpreter may need to look beyond the mere textual gaps.

In addition to the inherent imprecisions of language, there are at least two political explanations for a legislative text that is ambiguous or incomplete. One is lack of foresight: Congress as an institution may fail to anticipate new developments, whether factual or legal, or even new variations on current developments.²⁷ The second is lack of will: Congress may recognize a potentially divisive issue but decide to finesse the issue with ambiguous or incomplete language.²⁸

Given that text is at times inconclusive, the courts must decide what sources they will consult in an effort to find meaning in the text and resolve individual cases. Legislative history is certainly one potential source of meaning; what follows is a particular example in which the Supreme Court declined to credit that source and Congress paid a price.

26. 46 U.S.C. § 596 (1982) (recodified at 46 U.S.C. § 10313 (1988)) (providing recovery of double wages for discharged seamen for every day that their wages have been withheld "without sufficient cause"); see *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982).

27. See *Statutory Interpretation and the Uses of Legislative History: Hearing before Subcomm. on Courts, Intellectual Property and the Administration of Justice of the Comm. on the Judiciary*, 101st Cong., 2d Sess. 1 (1990) [hereinafter *Stat. Interp. Hrg.*] (statement of Chairman Kastenmeier); *id.* at 16-17 (statement of Chief Judge Patricia M. Wald); *id.* at 88 (statement of Prof. William N. Eskridge, Jr.); see also Bradford L. Ferguson et al., *Re-examining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 *TAXES* 804, 806 (1989).

28. See Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 187 (1986); Mikva, *supra* note 3, at 380-81; *Stat. Interp. Hrg.*, *supra* note 27, at 88 (statement of Prof. Eskridge).

What I refer to as "lack of will" may reflect sensitivity to the *procedural* difficulties of effecting change even when the change itself would command the requisite majority or supermajority support. Alternatively, the lack of will may reflect sensitivity to the *substantive* difficulties of being unable to command majority support for the proposed change. This distinction is explored further *infra* at text accompanying notes 335-40.

In attributing inconclusive statutory text to either a lack of foresight or a lack of will, I do not distinguish between text that is inconclusive due to ambiguity and text that is inconclusive due to incompleteness. Each may reflect a failure of foresight or a failure of will. See *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1495-96 (1994) (describing the language on retroactivity in the 1991 Civil Rights Act as indicative of ambiguity and lack of will); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11 (1989) (describing the use of the word *defendant* in Federal Rule of Evidence 609 as indicative of ambiguity and lack of foresight); *Moragne v. State Marine Lines*, 398 U.S. 375, 397-400 (1970) (describing the federal maritime statutes as indicative of incompleteness and lack of foresight); Mikva, *supra* note 3, at 380-81 (discussing 1977 strip mining legislation as an example of incompleteness and lack of will). I will discuss the distinction between lack of foresight and lack of will at a later point. See *infra* notes 332-34 and accompanying text.

B. *The Meaning of Subterfuge Under the ADEA*

1. *The 1967 Statute*

The Age Discrimination in Employment Act (ADEA)²⁹ was enacted in 1967; the statute prohibits age-based discrimination against older individuals in the terms or conditions of employment.³⁰ As originally enacted, the ADEA applied to individuals between the ages of forty and sixty-five.³¹ Mandatory retirement was therefore lawful at age sixty-five and above. The ADEA also permitted any bona fide employee benefit plan "which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual."³²

In the Act's first decade, controversy arose over whether private pension plans that required retirement prior to age sixty-five violated the ADEA.³³ A large percentage of the workers covered by private plans were subject to mandatory retirement prior to age sixty-five.³⁴ The Supreme Court, in *United Airlines v. McMann*,³⁵ concluded that such plans were lawful.

2. *The McMann Decision*

The Court in *McMann* referred to the ADEA's primary purpose as preventing age discrimination in the *hiring* and *discharge* of workers but not in their *retirement*. Chief Justice Burger, writing for the majority, reasoned that while the language of section 4(f)(2) did not immunize age-based *discharges* — that is, termination without compensation — it did protect age-based *retirements* that were part of a bona fide pension plan. Thus, the Court concluded, mandatory retirement provisions of bona fide employee pension plans were lawful whether adopted before or after enactment of the ADEA.³⁶

29. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

30. 29 U.S.C. § 623(a) (1988).

31. Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (1967).

32. Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603 (1967).

33. Compare *Zinger v. Blanchette*, 549 F.2d 901 (3d Cir. 1977) (holding such plans lawful under § 4(f)(2)) and *Brennan v. Taft Broadcasting*, 500 F.2d 212 (5th Cir. 1974) (same) with *McMann v. United Airlines*, 542 F.2d 217 (4th Cir. 1976) (holding that § 4(f)(2) does not accommodate plans that include mandatory retirement prior to age 65).

34. See S. REP. NO. 493, *supra* note 11, at 9, reprinted in 1978 U.S.C.C.A.N. at 512 (reporting that a 1974 Labor Department study concluded that 41% of workers covered by private pension plans were subject to mandatory retirement).

35. 434 U.S. 192 (1977).

36. 434 U.S. at 198-202. As part of its analysis, the Court rejected *McMann's* argument that § 4(f)(2) immunized "lesser benefits," including involuntary retirement, for older work-

In addition, Chief Justice Burger separately concluded that the particular plan before the Court, which had been established in 1941, could not possibly be a "subterfuge to evade the purposes of this Act" under section 4(f)(2). Relying on the dictionary definition of *subterfuge* as "a scheme, plan, stratagem or artifice of evasion," the Court reasoned that a plan adopted prior to 1967 logically could not have been motivated by an intent to evade the purposes of the 1967 Act.³⁷ In reaching this conclusion, the Court credited the dictionary more than the legislative history, which explained that the exception applied to "new and existing employee benefit plans, and to both the establishment and maintenance of such plans."³⁸

3. The 1978 Statute

When *McMann* was decided in mid-December of 1977, Congress was already well advanced in the process of enacting amendments to the ADEA.³⁹ Congress enacted the modifying legislation

ers covered under a pension plan *only* when those lesser benefits were offered as a way of making it economically feasible for an employer to hire older employees. Relying extensively on the Act's legislative history, the Court concluded that Congress in 1967 meant to protect all bona fide pension plans under § 4(f)(2), including plans that permit involuntary separation. 434 U.S. at 198-99.

37. 434 U.S. at 203.

38. H.R. REP. NO. 805, 90th Cong., 1st Sess. 4 (1967) (emphasis added); S. REP. NO. 723, 90th Cong., 1st Sess. 4 (1967) (emphasis added). The majority sought to limit the import of these statements by stressing the next sentence in each committee report: "This exception serves to emphasize the primary purpose of the bill — hiring of older workers — by permitting employment without necessarily including such workers in employee benefit plans." H.R. REP. NO. 805, *supra*, at 4; S. REP. NO. 723, *supra*, at 4. It then asserted that a preexisting bona fide plan used as a reason for *refusing to hire* older applicants might well be an unlawful subterfuge. See 434 U.S. at 203 n.9. But this response undermines the Court's conclusion that *any* preexisting plan cannot logically be a subterfuge and suggests that the Court's mandatory retirement analysis is the key to its decision.

In any event, the "pre-Act v. post-Act" analysis of subterfuge may fairly be characterized as a secondary holding in *McMann*. It is principally contained in one paragraph at the conclusion of the majority opinion, whereas analysis of § 4(f)(2) and mandatory retirement runs for several pages. Justices Marshall and Brennan, in dissent, focused almost exclusively on the mandatory retirement issue, 434 U.S. at 208-19, although in passing they also rejected the Court's subterfuge analysis, 434 U.S. at 219 n.13. Justice White concurred in the judgment but explicitly disagreed with the majority's analysis on subterfuge while endorsing the majority's treatment of the mandatory retirement issue. 434 U.S. at 204-08. Justice Stewart, in a brief opinion concurring in the judgment, agreed with the Court's analysis of subterfuge and found it unnecessary to address the issue of mandatory retirement to which the Court devoted most of its attention. 434 U.S. at 204.

39. See H.R. 5383, 95th Cong., 1st Sess. (1977); S. 1784, 95th Cong., 1st Sess. (1977). The House version was introduced on Mar. 22, 1977, 123 CONG. REC. 8497 (1977), and a report was submitted by the House Education and Labor Committee on July 25, 1977, H.R. REP. NO. 527, 95th Cong., 1st Sess., pt. 1 (1977). The bill was considered and passed by the full House on Sept. 23, 1977, 123 CONG. REC. 30,573 (1977). The Senate version was introduced on June 29, 1977, 123 CONG. REC. 21,530 (1977), and a report was submitted by the Senate Human Resources Committee on Oct. 12, 1977, S. REP. NO. 493, 95th Cong., 1st Sess. (1977). The bill was considered and passed by the full Senate on Oct. 19, 1977, 123 CONG. REC. 34,324 (1977).

primarily to reduce the incidence of mandatory retirement.⁴⁰ To that end, it raised the upper age limit from sixty-five to seventy for individuals employed in the private sector or with state or local governments,⁴¹ and it clarified the section 4(f)(2) exemption for employee benefit plans to prohibit early mandatory retirement.⁴²

With respect to section 4(f)(2), both the House and Senate had added language prior to the Supreme Court decision in *McMann*. The new language specified that employee benefit plans would not qualify for the exemption if they required or permitted the involuntary retirement of any individual because of age.⁴³ The drafters of this legislation were responding to the split in the circuit courts and were endorsing in text the result reached by the Fourth Circuit in its *McMann* opinion,⁴⁴ namely that section 4(f)(2) should not be construed to permit mandatory retirement within the protected age group.⁴⁵

Several months after the Supreme Court decision, a conference committee resolved the differences between the House and Senate versions of the proposed ADEA amendments. The language amending section 4(f)(2) was virtually identical in the two versions and was unchanged by the conferees.⁴⁶ The Joint Explanatory

40. See H.R. REP. NO. 527, *supra* note 39, pt. 1, at 1; S. REP. NO. 493, *supra* note 39, at 1.

41. See Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (1978) (amending 29 U.S.C. § 631(a)). The 1978 amendments also removed any upper age limit for most federal employees, thereby abolishing mandatory retirement altogether for these individuals. See Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (1978) (amending 29 U.S.C. § 631(b)).

42. See Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978) (amending 29 U.S.C. § 623(f)(2)). In addition, the amendments included provisions clarifying the right to a jury trial, the timing for filing of charges, and certain minor procedural issues, and also raised the ceiling for authorized federal funding to enforce the Act. See Pub. L. No. 95-256, §§ 4-7, 92 Stat. 189, 190-93 (1978).

43. The relevant language of § 4(f)(2) thus reads as follows, with the 1978 addition in italics:

(f) It shall not be unlawful for an employer . . .

(2) to observe the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title [ages 40-70] because of the age of such individual.*

29 U.S.C. § 623(f)(2) (1988), *as amended by* Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978).

44. *McMann v. United Airlines*, 542 F.2d 217 (4th Cir. 1976), *revd.*, 434 U.S. 192 (1977).

45. See H.R. REP. NO. 527, *supra* note 39, pt. 1, at 5-8; S. REP. NO. 493, *supra* note 39, at 10; *see also* 123 CONG. REC. 34,295-96 (1977) (statement of Sen. Williams).

46. See H.R. CONF. REP. NO. 950, *supra* note 11, at 7-8, *reprinted in* 1978 U.S.C.C.A.N. at 528-29. Senate and House Rules confined the conferees to the areas of disagreement between the Senate and House versions of the bill. See STANDING RULES OF THE SENATE Rule 27.2 (1977); RULES OF THE HOUSE OF REPRESENTATIVES Rule 28.3 (1978). If conferees violated this rule, the conference report was subject to a point of order. STANDING RULES OF THE SENATE Rule 27.2 (1977). There are several methods by which conferees may defeat points of order asserting violations of the rule on scope, but these methods are often time-

Statement of the Conferees, however, did include an explicit reference to the Supreme Court's intervening holding:

The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann v. United Airlines*, 98 S. Ct. 244 (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). *The conferees specifically disagree with the Supreme Court's holding and reasoning in that case. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.*⁴⁷

The conference report was approved by overwhelming margins in both Houses,⁴⁸ and the ADEA amendments became law on April 6, 1978.

4. *The Betts Decision*

Eleven years later, the Supreme Court revisited the "subterfuge" issue in *Public Employees Retirement System v. Betts*.⁴⁹ The case involved a public employee who became disabled at age sixty-one after seven years on the job. The state's disability retirement scheme, which required that retirees receive at least thirty percent of their final average salary, was available only to individuals who became disabled prior to reaching age sixty.⁵⁰ Betts brought suit under the ADEA, leading the Supreme Court to reconsider the scope of the section 4(f)(2) exemption.

With respect to the meaning of *subterfuge*, Justice Kennedy, writing for the Court, reaffirmed the *McMann* Court's conclusion that an employee benefit plan adopted prior to the ADEA's enact-

consuming and burdensome for each chamber as a whole. See generally CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 811-33 (1989). The same rules confining the scope of action by conferees remain in effect today. See STANDING RULES OF THE SENATE Rule 28 (1990); RULES OF THE HOUSE OF REPRESENTATIVES Rule 28.3 (1991).

47. H.R. CONF. REP. NO. 950, *supra* note 11, at 8, reprinted in 1978 U.S.C.C.A.N. at 529 (emphasis added).

48. See 124 CONG. REC. 7889 (1978) (reporting a House vote of 391-6); *id.* at 8220 (1978) (reporting a Senate vote of 62-10).

49. 492 U.S. 158 (1989).

50. 492 U.S. at 163. The "normal" retirement scheme, based on age plus years of service, did not include the 30% guarantee. As a relatively short-term employee, Mrs. Betts was entitled to roughly \$160 per month of age-and-service retirement payments. Had she been permitted to take disability retirement, she would have received over twice that amount, some \$355 per month. 492 U.S. at 163.

ment in 1967 could not be a subterfuge.⁵¹ While acknowledging that the 1978 ADEA amendments had overruled the result in *McMann*, Justice Kennedy emphasized that Congress had done so by barring early mandatory retirement and had *not* altered or redefined the term *subterfuge*. The conference report's explicit disapproval of *McMann's* subterfuge *analysis* was deemed inconsequential because Congress had failed to amend the subterfuge *text*.⁵²

5. The 1990 Statute

Within weeks of the *Betts* decision, bills were introduced in both chambers to overturn the Court's holding and analysis on the meaning of *subterfuge*.⁵³ In the fall of 1990, Congress enacted the Older Workers Benefit Protection Act (OWBPA).⁵⁴ The principal purpose and effect of the legislation was to override the Court's deci-

51. 492 U.S. at 166-68.

52. 492 U.S. at 168. The *Betts* Court's reaffirmation of *McMann* on this issue did not, however, fully resolve the case. Whereas the Ohio state employees' retirement system had been in place since 1933 and the age-sixty ceiling for disability retirement was unchanged since 1959, the 30% guarantee for disability retirees was added in 1976. This post-1967 modification *could* logically qualify as a subterfuge under the Court's approach. The Court, therefore, proceeded to define *subterfuge* for purposes of employee benefit plans adopted or modified *after* enactment of the ADEA.

Even here, the *Betts* Court rejected the declared intentions of the principal authors of the 1978 amendments. The agency charged with interpreting the ADEA had concluded at an early stage that age-based distinctions in employee benefits were a subterfuge unless economically justified by the increased cost of providing the benefits in question for older workers. See 29 C.F.R. § 860.120(a) (1970) (Dept. of Labor guidance). This initial executive branch interpretation was expressly endorsed by the bill's managers and principal sponsors in legislative history accompanying the 1978 amendments. For example, Senator Javits stated:

[A] retirement, pension or insurance plan will be considered in compliance with [§ 4(f)(2)] where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 CONG. REC. 8218-19 (1978); see also *id.* at 8219 (statement of Sen. Williams); *id.* at 7881 (statement of Rep. Hawkins); *id.* at 7888 (statement of Rep. Waxman). The agency, relying on this legislative history, reaffirmed its original guidance as a regulation in 1979. See 29 C.F.R. § 860.120(a)(1) (1979), recodified at 29 C.F.R. § 1625.10(a)(1) (1993).

Nonetheless, the *Betts* Court declined to rely on either the 1978 legislative history or the two decades of consistent agency interpretation. It concluded instead that an age-based distinction in benefits is a subterfuge *only* if it is actually used as a method of discriminating in non-fringe-benefit aspects of the employment relationship — notably, constructive discharge or failure to hire. 492 U.S. at 175-80. Thus, age-based distinctions in employee benefits were given extremely broad protections whether implemented before or after the enactment of the ADEA in 1967.

53. *Betts* was decided on June 23, 1989. In the Senate, S. 1511 was introduced August 3, 1989. 135 CONG. REC. 18,394 (1989). In the House, H.R. 3200 was introduced August 4, 1989. *Id.* at 19,330.

54. Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 629, 630 (1988 & Supp. V 1993)).

sion in *Betts*.⁵⁵ Of particular relevance here, the new law modified section 4(f)(2) to expunge the word *subterfuge* from the ADEA. It then added a new section 4(k) that expressly required an employee benefit plan to comply with the ADEA regardless of the date of the plan's adoption.⁵⁶

6. *The Institutional Costs to Congress*

How should one evaluate this extended dialogue between the Supreme Court and Congress? One can argue that the 1990 statute, with its elimination of the term *subterfuge* and its addition of new section 4(k), fully vindicated the Court's approach in *McMann* and *Betts*. Congress in 1978 had overridden one aspect of the *McMann* decision in text, but it had failed to provide a textual foundation for the conferees' disapproval of the Court's treatment of the subterfuge issue. The *Betts* Court's focus on the 1978 statutory language to the exclusion of legislative history was, therefore, "respectful" of the democratic process, if that respect requires the Court to address only the text considered and voted on by Congress.⁵⁷ Moreover, as a practical matter, the *Betts* Court forced Congress to take the time to clarify the language of the ADEA exception for employee benefit plans. One consequence of such judicial "tough love" is that we now have a less inconclusive, more carefully worded statute.

This argument, however, overlooks important costs to Congress. The initiation, negotiation, and enactment of a statute is a multidimensional process that requires committing considerable institu-

55. See Pub. L. No. 101-433, § 101, 104 Stat. 978, 978 (1990); 136 CONG. REC. H8616 (daily ed. Oct. 2, 1990) (statement of Rep. Clay); *id.* at S13,603 (daily ed. Sept. 24, 1990) (statement of Sen. Pryor). Title I of the OWBPA dealt exclusively with the *Betts* decision. See Pub. L. No. 101-433, §§ 101-05, 104 Stat. 978, 978-83 (1990). Title II addressed the discrete issue of when individuals may waive their rights or claims under the ADEA. See Pub. L. No. 101-433, §§ 201-02, 104 Stat. 978, 983-84 (1990).

56. See Pub. L. No. 101-433, § 103, 104 Stat. 978, 978-81 (1990) (amending § 4(f) and adding § 4(k)). These changes fully addressed the issue of whether an employee benefit plan may be exempt by virtue of its pre-ADEA adoption.

In modifying § 4(f)(2), Congress also expressly codified the "economic purpose" justification for age-based distinctions in employee benefits that had been promulgated by the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC) prior to *McMann* and had been endorsed by the chief sponsors of the 1978 amendments. See *supra* note 52. Thus, with respect to the meaning of the employee benefit plan exception as applied to plans adopted or modified after enactment of the ADEA, Congress once again repudiated the *McMann* Court's reasoning — the Court there having rejected a "business purpose" analysis, see *supra* note 36 — as that reasoning had been expanded upon by the *Betts* Court.

57. See *infra* notes 179-89 and accompanying text for a discussion of textualist arguments based on legislative supremacy. But cf. Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 266 (1992) (discussing whether the Court's textualist analysis in a comparable setting was "democracy-forcing" or "anti-democratic").

tional resources, navigating politically sensitive internal procedures, and anticipating substantial societal consequences. The complexity of the process precludes the more straightforward interpretive inferences that may be appropriate when construing certain other legal texts.⁵⁸ Unlike appellate court decisions, which are generally drafted by a single author and presumably subject to careful review by a few colleagues, legislation is a product of negotiation and compromise among multiple participants over an extended period of time. Accordingly, to treat inconclusive statutory text as though it were the consciously streamlined product of one legislator's pen risks undervaluing what the legislative process has to offer in explaining that text. Further, to assert that Congress can simply "do it better next time" discounts how resource-intensive that next time is likely to be.

The OWBPA itself exemplifies the considerable investment of legislative resources often required to overturn a judicial decision.⁵⁹ In the Senate, where the battle began and ended, a broad coalition of Democrats, together with a handful of moderate Republicans, supported the bill.⁶⁰ Opposition came from the Bush administra-

58. Cf. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 710-11 (1992) (concluding that interpretive problems are more complex for legislation than for contracts, as the former typically involves bargaining among more parties "having a wider diversity of purposes").

59. See STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 102D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT (S. Comm. Print 33, 1991) (two volumes containing 1266 pages of hearings, committee reports, and floor debates) [hereinafter LEGIS. HIST.]. Although some of the controversy was unrelated to the *Betts* decision, see *supra* note 55, most of the attention focused on the Court's interpretation of *subterfuge* and its refusal to follow the 1978 legislative history and consistent agency interpretations.

60. The bill, S. 1511, was introduced by Senator Pryor (D-Ark.), chairman of the Special Committee on Aging, and cosponsored by Senators Jeffords (R-Vt.), Metzenbaum (D-Oh.), Kennedy (D-Mass.), DeConcini (D-Ariz.), and Bumpers (D-Ark.). 135 CONG. REC. 18,408-10 (1989), reprinted in 2 LEGIS. HIST., *supra* note 59, at 909-15. A joint hearing was held before the Special Committee on Aging and the Subcommittee on Labor of the Committee on Labor and Human Resources, chaired by Senator Metzenbaum. The bill was reported by the Committee on Labor and Human Resources, chaired by Senator Kennedy. Ultimately, the key Senate sponsors who negotiated a compromise with Senator Hatch were Senators Pryor, Metzenbaum, Jeffords, and Heinz (R-Pa.). Pryor and Heinz were respectively the chair and ranking minority member for the Aging Committee, while Metzenbaum and Jeffords were the chair and ranking minority member for the Labor Subcommittee.

In the House, leadership also was shared between the chair of the Select Committee on Aging, Representative Roybal (D-Cal.), and the chairs of the Subcommittees on Employment Opportunities and Labor-Management Relations of the Committee on Education and Labor: Representatives Martinez (D-Cal.) and Clay (D-Mo.), respectively. 135 CONG. REC. H5334, E2880, E2906-07 (daily ed. Aug. 4, 1989), reprinted in 2 LEGIS. HIST., *supra* note 59, at 899-903. There was no Republican participation in the House that was comparable to that in the Senate. After the final compromise was negotiated in the Senate, it was approved by the House without change, although the House added a technical clarification as a short separate bill. See 2 *id.* at 1260-66.

tion⁶¹ and from Senator Hatch, who, as ranking minority member of the Labor and Human Resources Committee, was the key member defending the administration's position.⁶²

The dynamics of this political struggle were very similar to the dynamics surrounding the proposed Civil Rights Act of 1990, which also was under active consideration during the second session of the 101st Congress.⁶³ In each instance, substantive disagreements separated the predominantly Democratic proponents from both the Bush administration and Senator Hatch as the leader of the Senate opposition.⁶⁴ In each instance, the proponents had a comfortable majority in both houses to override Supreme Court decisions. Yet in each instance, proponents strained to find the two-thirds support necessary to overcome a threatened presidential veto.

The political battle over the OWBPA was resolved in late September 1990. After several days of floor consideration by the full Senate and extended negotiations involving five senators, Senator Hatch reached a compromise agreement with Senators Metzenbaum and Pryor.⁶⁵ Although overwhelming majorities approved

61. Although the Justice Department had argued in support of Mrs. Betts in the Supreme Court in early 1989, see 1 LEGIS. HIST., *supra* note 59, at 157-67, and the EEOC testified in qualified support of the bill at the Senate hearings, see 1 *id.* at 451-58, the administration reversed its position in early 1990 and thereafter steadfastly threatened a veto. See Letter from Roger Porter, Assistant to the President for Economic and Domestic Policy, to Rep. Goodling (Mar. 27, 1990) (on file with author) (opposing the bill as reported out of the Senate committee); Letter from Secretary of the Treasury Nicholas Brady, Secretary of Labor Elizabeth Dole, and EEOC Chairman Evan Kemp to Sen. Dole (Sept. 18, 1990) (on file with author) (opposing the bill as modified on the Senate floor by Sens. Pryor and Metzenbaum). The administration's opposition derived primarily from concerns that both private and public employers would incur substantial costs in having to modify existing employee benefit plans.

62. See, e.g., 136 CONG. REC. S9444 (daily ed. July 10, 1990) (statement of Sen. Hatch) (expressing the concerns of the administration and the business community over the impact of S. 1511); "Dear Colleague" Letter from Senators Hatch and Dole (Sept. 17, 1990) (on file with author) (opposing Pryor bill as modified on Senate floor by Pryor and Metzenbaum).

63. See 136 CONG. REC. S1018 (daily ed. Feb. 7, 1990) (S. 2104 introduced); *id.* at S7638 (daily ed. June 8, 1990) (report on S. 2104 submitted by Committee on Labor and Human Resources); *id.* at H364 (daily ed. Feb. 7, 1990) (H.R. 4000 introduced); *id.* at H6049 (daily ed. July 31, 1990) (report on H.R. 4000 submitted by Committee on the Judiciary).

64. The Civil Rights Act proposed to override a number of Supreme Court decisions from recent terms, addressing diverse issues including but not limited to the coverage of 42 U.S.C. § 1981, see *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the meaning of disparate impact employment discrimination under Title VII, see *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and whether "mixed motive" employment decisions violate Title VII, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In addition, the 1990 Act proposed, for the first time under Title VII, a right to jury trials and compensatory and punitive damages. The Bush administration agreed with certain discrete sections of the bill but strongly opposed the bill's language on *Wards Cove*, damages, and numerous other procedural and remedial issues.

65. For extended floor consideration, see 136 CONG. REC. S13,236-55 (daily ed. Sept. 17, 1990), S13,286-93, S13,296-98, S13,348 (daily ed. Sept. 18, 1990), S13,405, S13,417, S13,435-36 (daily ed. Sept. 19, 1990), reprinted in 1 LEGIS. HIST., *supra* note 59, at 96-188. For a descrip-

the compromise version in both the Senate and the House, the Bush administration remained opposed to the bill and publicly expressed that opposition.⁶⁶ President Bush eventually signed the bill into law only when faced with veto-proof majorities.⁶⁷

Less than one month later, the political battle over the Civil Rights Act of 1990 reached a very different resolution. Once again, Senator Hatch, working with proponents of the legislation, played a central role in brokering a compromise agreement.⁶⁸ This time, however, Senator Hatch made clear that, while he found the substitute version acceptable, he would not support it over the objections of the Bush administration.⁶⁹ Despite pleas from the bill's proponents,⁷⁰ neither Senator Hatch nor any other prior opponents voted for the compromise that Hatch had helped negotiate. The Bush administration maintained its strong opposition,⁷¹ and Hatch de-

tion of senators' personal involvement in negotiations, see 136 CONG. REC. S13,405 (daily ed. Sept. 19, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 96, and 136 CONG. REC. S13,597 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 53-54. For the announcement of the compromise agreement, see 136 CONG. REC. S13,594-97 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 46.

66. See 136 CONG. REC. S13,611 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 90 (reporting a Senate vote of 94-1); 136 CONG. REC. H8738 (daily ed. Oct. 3, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 10-11 (reporting a House vote of 406-17); Statement of Administration Policy (Oct. 2, 1990) (on file with author) (opposing enactment of S. 1511 as passed by the Senate); 136 CONG. REC. H8623 (daily ed. Oct. 2, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 36 (statement of Rep. Bartlett) (noting continued opposition of the administration). Senator Hatch worked closely with the administration during the bill's legislative journey; when he signed on to the compromise he had helped negotiate, he could not have been unaware of the administration's displeasure.

67. 136 CONG. REC. D1362 (daily ed. Oct. 18, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 10. For reference to the veto-proof majorities, see *supra* note 66.

68. See 136 CONG. REC. S15,328 (daily ed. Oct. 16, 1990) (remarks of Sen. Hatch) (discussing negotiations process); *id.* at S15,332 (remarks of Sen. Specter) (discussing "the so-called Hatch-Coleman [former Secy. of Transportation William Coleman]-Specter compromise").

69. See *id.* at S15,333 (remarks of Sen. Hatch) ("I wanted to please the President. I wanted to see if there was some way we could get this to a point where he could sign the bill . . . Unfortunately, as I look at it in retrospect, I think we failed."); *id.* (remarks of Sen. Specter) (agreeing with Hatch that "he [Hatch] found this compromise acceptable and that he recommended it to the President even though he reserved the right to vote against it, oppose it if the President did not go along").

70. See *id.* at S15,333, S15,401 (statement of Sen. Specter) (urging colleagues to rely upon Hatch's "professional judgment" and accept compromise rather than following the President); *id.* at S15,342-43 (statement of Sen. Kennedy) (arguing that the compromise cannot be a "quota bill" if Hatch recommended it to the President); *id.* at S15,335 (statement of Sen. Metzenbaum) (commenting, with respect to Hatch's political imperatives, that Hatch "has no choice but to oppose the bill, even though the conferees accepted his suggested changes," and asserting that "[w]e do not have a consensus because the White House operatives simply do not want a consensus").

71. See Letter from Attorney General Thornburgh to Sen. Dole (Oct. 12, 1990), *reprinted in* 136 CONG. REC. S15,328 (daily ed. Oct. 16, 1990) (indicating the President's intention to veto the compromise).

clined to buck the White House on major civil rights legislation twice in a period of less than one month. Thus, thirty-four senators, including Senator Hatch, opposed the compromise; this was precisely the number needed to sustain a presidential veto.⁷²

When President Bush subsequently vetoed the legislation,⁷³ the override vote failed in the Senate by a one-vote margin of 66-34.⁷⁴ A year later, Congress did pass the Civil Rights Act of 1991, which President Bush signed. That bill was, in many respects, substantially weaker for civil rights plaintiffs than the 1990 version that failed to garner veto-proof support in the Senate by one vote.⁷⁵

II. THE ISSUE OF OPPORTUNITY COSTS

The example just described suggests that Congress's devotion of considerable resources to clarifying the meaning of certain language under the ADEA in 1990 rendered it marginally less capable — during the same period — of resolving the meaning of certain *other* language under Title VII and related civil rights statutes. This marginal decline in institutional capability, in turn, helped produce a substantially different legislative outcome in the Title VII context.

72. The vote on the conference report was 62-34. See 136 CONG. REC. S15,407 (daily ed. Oct. 16, 1990). Three of the four senators who were absent — Exon, Kerry, and Hatfield — had voted for the version of the bill that had been approved by the Senate in July, while the fourth, Stevens, had opposed it. See *id.* at S9966 (daily ed. July 18, 1990). Accordingly, it is reasonable to infer that sixty-five senators would have voted for the compromise civil rights bill negotiated in October. This was exactly the same number that had voted for the preconference version in July. See *id.*

73. See *id.* at S16,562-63 (daily ed. Oct. 24, 1990) (Bush Veto Message).

74. See *id.* at S16,589. The 66th vote came from Senator Boschwitz (R-Minn.) who switched from his prior votes in July and mid-October.

75. There are numerous substantive differences between the 1991 bill that became law, S. 1745, 102d Cong., 1st Sess., 137 CONG. REC. S15,503-12 (daily ed. Oct. 30, 1991), and the 1990 bill as described in H.R. CONF. REP. NO. 856, 101st Cong., 2d Sess., 136 CONG. REC. H9552-55 (daily ed. Oct. 12, 1990). For example: (i) the 1990 Act capped *punitive damages* at the greater of \$150,000 or the total compensatory and equitable amounts awarded (§ 8), whereas the 1991 Act caps *punitive and compensatory damages combined* at \$50,000 to \$300,000 based on size of employer (§ 102); (ii) the 1990 Act required employers to demonstrate that "disparate impact" employment practices — such as tests, education requirements, or minimum height and weight standards — "bear a significant relationship to successful performance of the job" (§ 3, new definition added to § 701(o)(1)(A) of the Civil Rights Act of 1964), whereas the 1991 Act requires only that employers demonstrate that the practice at issue "is job related for the position in question and consistent with business necessity" (§ 105(a)); (iii) the 1990 Act included a provision overriding *Evans v. Jeff D.*, 475 U.S. 717 (1986), thereby prohibiting a compelled waiver of attorney's fees as a condition of settlement (§ 9), whereas the 1991 Act is silent on this issue; (iv) the 1990 Act included a provision overriding *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989), thereby allowing for an award of attorney's fees against intervening defendants under Title VII (§ 9), whereas the 1991 Act is silent on this issue; (v) the 1990 Act did not address race-based scoring of employment tests, whereas the 1991 Act prohibits such practices (§ 106).

Although the evidence does not compel such a conclusion,⁷⁶ it raises in vivid terms the reality of trade-offs and opportunity costs within the legislative process.

A. *Finite Resources and Limited Windows of Opportunity*

There are approximately 10,000 bills introduced in each session of Congress, but fewer than ten percent survive the legislative process to become law.⁷⁷ While the number of public laws being enacted has stabilized in recent years, these laws are of unprecedented length and complexity, and their consideration and approval — or rejection — has become virtually a continuous operation.⁷⁸ Under

76. It is difficult to imagine what would qualify as conclusive proof that Senator Hatch, or any of the other 33 Republican senators involved, would have opted to defy the President, also a Republican, on the Civil Rights Act of 1990 but for the expenditure of political capital on the OWBPA. There were important connections between the two pieces of legislation, in terms of the proximity of timing on the floor and also an identity of many key actors involved from the Senate (including Sens. Hatch, Kennedy, Metzenbaum, and Jeffords), the administration (Roger Porter, Assistant to the President, and Tom Scully of the Office of Management and Budget), and interest groups on both sides (Leadership Conference on Civil Rights and AFL-CIO for the proponents; National Assn. of Manufacturers and Chamber of Commerce for the opponents). But there also were many factors endemic to each bill individually — for example, the costs of employee benefits for OWBPA and the political implications of a so-called "quota" bill for the Civil Rights Act — and the Civil Rights Act attracted far more public and media attention than the OWBPA. Moreover, even senators themselves cannot possibly be certain how they would have voted on one bill in the absence of a second bill that may have affected their outlook in subtle or unanticipated ways.

77. See U.S. HOUSE OF REPS., *CALENDARS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND HISTORY OF LEGISLATION* (final ed.) 98th Cong. (10,134 bills introduced, 623 public laws), 99th Congress (8697 bills introduced, 664 public laws), 100th Congress (8515 bills introduced, 713 public laws), 101st Congress (9248 bills introduced, 650 public laws), 102d Congress (9602 bills introduced, 590 public laws).

78. The number of public acts passed by each Congress rose from an average of just under 550 during the first one-third of this century (1901-1933) to an average of 780 during the ensuing four decades (1933-1970); it has leveled off at 620 since 1971. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, pt. 2, at 1081 (1975); U.S. STATS. AT LARGE (vols. 85-106).

Numerous commentators have observed that federal legislation in recent decades has addressed new and complex areas. See, e.g., George E. Connor & Bruce I. Oppenheimer, *De-liberation: An Untimed Value in a Timed Game*, in CONGRESS RECONSIDERED 315, 316 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993) (noting the increased role of federal legislation since World War II in the economy, health care, education, the environment, energy, and civil rights). One indicator of this complexity is an enormous increase in the sheer volume of legislative language being enacted. For the 68th Congress (1923-1925), the *Statutes at Large* includes 1357 pages for 632 public laws. For the 83d Congress (1953-1954), the *Statutes at Large* includes 2850 pages — more than double the volume for 781 public laws. For the 98th Congress (1983-1984), the *Statutes at Large* includes 5299 pages — another enormous increase in volume even though the number of public laws enacted actually declined to 623, below the number enacted 60 years earlier. See U.S. STATS. AT LARGE (vols. 43, 67, 68, 68A, 97, 98).

The increased length and complexity of the legislative work product has imposed new constraints on Congress's ability to cope with competing demands. Prior to the 1960s, Congress ordinarily functioned for only seven or eight months each calendar year, but since the 1970s, Congress normally has operated eleven to twelve months a year. Today, many bills that would command majority support are not passed simply from lack of time to move them

these circumstances, the decisions about which bills are given priority are in large part a function of how Congress manages two institutional resources — time and political capital.

Individual senators and representatives facing the press of legislative business must deal with serious time constraints. Members must choose to expend their energies on certain legislative subjects instead of others.⁷⁹ They also must decide to participate in certain legislative activities and not others.⁸⁰ These time pressures assume added urgency because members must devote considerable attention to nonlegislative business, especially raising funds for reelection.⁸¹ Apart from the constraints on individual members, there is not enough floor time for every bill that one or more members wish to have considered. Accordingly, the leadership in each chamber must decide to bring up some bills and not others.⁸²

There also are inherent limits on the political capital available to each senator or representative. Individual members and committee leaders may alienate their colleagues by pressing them to vote for too many "controversial" bills.⁸³ Moreover, party leadership may

through the legislative process. See Connor & Oppenheimer, *supra*, at 316. Even the bills that do pass may receive markedly less deliberative attention from the body as a whole than was true on average in prior eras. See *id.* at 322-23 (comparing hours allotted for general debate in the 68th, 84th, and 96th Congresses).

79. Members' subject-matter priorities are determined in large part by their choice of committee assignments. Committee choices in turn are heavily influenced by how members view the distinct but overlapping objectives of serving local constituents (thereby advancing reelection prospects), enhancing relationships with colleagues (thereby securing prestige and power within the chamber), and promoting ideological or public policy objectives. Different committees offer varying opportunities to achieve each of these goals. See RICHARD F. FENNO, *CONGRESSMEN IN COMMITTEES* (1973); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 41-42 (1984).

In addition, committee choices are affected by members' prelegislative occupational interests; for example, judiciary committees attract attorneys, and commerce committees appeal to members with backgrounds in business.

80. It is routine for members to have conflicts among several hearings or between committee functions and floor time. See MICHAEL J. MALBIN, *UNELECTED REPRESENTATIVES* 239 (1980) (reporting that members are often unable to attend meetings at which legislative business is transacted); Richard L. Hall, *Participation, Abdication, and Representation in Congressional Committees*, in *CONGRESS RECONSIDERED*, *supra* note 78, at 161, 166-68 (reporting that scheduling conflicts are a major source of member frustration). At the end of a session, such conflicts may affect attendance at conferences as well. See generally TIEFER, *supra* note 46, at 823-24; LAWRENCE D. LONGLEY & WALTER J. OLESZEK, *BICAMERAL POLITICS: CONFERENCE COMMITTEES IN CONGRESS* 129, 212-13 (1989).

81. See Norman J. Ornstein et al., *The U.S. Senate in an Era of Change*, in *CONGRESS RECONSIDERED*, *supra* note 78, at 13, 20.

82. Certain bills are assured of being scheduled, such as the appropriations measures necessary for the federal government to continue operating and any revenue measures needed to raise the funds to be appropriated. Beyond these "imperatives," the leadership has more power to make discretionary scheduling decisions in the House than in the Senate. See TIEFER, *supra* note 46, at 187-88.

83. See generally KINGDON, *supra* note 79, at 194.

offend the rank and file by attempting — or being seen as attempting — to force too many bills to the floor that have a certain ideological flavor or come from a particular committee.

In the case of the OWBPA and the Civil Rights Act of 1990, the political capital of a key minority player was implicated. Senator Hatch, as ranking Republican on the Committee on Labor and Human Resources, was looked to by his conservative colleagues for leadership and guidance on legislation that emanated from the committee. He risked losing their respect, and adherence, if he broke with the conservative positions taken by a Republican president. Having done so once, and having carried most of them along,⁸⁴ he ran an even greater risk in doing so a second time on another civil rights bill.

The issue of limited political capital obviously may confront a majority party as well. For instance, assuming the presence of a Democratic majority, Democrats from the Northeast and Midwest may try to bring to the floor a range of bills or amendments supporting ideologically liberal positions on civil rights, protection for labor unions, environmental cleanup, and other social issues. But conservative Democrats from the Southeast and Southwest will resist having to vote on too many of these measures, which may be highly controversial with their supporters. The leadership has an incentive to regulate and limit the number of votes on these liberal bills, in an effort to minimize internal party dissension and avoid defeat before the full Senate.

The incentive to limit votes on potentially divisive issues is even stronger when one factors in the realities of time constraints on the floor. Given the number of bills competing as serious candidates for enactment, measures on which substantial consensus has been achieved are more likely to be brought up for a vote. This tendency places a premium on making bills broadly palatable.⁸⁵ Minimizing the controversial aspects of legislation is often accomplished procedurally. Thus members may agree to specify a time length for debate and a time certain for final vote, or they may schedule a few

84. Compare 136 CONG. REC. S13,611 (daily ed. Sept. 24, 1990), reprinted in 1 LEGIS. HIST., *supra* note 59, at 90 (reporting that 41 Republicans voted for the final negotiated version of the OWBPA and only four Republicans failed to vote for that version) with 136 CONG. REC. S13,217 (daily ed. Sept. 14, 1990), reprinted in 1 LEGIS. HIST., *supra* note 59, at 189 and S. 1511 (as reported by committee Apr. 15, 1990), reprinted in 1 LEGIS. HIST., *supra* note 59, at 394 (the latter two sources together indicating that recorded support for earlier versions of the bill included only four Republicans: Sens. Heinz, Jeffords, Cohen, and Hatfield).

85. See C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE 127-34 (1991); *Stat. Interp. Hrg.*, *supra* note 27, at 112 (statement of Prof. Stephen F. Ross).

key votes on identified, potentially divisive issues.⁸⁶ On other occasions, members advance the quest for consensus substantively by leaving divisive issues ambiguous in text or omitting them entirely from the statutory language.⁸⁷

Even at the committee stage, there can be pressure to achieve consensus for scheduling purposes. Because committee leaders know they must compete for scarce floor time, they may seek to move a bill quickly through markup in order to maximize the time available for subsequent floor consideration.⁸⁸ The attempt to accommodate opposing views may lead to substantive adjustments or compromises, but it may also produce the same kind of ambiguity or omission that occurs on the floor.

Contrary to the view of some theorists, Congress's approach to managing its institutional resources of time and political capital is neither static nor mechanical.⁸⁹ Decisionmaking in the legislative

86. See Ornstein et al., *supra* note 81, at 21-22 (discussing the Senate's use of unanimous consent agreements); Steven S. Smith, *Forces of Change in Senate Party Leadership and Organization, in CONGRESS RECONSIDERED*, *supra* note 78, at 259, 269-72 (reporting that unanimous consent agreements are more common and complex in the Senate today); Hall, *supra* note 80, at 162-63 (reporting that the number of bills considered under special rules in the House has risen dramatically in the last 20 years); Garry Young & Joseph Cooper, *Multiple Referral and the Transformation of House Decision Making, in CONGRESS RECONSIDERED*, *supra* note 78, at 211, 223 (describing the growth of restrictive rules in the House); see also CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 427 (4th ed. 1991) [hereinafter CQ GUIDE] (reporting that in the 95th Congress (1977-79), 15% of the rules reported to the House were closed or restrictive, and by the 101st Congress (1989-91), that number had risen to 55%). The Rules Committee's effort to control the number and nature of amendments offered followed the House decision to allow recorded votes on floor amendments, thereby making members accountable for these amendment votes to constituents, not just colleagues. *Id.*

87. Anecdotal examples of this practice abound. Former Representative Mikva describes how Representative Udall steered major strip mining legislation through the House using humor to avoid resolving tensions between supporters of uniform national standards and defenders of state sovereignty. See Mikva, *supra* note 3, at 380-81. Similarly, the 1991 Civil Rights Act is ambiguous on the issue of retroactivity, and the floor debates are replete with inconsistent statements on the issue from competing groups of supporters. See Pub. L. No. 102-166, §§ 109(c), 402, 105 Stat. 1071, 1078, 1099 (1991); 137 CONG. REC. S15,477 (daily ed. Oct. 30, 1991) (presenting the administration's views on the Act's effective dates); *id.* at S15,483 (statement of Sen. Danforth) (presenting his views on the retroactivity of the Act); *id.* at S15,485 (statement of Sen. Kennedy) (presenting his views on retroactivity).

At a more general level, text may be left inconclusive on certain matters to ensure the "supermajority" support for a suspension of the House rules that is needed to move the bill expeditiously. See Young & Cooper, *supra* note 86, at 224 (noting "an expanded reliance on suspension of rules," a device that requires that the bill be sufficiently noncontroversial to enjoy bipartisan committee support); Connor & Oppenheimer, *supra* note 78, at 323 (reporting that 47 bills were considered under suspension in 1923-24, 69 in 1955-56, and 397 in 1979-80). See generally 5 CONGRESSIONAL QUARTERLY, INC., CONGRESS AND THE NATION, 1977-1980, at 902-03 (1981).

88. See EVANS, *supra* note 85, at 48-49, 59 (discussing accelerated committee action as part of the reauthorization of Superfund).

89. Public choice theory has been criticized for asserting a unidimensional and overly simplistic model of the legislative process. See, e.g., WILLIAM N. ESKRIDGE, JR. & PHILIP P.

process is best viewed as dynamic and discontinuous. In this regard, political scientist John Kingdon has described Congress as an "organized anarchy."⁹⁰ Borrowing from the "garbage can model of organizational choice,"⁹¹ Kingdon views the congressional "garbage can" as one in which three separate "streams" coexist: *problems* that come to capture the attention of the policy community working in and around Congress;⁹² *proposals* generated as possible solutions to the problems;⁹³ and *politics*, which allows for openings in the legislative process to enact possible solutions.⁹⁴ A problem may be recognized and a solution may be favored by key players in the congressional policy community, but the solution will not become law unless the political process is simultaneously mastered by those favoring the legislative proposal. Whether proponents are able to master the process is unpredictable and not directly related to the magnitude of the problem or the objective persuasiveness of the solution.⁹⁵

FRICKEY, CASES AND MATERIALS ON LEGISLATION 58-59 (1988) (criticizing public choice theory for misconceiving the legislative process as static rather than dynamic); Daniel Shavero, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 77-85 (1990) (claiming that voters are not narrow profit maximizers and that politicians have goals beyond self-interest). See generally Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

90. KINGDON, *supra* note 79, at 89-91. These references to discontinuity and organized anarchy should not be equated with indeterminacy or incoherence. Although decisionmaking in Congress is a complex and fractured process, there may well be rules or considerations that can explain and predict legislative action. See generally *id.*; KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1992); McNollgast, *supra* note 58; Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, LAW & CONTEMP. PROBS., Winter 1994, at 51.

91. KINGDON, *supra* note 79, at 89 (citing Michael D. Cohen et al., *A Garbage Can Model of Organizational Choice*, ADMIN. SCI. Q., Mar. 1972, at 1).

92. This general "policy community" includes legislators, congressional staffs, interest groups, academic experts, and agency personnel. See KINGDON, *supra* note 79, at 92. The community actually consists of various more specialized policy communities devoted to particular policy areas. *Id.* at 122-23. Problems may come to the attention of a particular community through routine review of various activities or events; alternatively, some crisis or disaster may serve as a triggering or focusing event. See *id.* at 95-101, 199.

93. See *id.* at 92-93, 122-52. Although a large number of ideas are generated for consideration — what Kingdon refers to as a "policy primeval soup" — the ones most likely to ripen into concrete, problem-solving proposals possess certain traits: they are technically feasible, they are acceptable in value terms to specialists in the community, and they anticipate relevant budgetary and political constraints. *Id.* at 128, 138-46.

94. See *id.* at 93, 152-72. Various elements make up the political climate, including the national mood, public opinion polls, interest group pressure campaigns, shifts in partisan distribution of Congress, and change in administrations. Kingdon observes that these elements differ in weight from one situation to another; further, because of the extrinsic variables involved, events in this "politics" stream occur largely independently of problems and proposals.

95. See *id.* at 170-72.

The difficulty of enacting into law widely endorsed solutions to recognized policy problems is attributable, in part, to the procedural constraints within our legislative structure that allow a determined minority to delay or obstruct legislation.⁹⁶ These procedural hurdles can become especially formidable because, as Kingdon observes, problems not resolved in relatively short order may simply disappear from the legislative agenda.⁹⁷ There is no irresistible momentum for any given initiative, and legislative opportunities are lost when Congress determines that it is counterproductive to invest more time on the particular problem. Congress may reach this conclusion because the focusing event fades from public consciousness or from an interested group's agenda, or because key participants shift their attention to another problem that has greater personal appeal or more chance for success, or even because a key legislator pushing for change has passed from the scene.⁹⁸

In short, the opportunities for Congress to act are limited in predictable ways by the finite quantity of temporal and political resources and by substantial logistical and procedural constraints. These opportunities also are limited in unpredictable ways by the ebb and flow of public attention, interest group commitment, and intensity of member preferences. When Congress devotes more time to one legislative item, it sacrifices the opportunity to address other items on the legislative agenda. These opportunity costs are substantial and are often impossible to anticipate.

B. *Legislative History and Limited Windows of Opportunity*

One important way that Congress deals with its opportunity-cost problem is through the use of legislative history.

As has been frequently observed, Congress today is not in any meaningful sense a deliberative body.⁹⁹ Members are not generalist

96. See generally ESKRIDGE & FRICKEY, *supra* note 89, at 28-40 (discussing committee referral and markup, floor debate and amendment, and reconciliation between two versions through conference). Although some of these constraints — bicameralism, for example — are constitutionally explicit, many, including filibusters and committee structure, are not.

97. See KINGDON, *supra* note 79, at 109-10, 176-78 (discussing policy windows).

98. See *id.*

99. See, e.g., HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS 143-45 (1977); MALBIN, *supra* note 80, at 240-43; Connor & Oppenheimer, *supra* note 78, at 315-16, 320-27. There are, of course, occasions when Congress does deliberate as a body — that is, when many members participate in discussion and debate while many more members listen to the exchanges. A notable recent example was the debate by both houses of Congress in January 1991 on U.S. participation in the Persian Gulf War. But such examples are exceptional.

It is not clear at what point Congress ceased to be deliberative on a regular basis. Some observers may be looking through rose-colored glasses when they suggest that extended de-

legislative guardians of the common good, engaging in extemporaneous debate on the floor to explore the details and ambiguities of statutory language or to seek broad agreement about the meaning and merits of that language. Rather, Congress is a bureaucratic organization with thousands of employees, and its members are managers on the executive model more than deliberators on the judicial model.¹⁰⁰

Deliberation does occur, but it occurs at the committee and subcommittee levels. There, legislation is drafted and debated, policy expertise is solicited or contributed through informal exchanges and public hearings, and compromises are reached among key committee members and nonlegislative players.¹⁰¹

Beyond this committee-based policy community, most members decide to support or oppose a measure by relying on the expertise of particular colleagues who have taken leadership roles on the bill in question.¹⁰² This expertise is accessible to members in the form of legislative history — principally committee reports and to some extent explanatory floor statements.¹⁰³ Congressional rules require — subject to limited exceptions — that any committee report filed be made available to all members before the bill is considered on the floor.¹⁰⁴ Members may then examine the report directly to re-

liberative discussion on the meaning of substantive legislative language survived as the normal means of conducting business on the House or Senate floor until relatively recent times. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (World Publishing Co., 1956) (1885) (writing in 1883-1884 that "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work").

100. See Breyer, *supra* note 3, at 858-59.

101. See generally KINGDON, *supra* note 79, at 123; McNollgast, *supra* note 58, at 720-21.

102. Prior to floor consideration, most members are not personally familiar with the details — or sometimes even with the broad outlines — of legislation in which they have not actively participated. See, e.g., *Stat. Interp. Hrg.*, *supra* note 27, at 111 (statement of Prof. Stephen F. Ross). Reliance is not strictly a matter of party loyalty. Considerations of ideology or politics may cut across party lines. Thus, for instance, on a civil rights bill conservative Democrats may weigh the views of a moderate Republican more carefully than a liberal Democratic committee chair or floor manager.

Of course, members also are influenced by presentations from the executive branch, interest groups, and individual constituents. But the primary source of expertise is generally presentations from colleagues, although input from others may be coordinated with such presentations.

103. Hearings rarely are available in printed form prior to floor vote, so access depends on obtaining copies of individual prepared statements, or viewing the proceedings on C-Span. By contrast, committee reports and introductory floor statements are promptly accessible in print, to staff as well as members.

104. See STANDING RULES OF THE SENATE Rule 17.5 (1992) (requiring that reports be available two days prior to consideration, excluding Sundays and legal holidays); RULES OF THE HOUSE OF REPRESENTATIVES Rule 11.2(l)(6) (1992) (requiring that reports be available two days prior to consideration excluding Saturdays, Sundays, and legal holidays). Customarily, a copy of the report is placed on each member's desk prior to the start of debate.

ceive necessary information and assurances about a bill's content and projected consequences. Or they may depend on written or oral briefings from their own staffs, who in turn have relied heavily on the committee report to educate themselves.¹⁰⁵

Many former and current members have confirmed the central importance of committee reports to their own understanding of statutory text. For example, Judge James L. Buckley, former U.S. Senator and presently on the D.C. Circuit, has commented, "[M]y understanding of most of the legislation I voted on [while a U.S. Senator] was based entirely on my reading of its language and, where necessary, on explanations contained in the accompanying report."¹⁰⁶ Abner Mikva, a former member of the U.S. House of Representatives and until recently a judge on the D.C. Circuit, describes the committee report as the "bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute."¹⁰⁷ Finally, *Congressional Quarterly* has summarized Senator Arlen Specter's views in this way: "[M]embers of Congress are more likely to read a committee report than the bill itself. The prose of a report is easier to understand, and, because a bill usually amends an existing statute, it is impossible to follow without referring to the U.S. Code."¹⁰⁸

The detailed information and commentary included in committee reports invariably covers more ground than the text itself. Two key substantive sections of most reports — not always titled the same way — are "Background and Need" and "Committee Views." The former explains the problems that gave rise to the bill and the bill's broad response. The latter is a more detailed commentary on legal issues arising under each section or title of the bill.¹⁰⁹ This approach represents a "middle ground" response to the intractable dilemma of drafting legislative rules.

105. See *Stat. Interp. Hrg.*, *supra* note 27, at 111 (statement of Prof. Stephen F. Ross). My experience in seven years as subcommittee staff counsel is similar to that described by Ross. Staff for legislators off-committee who sought written information asked primarily if not exclusively for the report and almost never for the text of the reported bill. My own inquiries, directed to staff from other committees, were similarly focused on the report. Occasionally, briefing documents prepared by staff from the Democratic or Republican leadership also play a role in educating staff and members. But these too are generally drafted on the basis of committee report language and often with substantial input from staff on the committee that reported the bill in question.

106. *Stat. Interp. Hrg.*, *supra* note 27, at 21 (statement of James L. Buckley).

107. Mikva, *supra* note 28, at 184.

108. Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress' Will*, 48 CONG. Q., 913, 917 (1990) (relating Sen. Specter's view).

109. Apart from these and other substantive sections, reports also include many formal or recitative provisions. See generally TIEFER, *supra* note 46, at 183-86.

One horn of the dilemma is that statutory language must be specific enough to give notice to affected parties, as well as to guide agencies charged with implementing and enforcing the text and courts charged with reviewing alleged noncompliance. If such predictability and notice were the sole justifications for having legislative rules, then it would be easier to make such rules categorical and unequivocal. But there is another horn to the dilemma.

In the real world, categorical rules end up covering more or less than their authors sought to address — and sometimes more or less than makes sense. After all, statutes ordinarily must be applied to unanticipated circumstances affecting unidentifiable entities in the indefinite future. If legislative rules are too specific or exhaustive, they will unduly constrain agencies, courts, and private parties in their ability to adapt to situations that were unforeseen and even unforeseeable at the time a statute was enacted.

The problem of an unduly confining text is particularly vexing in an era when Congress must respond to more complex and technically sophisticated problems through the legislative process.¹¹⁰ The solution chosen by Congress has generally been a text that is rougher and more approximate than what is optimal from the standpoint of predictability. It contains some details, but it is accompanied by committee reports that amplify the need for the legislation and include examples or additional instructions for applying the text to specific settings. By allowing for some flexibility in statutory language, Congress minimizes the risk of erroneous or absurd applications of an overly detailed text.¹¹¹ This flexibility also allows agencies the scope to perform their delegated interpretive function.¹¹²

Apart from improving the particular legislative product, Congress's use of legislative history enhances its overall product by diminishing burdens on the congressional calendar. Detail or guidance included in committee reports generally addresses matters that are subsidiary to what is contained in the text. This kind of explanatory material is meant to be illustrative and *not* to resolve

110. See *supra* note 78.

111. This approach has long been justified as essential in areas of tax legislation. See Ferguson et al., *supra* note 27, at 806-07. The approach has far broader application in the modern era of statutory rulemaking, when Congress regulates environmental emissions into the air and water, the use of communications technology, and innumerable other subjects that defy definitive textual renditions.

112. See Peter L. Strauss, *When the Judge Is not the Primary Official with the Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI-KENT L. REV. 321, 335-38 (1990).

ambiguities that have consciously been included or retained by the authors. The alternative of adding these details to text increases the possibility for delay and obstruction even though the details themselves would command overwhelming support. This is because each provision, clause, or word of a statute can become the focus of additional amendments or procedurally based attacks from a small but sufficiently determined minority.¹¹³ The amendments may be defeated, or the attacks overcome, but the time and resources expended will limit Congress's capacity to legislate in other areas.

Treatment of subsidiary matters in text also increases the prospect that more divisive collateral issues will have to be confronted by Congress. These collateral issues may be raised in the form of strategic amendments to jeopardize the bill's progress by attracting opposition that would not otherwise exist.¹¹⁴ Disagreement over such issues may delay for years the enactment of a bill that has broad majority support.¹¹⁵ Congress may even decline to pursue enactment of the underlying legislation for fear of disturbing settled expectations and precedent on collateral issues.¹¹⁶

113. The difficulties of navigating the legislative process are in part a function of the typical legislative personality. *See, e.g., Quotable*, ROLL CALL, July 19, 1993, at 4 ("I believe if we introduced the Lord's Prayer here, Senators would propose a large number of amendments to it." (quoting Sen. Henry Wilson (R-Mass., 1812-1875))); Mikva, *supra* note 3, at 380 (commenting on the difficulty of getting agreement on a single set of words from "435 prima donnas in the House and 100 prima donnas in the Senate"). But these difficulties also reflect the reality of a modern decentralized Congress in which members, individually or in small groups, are more disposed to throw their weight around. *See, e.g., Ornstein et al., supra* note 81, at 21, 38 (discussing the strategic use of filibusters to extract concessions); Smith, *supra* note 86, at 270 (discussing the tactical use of holds or threatened filibusters).

114. *See* Popkin, *supra* note 4, at 318. Collateral amendments may pertain to a single "hot-button" issue, or to a series of marginally controversial matters. *See, e.g.,* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). The legislation overrode the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984), concerning the scope of statutory provisions prohibiting discrimination in federally funded programs. Although legislation to override *Grove City* was introduced early in 1984, it took four years to enact a bill into law. The delay was due in substantial part to collateral concerns about the bill's effect on the operation of religious institutions and small businesses. *Compare* S. REP. NO. 64, 100th Cong., 1st Sess. 20-21 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 22-23 (preserving the longstanding exemption for educational institutions controlled by religious organizations) and 131 CONG. REC. 2150 (1985) (statement of Sen. Kennedy) (describing same) with 134 CONG. REC. 393 (1988) (statement of Sen. Hatch) ("[The bill] forc[es] churches and synagogues to bow under the heavy hand of Federal regulations just because they run a social service program in their basement which receives but \$1 of Federal money.") and *id.* at 386 (statement of Sen. Thurmond). *See also* 134 CONG. REC. 4640 (1988) (statement of Sen. Mitchell) (criticizing a national lobbying effort that stated that the bill would force churches to hire homosexuals and AIDS victims); *id.* at 4756-57 (statement of Rep. Hefner) (same).

115. *See, e.g., supra* note 114 (discussing the Civil Rights Restoration Act).

116. One can easily imagine such an example in light of *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-75 (1989) (declining to overrule a prior decision construing 42 U.S.C. § 1981 to prohibit racial discrimination in private conduct). The Court in *Patterson*, after requesting the parties to brief whether it should overrule *Runyan v. McCrary*, 427 U.S. 160 (1976), relied on the fact that its prior interpretation was consistent with our nation's

Of course, some explanatory material is meant to address ambiguities in text. Ambiguous statutory provisions may be deliberately inserted by a bill's authors or may be perceived by other members subsequent to the bill's introduction.¹¹⁷ But when textual ambiguities appear during the legislative process, members may still deem the "cost" of clarifying amendments prohibitive.

A decision to seek amendments at the committee stage may result in a lower agenda priority and lengthy delays in securing committee approval.¹¹⁸ Negotiating language changes takes time. Also, if there are to be multiple amendments or a committee substitute, the changes must be circulated for review by committee members. Assuming that the process takes weeks, this may mean committee consideration is postponed for several markups, often delaying action for months. Such a delay can be critical in terms of floor scheduling.

If the ambiguities are discovered after the committee has reported the bill, parliamentary rules may make it inconvenient, time-consuming, or otherwise logistically impracticable to resolve them through a floor amendment. In the House, the Rules Committee typically issues a limited rule allowing only certain agreed-upon votes.¹¹⁹ Providing for additional votes on amendments to resolve late-discovered ambiguities requires additional negotiation and perhaps a new rule from the committee. In the Senate, if a bill has come up on unanimous consent, or on a unanimous consent time agreement with certain designated amendments, altering the procedural arrangement will require securing unanimous consent for the addition of a new amendment.¹²⁰ Such consent may be difficult to obtain.¹²¹ Finally, even when a floor amendment can be accom-

broad sense of justice and social welfare concerning racial discrimination. 491 U.S. at 174. But had the Court overruled *Runyan* and limited § 1981 to government conduct, the same broad sense of justice might well have inhibited corrective legislative action. Congress would have had to debate for years the scope and details of how to limit private intentional race discrimination under § 1981 — to consider, for example, whether remedies should be limited to the equitable relief then available under Title VII and whether "reverse discrimination" should be expressly prohibited. Supporters of broader coverage might well have concluded that such a debate was too costly in terms of disturbing the nation's broad sense of justice on this issue.

117. See *supra* text accompanying notes 20-28; see also Allan C. Hutchinson & Derek Morgan, *The Semiology of Statutes*, 21 HARV. J. ON LEGIS. 583, 592-95 (1984) (reviewing DAVID R. MIERS & ALAN C. PAGE, *LEGISLATION* (1982)) (discussing the politicization of statutory interpretation under English law).

118. See EVANS, *supra* note 85, at 48-52, 59.

119. See *supra* note 86. See generally TIEFER, *supra* note 46, at 291-95.

120. See generally TIEFER, *supra* note 46, at 468, 573-77.

121. See *id.* at 576. The modification could be made through recommittal of the bill to the authorizing committee, with instructions to report out the bill as modified. See *id.* at 679-

plished through the rules, the risks in terms of parliamentary tactics may be disproportionately high.¹²²

Obviously, some ambiguities that can significantly affect the thrust of the proposed law *are* resolved through amendment. Unless the textual ambiguities are of sufficient magnitude, however, Congress generally issues clarifying explanations through committee reports, floor statements by the bill's principal sponsor, or pre-arranged floor colloquies between members.¹²³

C. Congressional Self-Governance

Congress's reliance on legislative history as an integral aspect of managing its workload is not accidental. Rather, that reliance reflects a conscious decision in response to the changed realities of modern American government. Two developments within Congress have played an especially important role in triggering this institutional response.

First, Congress since World War II has striven to secure and maintain coequal policymaking status with the executive branch. Following the spectacular growth of executive-branch power during the New Deal era, Congress became concerned that it needed additional resources and expertise in order to reassert initiative in essential aspects of lawmaking such as information-gathering, formulation of legislative options, and oversight.¹²⁴ Beginning with

83. But the recommittal may take some time to implement and may also flag the bill as more controversial than it really is.

122. In the House, modifying the rule to add an amendment requested by the majority may lead to a negotiated addition of another amendment requested by the minority. In the Senate, modifying the bill on the floor through "committee amendments," which require no vote, may be attacked as evidence that members are being hoodwinked and will not know what version of the text they are voting on. *See, e.g.*, 136 CONG. REC. S13,238-40, S13,241 (daily ed. Sept. 17, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 148-53 (recounting Sen. Metzenbaum's modification of a bill and quoting Sen. Hatch as criticizing bill managers for "asking that the Senate proceed on a bill which . . . the vast majority of Senators have barely had enough time to read, let alone analyze"); 133 CONG. REC. 18,128 (1987) (statement of Sen. Quayle) (objecting to taking up a bill because of changes in text made while unanimous consent agreement was being negotiated).

123. *See Stat. Interp. Hrg.*, *supra* note 27, at 112-13 (statement of Prof. Stephen F. Ross); *see, e.g.*, Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POLY. 43, 46 (1988) (agreeing that legislative history may overcome some congressional shortcomings, noting that the Comprehensive Crime Control Act's failure to refer to the Speedy Trial Act was cured by floor debate).

124. *See* S. REP. NO. 1400, 79th Cong., 2d Sess. 2 (1946) (accompanying Legislative Reorganization Act of 1946) ("Devised to handle the simpler tasks of an earlier day, our legislative machinery and procedures are by common consent no longer competent to cope satisfactorily with the grave and complex problems of the post-war world. They must be modernized if we are to avoid an imminent break-down of the legislative branch of the National Government."); 92 CONG. REC. 10,039-40 (1946) (statement of Rep. Monroney); *id.* at 10,046 (statement of Rep. Michener); *id.* at 6344-45, (statement of Sen. LaFollette). *See gen-*

the Legislative Reorganization Act of 1946,¹²⁵ Congress overhauled its network of standing committees and augmented the size of its committee staffs. The number of staff members grew steadily for several decades, increased explosively during the 1970s, and has largely stabilized since 1980. Committee staff, which plays the most significant role in devising and implementing legislative strategies, has grown in the House from 193 staff members in 1947 to 589 in 1967, 1,917 in 1980, and 1,986 in 1989.¹²⁶ Senate committee staff has grown at an almost comparable rate, rising from 290 staff members in 1947 to 621 in 1967 and then 1,191 in 1980, before falling off slightly to 1,013 in 1989.¹²⁷

In the Legislative Reorganization Act of 1970,¹²⁸ Congress reaffirmed the central importance of committee staff efforts and authorized substantially higher professional staff levels.¹²⁹ Further, Congress since 1970 has greatly augmented its ability to conduct sophisticated factual and legal research and to evaluate ongoing and proposed government programs, through the creation and expansion of various support agencies that work closely with committee members and their staffs.¹³⁰

erally Fox & HAMMOND, *supra* note 99, at 20-22; KENNETH KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 3-4 (3d ed. 1977); MALBIN, *supra* note 80, at 5; David E. Price, *Professionals and "Entrepreneurs": Staff Orientations and Policy Making on Three Senate Committees*, 33 J. POL. 316, 316 (1971).

125. Pub. L. No. 79-601, 60 Stat. 812 (1946) (codifying 15 standing committees in the Senate and 19 in the House, and authorizing the hiring of four permanent staff members for each standing committee). See generally MALBIN, *supra* note 80, at 9-19.

126. CQ GUIDE, *supra* note 86, at 483. Congress used the experience of professional staffing for its "money committees," including Appropriations and Finance, during the 1920s as models for its new staffing approach. See 92 CONG. REC. 6395 (1946) (statement of Sen. LaFollette); MALBIN, *supra* note 80, at 11.

127. CQ GUIDE, *supra* note 86, at 483. There has also been dramatic growth in the size of members' personal staffs — from 1440 to 7569 in the House between 1947 and 1989, and from 590 to 3837 in the Senate over the same period. *Id.*

128. Pub. L. No. 91-510, 84 Stat. 1140 (1970).

129. See, e.g., H.R. REP. NO. 1215, 91st Cong., 2d Sess. 15 (1970), reprinted in 1970 U.S.C.A.N. 4417, 4431 ("The staffs of the committees of the House make vast contributions to the legislative, investigative, and oversight work all committees perform each Congress. But while the quality of the staffs is high, their numbers are insufficient to meet the increasing workload of the committees they serve.").

130. Among the established support agencies, the Congressional Research Service (CRS) had existed for decades, but it was during the 1970s that CRS first began to work closely with committee staff in analyzing and evaluating legislative proposals. Staff at CRS went from 332 in 1970 to 806 in 1976 and to 860 in 1987. The General Accounting Office (GAO), established in 1921, had long performed only traditional fiscal auditing functions. But Congress in the 1970 Legislative Reorganization Act directed the GAO to do cost-benefit studies of government programs. Pub. L. No. 91-510, § 204(a), 84 Stat. 1140, 1168 (1970). By the late 1970s, GAO reported that 35% of its workload and over half of its self-initiated work was "program evaluation," including evaluations of proposed — as opposed to already-operating — legislative programs. The GAO had over 5000 staff by the late 1980s.

Committees were an important instrument of congressional operations before World War II.¹³¹ But larger committee staffs, supported by expertise from other congressional agencies, have played a key role in transforming committees into aggressive policymaking entrepreneurs.¹³² Initial notions that committee staff would be "neutral professionals" — notions derived from the executive branch model — were dispelled rapidly as committee chairs harnessed the new expertise for predictably partisan ends.¹³³

Committees today vary in the degree to which staff merely implement specific directives from the committee chair, as opposed to exercising discretion in carrying out the chair's general marching orders.¹³⁴ Moreover, and directly related to the type of legislative history being considered here, modern committees also vary in the amount of attention and deference they are likely to give to decisions of the federal courts.¹³⁵ Yet even with due regard for these

As for newer support agencies, the Office of Technology Assessment (OTA), created by statute in 1972, was responsible for "generating accurate, comprehensive, and objective information about technology to facilitate its effective social management by political decisionmakers." S. REP. NO. 1123, 92d Cong., 2d Sess. 19 (1972), *reprinted in* 1972 U.S.C.A.N. 3568, 3584; *see* Pub. L. No. 92-484, § 2(c)(1), 86 Stat. 797, 797 (noting in the statement of purpose that federal agencies charged with reporting to Congress were "not designed to provide the legislative branch with adequate and timely information, independently developed, relating to the potential impact of technological applications"). OTA has over 140 staff members devoted exclusively to analyzing and evaluating future policy choices being presented to Congress. The Congressional Budget Office (CBO), created by statute in 1974, has more than 225 staff members, one-third of whom evaluate policy issues for Congress. *See generally* MALBIN, *supra* note 80, at 15-16; NORMAN J. ORNSTEIN ET AL., *VITAL STATISTICS ON CONGRESS 1993-1994* 130 (1994).

131. *See, e.g.*, 92 CONG. REC. 10,040 (1946) (statement of Rep. Monroney) (recognizing that the committee system had grown in importance, and urging that it be reorganized and modernized to ensure adequate performance).

132. *See* Price, *supra* note 124, at 335-36 (applying the term *policy entrepreneur* to committee staff); *see also* Shavero, *supra* note 89, at 93. *See generally* KINGDON, *supra* note 79, at 129-30 & n.3.

133. *See* FOX & HAMMOND, *supra* note 99, at 20-25 (describing early aspirations for non-partisanship as modeled on the executive branch, and stating that by the late 1940s members recognized that truly nonpartisan staff was difficult to come by and probably illusory); *id.* at 152-53 (noting that staff were encouraged to take initiatives furthering interests of their respective Congress members); MALBIN, *supra* note 80, at 12 (noting that committee chairs assert control over staffs).

134. *See* MALBIN, *supra* note 80, at 46-74; Price, *supra* note 124, at 320-36. To some extent, this reflects differing personalities and leadership styles of individual chairs. But it may also reflect differences between committees with a largely fixed and budget-related agenda, such as Appropriations or Finance, and committees with a more open-ended mission, such as Judiciary, Environment and Public Works, and Labor. The former tend to have less entrepreneurial staffs and to operate in a somewhat less partisan fashion. *See* Price, *supra* note 124, at 326-31; *see also* EVANS, *supra* note 85, at 15-42 (discussing five contextual and individual variables that explain behavior of committee chairs in the U.S. Senate).

135. *See* Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 W. POL. Q. 949 (1992). Miller discusses his study of three House committees that indicated that a committee with a constituency orientation — Interior and Insular Affairs — paid the least attention to judicial decisions, that a committee with a pri-

variations, the central point remains that for over four decades Congress has asserted its independent policymaking power primarily through its system of committees.¹³⁶ The manifestations of committee power include formulating policy recommendations as proposed text, developing explanatory materials that amplify the text, and building coalitions necessary to win approval of the text both in committee and on the floor.¹³⁷ The full body of each chamber depends on its subbodies to perform this work, including the drafting of legislative history materials to explain and justify policy that stems from the text. Insofar as committee reports — and floor statements by committee chairs serving as bill managers — are a central part of the policymaking enterprise, they plainly reflect Congress's own design for the legislative process.

The second principal development in triggering congressional reliance on legislative history has been the decentralization of power within Congress. During the 1950s and 1960s, Congress acted to modify the centripetal effects of the seniority system and to establish functioning subcommittees on a permanent basis.¹³⁸ Gradually, most Democratic senators, and many Democratic congressmen, were able to chair a subcommittee and make use of its professional staff. By the late 1960s, Republicans — the minority in both chambers — were pressing for the opportunity to have their own professional minority committee staff. The Legislative Reorganization Act of 1970 addressed this concern,¹³⁹ and minority committee staff were hired in increasing numbers during the 1970s.

many objective of securing power and prestige — Energy and Commerce — viewed courts as another political actor entitled to little deference, and that a committee with a policy orientation — Judiciary — treated judicial decisions with the most respect and deference. *Id.* at 954-63. There are obvious parallels between the variations identified in committee interaction with the courts and the distinct objectives that trigger members' interest in committee assignments. *See supra* note 79.

136. This is the consistent conclusion reached by political scientists who have studied Congress in the last four decades. *See generally* KOFMEHL, *supra* note 124 (1950s); Price, *supra* note 124 (1960s); MALBIN, *supra* note 80 (1970s); EVANS, *supra* note 85 (1980s).

137. *See* EVANS, *supra* note 85, at 2-3; George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 66-67.

138. The so-called Johnson Rule, in effect from 1953 to 1961, ameliorated the effects of the seniority system in the Senate by providing that no Democratic senator would receive a second "plum" committee assignment until every Democratic senator had at least one such assignment. *See* KOFMEHL, *supra* note 124, at 18 & n.3; *see also* Ornstein et al., *supra* note 81, at 20 (reporting a 1970 rule that limited members to service on only one of the four most prestigious committees). Also during the 1950s, the Senate Judiciary Committee established permanent subcommittees, setting a model for other committees and allowing for proliferation of majority subcommittee staff. *See* FOX & HAMMOND, *supra* note 99, at 23; MALBIN, *supra* note 80, at 13-14.

139. *See* Pub. L. No. 91-510, § 302(b), 84 Stat. 1140, 1177-78 (1970) (allowing the minority party to select up to two of the six professional staff on each committee); *see also* H.R. REP.

Given that the goal of these reforms was to "democratize" Congress, it is not surprising that one effect has been to disperse the power to initiate and negotiate legislative solutions. While the primary locus of decisionmaking remains at the full committee,¹⁴⁰ individual members have demonstrated an unprecedented interest in proposing their own legislative ideas and then pressing for those ideas to be adopted.¹⁴¹ Members have come to believe, apparently with good reason, that having a visible personal stake in a legislative solution enhances their status with their colleagues and also with the voters.¹⁴² Members now have the staff resources to translate that belief into action on a regular basis.¹⁴³

In these circumstances, legislative history often provides an effective, alternative form of currency. A committee member may want to modify the language of a bill authored by the chair, but the member's policy concern may also be accommodated through language in the committee report. Similarly, a senator or representative from off the committee who wishes to propose a floor amendment may, instead, negotiate a colloquy with the bill's floor manager that addresses the proposed policy change.¹⁴⁴ In each in-

No. 1215, *supra* note 129, at 15-17, reprinted in 1970 U.S.C.C.A.N. at 4431-32 (explaining need for change). See generally FOX & HAMMOND, *supra* note 99, at 23-24; MALBIN, *supra* note 80, at 13.

140. See EVANS, *supra* note 85, at 101-02 (discussing and rejecting the "subcommittee government" hypothesis).

141. See MALBIN, *supra* note 80, at 44-45; Ornstein et al., *supra* note 81, at 19 (noting a marked increase in the proportion of floor amendments coming from senators off the committee of jurisdiction). A dramatic recent illustration is the fact that more than 100 distinct health care reform bills were introduced and discussed during the 102d Congress. See CONGRESSIONAL RES. SERV., HEALTH INSURANCE LEGISLATION IN THE 102D CONGRESS: PART II, at 1 (1993).

142. See MALBIN, *supra* note 80, at 28; see also Price, *supra* note 124, at 320-22 (recounting the example of Sen. Magnuson championing consumer legislation based on his desire to stand for something after near-defeat in the 1962 election).

143. Subcommittee chairs often have staffs of their own, especially in the more decentralized committees such as Senate Labor and Human Resources, House Education and Labor, and both Judiciary Committees. Members who are not subcommittee chairs need not rely only on their personal staffs. They often call on support agencies such as CRS, GAO, and OTA for assistance in gathering information, analyzing currently authorized programs, and proposing new or modified legislative approaches. See *supra* note 130.

144. These are both regular practices in Congress. For an example of committee report language, see S. REP. NO. 380, 102d Cong., 2d Sess. 25 (1992). This report accompanied S. 600, the Child Labor Amendments, and specified that despite the proposed prohibition on seafood processing by sixteen- and seventeen-year-olds, "teenagers would still be able to work for their parents on the family fishing boat." *Id.* Apparently, such practice is common in Rhode Island, and the report language was included at the request of committee member Senator Pell. Telephone conversation with Gail Laster, formerly counsel to Senate Labor Subcommittee (Feb. 1, 1994) (notes on file with author). For an example of a floor colloquy, see 133 CONG. REC. 18,924 (1987) (statement of committee chair Kennedy) (assuring Sen. Reid (D-Nev.) that under the bill that eventually became the Worker Adjustment Retraining Notification Act, employers ordered by the Nevada State Gaming Authority to close down

stance, the individual member has achieved personal recognition on the issue, gaining credit with interested constituents and colleagues. The committee chair or floor manager has accommodated a colleague's concern while avoiding the risks that accompany a revision of the text.¹⁴⁵

D. *Valuing Legislative Efficiency*

The legislative process depicted in this Part is at odds with the idealized image of Congress as a collection of generalists who openly and thoughtfully debate the consequences of the legislation on which they are voting.¹⁴⁶ There are many factors besides the vigorous initiative of committees and the proliferation of staff that help explain why Congress today does not function in a unified deliberative mode. Advances in technology, notably electronic voting and live telecasts of floor proceedings, have resulted in members spending less time in the chamber, either listening to one another or discussing privately how they plan to vote.¹⁴⁷ The need to raise money for reelection campaigns occupies a sizeable proportion of members' time while they are in office.¹⁴⁸ Members also devote considerable time granting audiences to a burgeoning interest group community, as well as to large numbers of local constituents who come to Washington.¹⁴⁹ Further, the sheer complexity of national problems has contributed to the steady growth of government, of which Congress is a part.¹⁵⁰ But whatever the reasons may be, one important consequence of these developments is that Congress has paid increasing attention to the problem of managing its heavier workload — and the nation's more complex legislative

immediately and without warning would not have to give 60 days' notice to their employees). See generally *Stat. Interp. Hrg.*, *supra* note 27, at 142-43 (statement of Prof. Stephen F. Ross).

145. See *supra* text accompanying notes 79-123 (discussing delay, modification, and other opportunity costs).

146. See MALBIN, *supra* note 80, at 241-42.

147. See *id.* at 17. See also Connor & Oppenheimer, *supra* note 78, at 325 (confirming that the televising of floor proceedings coincided with a major decline in members' attendance on the floor).

148. This may be attributed to the high cost of purchasing "television time" during campaigns, as well as to the Supreme Court's conclusion in *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976), that the First Amendment prohibits imposing limits on candidate expenditures. Cf. MALBIN, *supra* note 80, at 243 (reporting that members in 1977 spent on average 11 minutes per day engaged in research and reading, versus one full day per week as recently as 1965).

149. See Connor & Oppenheimer, *supra* note 78, at 324; Jonathan Rauch, *The Hyperpluralism Trap*, NEW REPUBLIC, June 6, 1994, at 22.

150. See MALBIN, *supra* note 80, at 245.

agenda — as effectively as possible. Congress uses legislative history as an integral part of its quest for successful operation.¹⁵¹

This is not to suggest that legislative efficiency should be celebrated as a supreme value. There are constitutional constraints on the promotion of congressional efficiency.¹⁵² Moreover, Congress faces certain risks if it fails to balance efficiency against competing legislative values, such as fair notice to regulated entities and coherence among related laws. Part III will discuss these constitutional and functional concerns.

Still, this article does suggest that legislative efficiency ought to be valued, and a reader might well ask, "Why?" For example, assuming *arguendo* that the 1991 Civil Rights Act is weaker for plaintiffs in part because Congress expended key institutional resources on the OWBPA, a reader might ask why weaker civil rights laws are a bad result. More generally, one might argue that the powers of a determined minority to delay or derail the passions of an activist majority — that is, to interfere with legislative efficiency — are just what the Founding Fathers had in mind.¹⁵³

This objection deserves a more complete response than can be provided here, but several observations are worth making. First, the concern to check legislative efficiency developed in the late eighteenth century, when federal legislative power was conceived in very limited terms. In the post-New Deal era, we expect problems to be addressed by the national government, and Congress acts on

151. It is apparent, of course, that Congress has not been steadfast or entirely successful in its effort to manage its agenda. Indeed, the democratization and decentralization of Congress arguably have made the legislative process more fragmented and less efficient. *See, e.g.,* Adam Clymer, *The Gridlock Congress*, N.Y. TIMES, Oct. 11, 1992, at A1; Martin Tolchin, *If This Is Gridlock, Where's the Traffic Cop?*, N.Y. TIMES, Oct. 9, 1984, at A26. Still, without legislative history as a lubricant for a more individualistic Congress, the problem of inefficiencies and opportunity costs would be far worse. This argument carries special force when democratization itself seems irreversible and when any structural efforts to limit its scope may well be effective only at the margins. *See* Janet Hook, *Congressional Reform Panel Winds Up Work in Discord*, 51 CONG. Q. 3249, 3249-50 (1993) (reporting that modest reform proposals were recommended, House and Senate recommendations differed, and there was a strong partisan split in the House); Janet Hook, *Fervor for Reform Wanes Amid Internal Misgivings*, 52 CONG. Q. 1265, 1274-75 (1994).

152. *See, e.g.,* INS v. Chadha, 462 U.S. 919, 951 (1983) (holding that legislative action must comply with the procedural requirements of Article I); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (stating that legislative action may not conflict with a specific prohibition of the Constitution or unduly restrict essential political processes).

153. *See* THE FEDERALIST NO. 10, at 80-84 (James Madison) (Clinton Rossiter ed. 1961) (arguing that a system of representation controls factions), No. 51, at 322 (James Madison) (arguing that bicameralism hinders the abuse of legislative authority), No. 71, at 432 (Alexander Hamilton) (asserting that elected representatives must not give "an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive" but instead should "withstand the temporary delusion in order to give [the people] time and opportunity for more cool and sedate reflection").

an unprecedented range of complex issues.¹⁵⁴ When we seek to reconcile the modern paradigm of broad federal legislative powers with the reality of Congress as an institution of limited resources, legislative efficiency does become an important value. Forcing Congress to address issues in legislative text — including responding in text to every aspect of judicial decisions interpreting prior text — erects obstacles that diminish Congress's ability to control its own agenda and to fulfill its mandate in a framework of expanded national government.¹⁵⁵

One alternative to promoting congressional efficiency by relying on legislative history is to delegate to administrative agencies the primary responsibility for interpreting inconclusive text.¹⁵⁶ Such an attitude, however, cannot be a complete substitute for judicial use of legislative history. First of all, Congress often does not grant any agency the authority to interpret the statute in question.¹⁵⁷ And second, even when it does, Congress may intend that the agency be constrained by relevant legislative history.¹⁵⁸ Indeed, judicial deference to agencies on the meaning of inconclusive text may conflict with understandings expressed in legislative history that are fairly attributable to Congress.¹⁵⁹ At the very least, normative issues are raised as to why agency deference should not be subordinated to appropriately reliable statements in legislative history.

Finally, it is not at all clear that judicial interference with legislative efficiency will yield a higher quality textual product. Transferring legislative history details into statutory text may on occasion make Congress confront important substantive matters that ought

154. See *supra* note 78. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* (1990).

155. Increases in staff may enhance legislative productivity up to a certain point, but crucial aspects of the legislative process, such as negotiating compromises and persuading individual colleagues, require significant leadership from members. See, e.g., *supra* text accompanying notes 65-69 (describing the role of senators on OWBPA and the 1990 Civil Rights Act); McNollgast, *supra* note 58, at 726. Because that leadership is in large part non-delegable, any depletion of members' own time and political capital makes Congress less capable of setting and fulfilling its own priorities.

156. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) (holding that "reasonable" agency interpretations will prevail "[i]f . . . Congress has not directly addressed the precise question at issue"). See generally David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 954-56 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990).

157. The agency may be authorized to litigate but not to make rules; alternatively, there may be no agency authority at all. See Sunstein, *supra* note 156, at 2093-94.

158. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See generally Sunstein, *supra* note 156, at 2109.

159. Cf. McNollgast, *supra* note 58, at 737 (suggesting that judicial deference to agencies may reassign weight to the President's preferences even though the President's preferences were not pivotal, or even significant, at the time the legislation was developed).

not to be avoided. At the same time, the systematic addition of such details will often result in reduced textual coherence and a less inclusive legislative process.¹⁶⁰

In sum, Congress's increased use of legislative history is part of an institutional effort to augment and maintain its status as a co-equal branch of government, while managing its consequently more burdensome workload. The end of having lawmaking authority exercised without domination from outside sources — be they interest groups or executive branch agencies — is entirely appropriate under our system of separation of powers. The means chosen — substantial reliance on committee specialists assisted by a bureaucracy of expert staff — is worthy of respect because Congress itself has made the choice and is most unlikely to reverse its decision.¹⁶¹

Under these circumstances a refusal by courts to credit legislative history will have the predictable consequences of altering how Congress conducts legislative business and diminishing Congress's overall legislative product. Such results may or may not be desirable from the standpoint of individual jurists, but they are not normatively neutral. In particular, rejecting or systematically discounting legislative history is countermajoritarian, both in declining to consult materials that are integral to Congress's chosen lawmaking process and in failing to acknowledge the substantial opportunity costs imposed on Congress.

To be sure, the concerns expressed about judicial reliance on legislative history are not without foundation. It is worth considering, however, whether the concerns warrant total rejection or systematic discounting, as opposed to intelligent screening, of that history. Accordingly, I now turn my attention to those concerns.

III. THE PROBLEMS OF RELYING ON LEGISLATIVE SIGNALS

Despite Congress's regular creation of amplifying materials as part of its legislative process, there is considerable skepticism as to whether courts should rely on this legislative history when inter-

160. See *infra* notes 228-31 and accompanying text.

161. Despite occasional complaints from members about misuses of legislative history, most members support judicial reliance on such history in appropriate circumstances. See *infra* text accompanying notes 219-24. There has been no serious effort to limit such reliance. By contrast, Congress in 1979 did entertain and take seriously an effort to limit or abolish judicial reliance on the validity of agency regulations. See 125 CONG. REC. 23,478-99 (1979) (recording the Senate's adoption of Sen. Bumpers's amendment to the Federal Courts Improvements Act after a motion to table failed 51-27, though the bill ultimately died in the House). See generally Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 567-70 (1992).

preting federal statutes. Congressional commentary that expresses approval or disapproval for prior judicial interpretations of materially unaltered text provokes a broad range of arguments against the use of legislative history. Of course, it is anathema to those who refuse to credit any legislative history.¹⁶² But it also draws fire from those who would comfortably rely on other kinds of legislative signals, because it is both postenactment history¹⁶³ and history associated with legislative inaction.¹⁶⁴

Although a thorough treatment of these positions lies beyond the scope of this article,¹⁶⁵ this Part briefly considers and responds to each argument. In each instance, it will appear that the risks in having courts credit such statements of approval or disapproval are not so substantial as to warrant excluding them per se. At the same time, these risks are significant enough to justify judicially fashioned limits based on certain considerations, which are set forth in Part IV.

A. *Constitutional Arguments for Disregarding or Devaluing Legislative History*

Justice Scalia has been the leading proponent of the idea that federal courts should reject legislative history when seeking to give meaning to congressional enactments in the context of a specific case.¹⁶⁶ The justification for this so-called textualist approach is in part constitutional, based on considerations of separation of powers

162. See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring); *United States v. Taylor*, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring). See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990).

163. See, e.g., *South Carolina v. Regan*, 465 U.S. 367, 378-80 n.17 (1984); *Consumer Prod. Safety Comm'n. v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980). See generally Aleinikoff, *supra* note 4, at 41 n.96.

164. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119-22 (1940); *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969). See generally John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture Into "Speculative Unrealities"*, 64 B.U. L. REV. 737 (1985).

165. For more extensive analysis of these issues, see sources cited *infra* at notes 171, 183, 191, 202-03 (discussing broad-based refusal to credit legislative history); *infra* notes 241 and 243 (discussing refusal to credit postenactment history); and *infra* note 262 (discussing refusal to credit legislative inaction).

166. It is not strictly accurate to say that Justice Scalia believes courts should *never* consult legislative history. He has asserted that courts may do so in the rare cases when such history would enable them to avoid an absurd result apparently dictated by text. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (noting that legislative history confirms that Congress nowhere contemplated or endorsed the absurd result suggested by a literal reading of text).

and legislative supremacy,¹⁶⁷ and in part practical, based on concerns about the inherently unreliable nature of committee reports and floor statements.¹⁶⁸ The constitutional arguments will be discussed in this section; section III.B will discuss the practical arguments for textualism.

1. *Separation of Powers*

One constitutional argument for ignoring legislative history stems from the Article I requirement that in order for a bill to become "the law" it must be adopted by both chambers of the legislature and then presented to the President.¹⁶⁹ Unlike bill language, committee reports and floor statements are not voted on by either chamber and are not presented to the President. Accordingly, a court's reliance on these materials impermissibly elevates the views of a legislative subgroup — a committee or individual members — over that of Congress as a whole.¹⁷⁰

This argument mistakenly conflates the Article I limits on congressional power to make laws with the Article III powers exercised by courts to apply and interpret laws.¹⁷¹ Legislative history is not itself "the law," nor do courts that refer to such history typically regard it as "the law."¹⁷² Rather, courts consult committee reports and floor statements just as they do the dictionary, or the canons of construction, or prior agency interpretive practice. All these

167. See, e.g., *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring); *United States v. Taylor*, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

168. See, e.g., *Conroy*, 113 S. Ct. at 1567; *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 619-22 (1991) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring).

169. U.S. CONST. art. I, § 7, cl. 2.

170. See generally Starr, *supra* note 3, at 375-76.

171. See Breyer, *supra* note 3, at 862-63; Eskridge, *supra* note 162, at 671-72; William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 371-75 (1990); Note, *Why Learned Hand Would Never Use Legislative History Today*, 105 HARV. L. REV. 1005, 1006-08 (1992).

172. Courts ordinarily use legislative history for one of three reasons — to confirm or reinforce plain meaning, to help resolve textual ambiguity, or to avoid an absurd or unconstitutional result. See *Stat. Interp. Hrg.*, *supra* note 27, at 5-6, 14-17 (statement of Chief Judge Patricia M. Wald) (reviewing each of these uses by the Supreme Court in its 1989 Term); Stephanie Wald, *The Use of Legislative History in Statutory Interpretation Cases in the 1992 U.S. Supreme Court Term: Scalia Rails But Legislative History Remains on Track*, 23 SW. U. L. REV. 47 (1993). See generally *Train v. Colorado Pub. Interest Res. Group*, 426 U.S. 1, 10 (1976) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (quoting *United States v. American Trucking Assns.*, 310 U.S. 534, 543-44 (1940))). But cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 412 n.29 (1971) ("Because of this ambiguity [in the legislative history] it is clear that we must look primarily to the statutes themselves to find the legislative intent.").

sources help a court attribute meaning to the actual statutory language — that is, to understand what Congress has enacted.¹⁷³

Judicial examination of relevant contexts might not be necessary if there were but one self-evident explanation of the text for each particular setting. As we have seen, however, statutory construction is often not this straightforward. Provisions enacted to adjust or extend an existing statutory scheme may include ambiguous language that permits more than one plausible meaning. Alternatively, the statutory language enacted in the adjustment or extension may be incomplete because the issue before the court was not resolved or even considered by the enacting Congress. In either instance — ambiguity or incompleteness — congressional action has failed to address definitively the matter that is now presented in a specific case or controversy. The parties to this controversy agree that the statutory scheme as modified *does* resolve the matter, although they disagree over the nature of that resolution. The question, therefore, is not whether an issue unresolved in an Article-I-approved context should be seen as resolved through non-Article-I-approved materials from legislative history. Rather, the question is whether a judge may consult these materials to shed light on matters that are controlled or affected by an inconclusive text. In these settings, looking to the historical expectations of the statute's authors for assistance in formulating a coherent response is just as compatible with the letter of Article I as looking to other contextual sources.¹⁷⁴

173. Textualists may be on more solid ground in arguing that legislative history unrelated to *any* enactment is entitled to little or no weight. If Congress has not passed a law, then the statements of committee members or individual legislators cannot qualify as evidence of any negotiation or compromise that was part of a lawmaking process. Moreover, from a practical standpoint, when a particular Congress has taken no action, any explanatory material is likely to be of indeterminate reliability. Either the material was *not* read because no bill was ever seriously considered, or it *was* read but one cannot say it was or would have been credited or endorsed because the accompanying bill never received the requisite support. At the same time, one cannot say it was or would have been rejected because there are so many different reasons for a bill's not receiving requisite support. See generally *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). But see *infra* note 265.

174. It is possible to contend that courts are more justified in using legislative history as a tool to address textual ambiguity than in using such history to fill gaps in a legislative scheme. See *American Hosp. Assn. v. NLRB*, 499 U.S. 606, 617 (1991) (citing *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158 (1989), for the proposition that legislative history unconnected to "specific statutory language ordinarily carries little weight"). Filling gaps may be viewed as more akin to the fashioning of federal common law, which takes courts beyond the domain of the enacted statutory text. But this distinction between ambiguities and gaps seems overdrawn. At times, legislative history generally related to the statutory scheme Congress has modified is wholly unrelated to the particular provisions that Congress seriously considered. Yet on other occasions when Congress has acted, legislative history may bear directly on provisions Congress decided *not* to change as well as on what it actually modified.

Nor does Article III specify what method the courts must follow when interpreting federal statutes. Although the English courts had embraced a textualist approach to statutory interpretation before the adoption of the U.S. Constitution,¹⁷⁵ that approach was not long adhered to in our newly established legal system. As far back as 1823, the attorney general invoked legislative history to interpret private laws, and as early as 1860 the Supreme Court relied on committee reports and floor statements to construe public laws.¹⁷⁶ Supreme Court reliance on legislative history increased steadily during the late nineteenth and early twentieth centuries¹⁷⁷

See, e.g., American Hosp. Assn. v. NLRB, 899 F.2d 651, 658 (7th Cir. 1990), *affd. on other grounds*, 499 U.S. 606 (1991). In the Seventh Circuit opinion in *American Hospital Association*, Judge Posner reasoned:

[I]n changing the domain of application of § 9(b) [of the National Labor Relations Act], the 1974 amendments *may have changed its meaning without changing its words*. The [committee report commentary on § 9(b)] can therefore be regarded as a commentary on the meaning of the 1974 amendments and hence as *equivalent to pre-enactment legislative history, rather than as a gratuitous comment unrelated to legislative action . . .*

899 F.2d at 658 (emphasis added).

Although there are arguments on both sides, this article assumes that the distinction between ambiguity and incompleteness at most addresses differences in degree as to reliability, rather than differences in kind as to legitimacy. Instead of pursuing that *ex post* distinction, the article focuses on a related *ex ante* question: whether a statutory text has been left inconclusive — that is, ambiguous or incomplete — on a specific issue because Congress did not anticipate the issue or because the issue was too contentious to be resolved in text. *See infra* notes 332-40 and accompanying text.

175. *See* Millar v. Taylor, 98 Eng. Rep. 201, 217 (K.B. 1769) (holding that the meaning of an Act of Parliament is taken from the text as enacted and not from the history of changes it underwent in the House of Commons). *See generally* FRANCIS BENNION, *STATUTORY INTERPRETATION* 455-59 (2d ed. 1992); P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 100-02 (1987).

176. *See* Note, *supra* note 171, at 1009 (discussing Opinion of the Attorney General); *Dubuque and Pacific R.R. v. Litchfield*, 64 U.S. 66, 87 (1860); *see also* *Blake v. National Banks*, 90 U.S. 307, 319-20 (1875); *Jennison v. Kirk*, 98 U.S. 453, 459-60 (1879).

There are reasons to distinguish the approaches of English and American courts on this issue. In the parliamentary system, legislative power is tightly controlled by the executive — that is, the Cabinet, supported by the civil service — and majority party discipline is rigorous. Parliamentary committees rarely initiate legislation on their own, and successful legislative forays by individual members are almost unthinkable. Further, unlike Congress, the British Parliament has virtually all laws drafted by a professional drafters' office, with few if any intermediate amendments. Under these circumstances, the "process" of legislative enactment involves little or no negotiation and compromise, and that process accordingly has little to offer in the way of amplification or explanation of text. *See* ATIYAH & SUMMERS, *supra* note 175, at 298-323; *see also* Breyer, *supra* note 3, at 868. *But cf.* *Pepper v. Hart*, 3 W.L.R. 1032 (1992) (relaxing the traditional English rule and holding that parliamentary materials may be relied upon to construe ambiguous or obscure text in certain circumstances). *See also* J.H. Baker, *Case and Comment: Statutory Interpretation and Parliamentary Intention*, 52 CAMBRIDGE L.J. 353 (1993) (criticizing *Pepper v. Hart*).

177. Landmark cases include *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 464-65 (1892), and *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). There also was persistent support from academics for this judicial reliance. *See, e.g.,* HENRY C. BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* § 96 (2d ed. 1911); James M. Landis, *Statutory Interpretation*, 43 HARV. L. REV. 886, 893 (1930); Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal*

and has grown at an accelerated pace since 1940.¹⁷⁸ In short, neither Article I nor Article III prohibits or even discourages the use of legislative history to assist in statutory interpretation, and such use is now supported by longstanding Supreme Court precedent.

2. *Legislative Supremacy*

A related, constitutionally based attack on the use of legislative history stems from an asserted respect for democratic theory and the lawmaking supremacy of Congress. Judges and scholars have argued that the text alone reflects the "intent" of Congress as a whole. Judicial reliance on materials that reflect the views of some mere subdivision of the elected membership, or even the views of unelected staff or lobbyists, undermines the supremacy of the legislative branch. The use of legislative history makes such undermining inevitable, the argument continues, because legislative history contains so many details, nuances, and even conflicting statements that federal judges end up with broad discretion to substitute their own ideological or personal views for the congressional text.¹⁷⁹

But the appeal to considerations of legislative supremacy gives rise to problems of its own. Congress's authority to exercise "all legislative powers" under Article I includes the authority to organize itself in order to fulfill its legislative mission.¹⁸⁰ Over two hundred years, Congress has developed a distinctive organizational approach. Each chamber delegates to committees the primary responsibilities for initiating, explaining, and justifying particular legislation. Committees in turn rely on professional staff for much of their work. In addition, Congress publishes a daily record through which members have prompt access to one another's views on pending legislative matters. Given that Congress as an institution has chosen to order its legislative affairs in this manner, considera-

Statutes, 25 WASH. U. L.Q. 2, 25 (1939). See generally J. WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 187-88 (1950); Note, *supra* note 171, at 1010-11.

178. See, e.g., *United States v. American Trucking Assns.*, 310 U.S. 534, 543-49 (1940). See generally Note, *supra* note 171, at 1010-11; Wald, *supra* note 3, at 195. Such growth is not surprising, given that statutes have grown in numbers and complexity, and the need to interpret them — and reconcile them with one another — comprises an ever-greater portion of the federal courts' workload.

179. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Eskridge, *supra* note 162, at 653-54; Starr, *supra* note 3, at 376.

180. See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . ."); U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . .").

tions of deference toward Congress would seem to warrant respect for its designated legislative process as well.¹⁸¹

If anything, a court will appear *less* deferential toward the legislative branch when it resolves textual ambiguities by reference to the dictionary or judicial canons of construction while discounting or ignoring statements from key legislators on which their colleagues relied in casting votes.¹⁸² The explanations offered in committee reports or in bill managers' floor statements at least derive directly from Congress's own policymaking authority. Absent evidence that Congress relied on, or was even aware of, extralegislative explanatory sources — evidence that would presumably be found in the legislative history — invoking these sources appears less "legitimate" from the standpoint of legislative supremacy.¹⁸³

In this regard, the record of recent congressional overrides of Supreme Court statutory interpretation rulings is instructive. The Court in recent years has placed greater reliance on dictionary definitions¹⁸⁴ and the canons of construction¹⁸⁵ and somewhat less reliance on legislative history¹⁸⁶ when interpreting statutes. Many of the well-publicized overrides have promptly reversed decisions in which the Court had relied on plain meaning or on the canons of

181. See *Stat. Interp. Hrg.*, *supra* note 27, at 7, 19 (statement of Chief Judge Patricia M. Wald). Obviously, such respect is not without limits. One can imagine Congress choosing a form of internal organization that produces unacceptable, antidemocratic consequences — for example, giving five votes to all committee chairs, or disenfranchising junior members of the minority party. See U.S. CONST. art. I, § 3, cl. 1 ("[E]ach Senator shall have one Vote."). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

182. See McNollgast, *supra* note 58, at 738; Mikva, *supra* note 3, at 385-86. The fact that statements are written by staff or even lobbyists is of no constitutional significance; members do not write statutes either. Staff are hired by and are responsible to members: "The job of congressional staff is to implement, not to thwart, their bosses' legislative agendas." Costello, *supra* note 137, at 67; see also *Stat. Interp. Hrg.*, *supra* note 27, at 32 (statement of Judge Stephen Breyer). Insofar as congressional staff depart from or frustrate the wishes of a member, that is a practical problem of manipulation or abuse. See *infra* section III.B.

183. See Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1130, 1137-38 (1992); Costello, *supra* note 137, at 64; cf. Eskridge, *supra* note 171, at 394-95 (noting observation by earlier legal process scholars that legislative history's "great advantage" was its ability to provide more comprehensive contextual framework that "minimiz[ed] the role of the judge's personal preferences").

184. See David O. Stewart, *By the Book: Looking up the law in the dictionary*, A.B.A. J., July 1993, at 46, 46-47 (reporting that Justices recited dictionary definitions of key phrases 54 times in 38 cases between Jan. 1, 1992 and May 17, 1993, compared to only four cases in 1951-1952); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994) [hereinafter *Looking It Up*] ("Over the past decade, the Supreme Court's use of dictionaries in its published opinions has increased dramatically."); see also Schauer, *supra* note 21 (discussing the Court's use of the dictionary in the 1989 Term).

185. See *Stat. Interp. Hrg.*, *supra* note 27, at 83 (statement of Prof. William N. Eskridge).

186. See *id.* at 5-6 (statement of Chief Judge Patricia M. Wald); *id.* at 83 (statement of Prof. William N. Eskridge).

construction.¹⁸⁷ Indeed, growing congressional frustration over the Court's approach is suggested by the increasing percentage of overrides that have occurred within a short period following the Court's decision.¹⁸⁸ At bottom, the Court's textualist approach seems to thwart, rather than respect, the will of Congress.¹⁸⁹

B. *Practical Arguments for Disregarding or Devaluing Legislative History*

Even if it is not suspect on constitutional grounds, legislative history is often criticized as dangerously unreliable. Judges and scholars have expressed concern that the positions taken in commit-

187. See, e.g., *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83 (1991), *overridden* by Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079; *Public Employees' Retirement Sys. v. Betts*, 492 U.S. 158 (1989), *overridden* by Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), *overridden* by Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845; *Smith v. Robinson*, 468 U.S. 992 (1984), *overridden* by Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796. See generally Eskridge, *supra* note 8, at 347-48 (concluding that Congress is more likely to override "plain meaning" decisions than any others, since nearly half of the overrides since 1967 address decisions in which the primary reasoning was plain-meaning or canons-of-construction reasoning, whereas overrides of decisions based on statutory "purpose" are rare); Solimine & Walker, *supra* note 14, at 448 (noting that a disproportionate number of decisions between 1968 and 1988 that were overridden by Congress relied on a "plain meaning" analysis).

188. See Eskridge, *supra* note 8, at 450-55 (reporting data on overrides that indicate that 62% of statutory overrides between 1987 and 1990 occurred within two years of the Court's decision, whereas 44% of overrides between 1982 and 1986, and 32% of overrides between 1967 and 1981, were within two years of the Court's decision). While an "override" Congress may be reacting to the Court's disregard for prior congressional purposes, the override Congress and the "previously enacting" Congress are of course two distinct entities that may have separate purposes. At the same time, a number of recent overrides have occurred promptly enough to allow for continuous participation by key legislators. See, e.g., 124 CONG. REC. 8218 (1978) (statement of Sen. Javits, coauthor of 1967 ADEA) (asserting during a floor debate on a conference report to override the Supreme Court's interpretation of the ADEA that the Supreme Court misconstrued an earlier congressional purpose respecting the scope of the employee benefit plan exception); 131 CONG. REC. 21,392 (1985) (statement of Sen. Simon, original House co-sponsor of the Education of All Handicapped Children Act) (asserting as part of the floor debate accompanying a bill to override the Supreme Court's interpretation of the Act that the Court misconstrued an earlier congressional purpose respecting availability of certain remedies against states).

The tension between a Congress that expresses certain collective understandings through legislative history and a judiciary that disregards such evidence as unauthoritative has distinctly historical overtones. See Strauss, *supra* note 112, at 343-46 (noting that earlier in this century, legislative history was viewed as providing context that forced judges to respect social purposes of statutes); Eskridge, *supra* note 171, at 392 (noting that legislative history as evidence of statutory purpose became a dominant theme after 1938).

189. See Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991); see also *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error." (quoting *Smith v. Robinson*, 468 U.S. 992, 1031 (1984) (Brennan, J., dissenting))).

tee reports and key floor statements are unlikely to be representative of the statutory text being enacted. They contend that the history is produced secretly, whereas text may be openly debated and must be openly voted on; that it is produced by congressional staff, who are not accountable to any member except their own boss and who often act even without her knowledge and consent; and that it is especially susceptible to pressure from individuals or groups outside Congress, who are less able to effect comparable modification in text.¹⁹⁰

Several observers maintain that reservations about the reliability of legislative history have come to assume special significance in very recent times. They note that as judges have more regularly and visibly consulted legislative history and as drafters of that history have recognized the judicial propensities, the drafters have acquired an incentive to introduce statements solely to affect the meaning of the text as applied in court. Thus, it is argued, those who create legislative history no longer confine their interest to the legitimate "political" objective of informing members or persuading them to vote for the bill. They now have a powerful additional interest in the distinct "legal" objective of altering the way a court will construe the bill's provisions subsequent to enactment.¹⁹¹

This argument is more appealing than the formal, constitutional arguments previously discussed. It also has direct application to the type of legislative history we are considering — approvals and disapprovals of court decisions construing materially unaltered statutory provisions that are now being reenacted. Insofar as the statements of approval or disapproval contained in the committee report have no specific analogue in text, they do not explain anything the committee itself has drafted.¹⁹² Thus, the contention that these statements illuminate the meaning of text approved by the committee and by Congress seems less persuasive. Moreover, commentary on court decisions may use technical, "legal" vocabulary

190. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring); Popkin, *supra* note 4, at 310-12; Starr, *supra* note 3, at 376-77.

191. See Strauss, *supra* note 112, at 340-43; *Stat. Interp. Hrg.*, *supra* note 27, at 140-41 (statement of Prof. William N. Eskridge); Note, *supra* note 171, at 1015-18. Some might question, however, whether this concern over the potential for abuse in the creation of legislative history is really all that new. See Glendon M. Fisher, Jr. & William J. Harbison, Note, *Trends in the Use of Extrinsic Aids in Statutory Interpretation*, 3 VAND. L. REV. 586, 596 n.29 (1950) ("The freedom with which the federal courts have resorted to the use of extrinsic materials has probably tended to encourage an abuse in the legislative process itself; namely, the 'manufacturing' of 'legislative history' for statutes.").

192. See *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (Scalia, J.); Costello, *supra* note 137, at 43.

that is more familiar to judges than to the “average” member who is not an attorney. This heightens the suspicion that inclusion of such commentary is part of an agenda to manipulate courts rather than to inform or persuade legislators.

Still, the fact that legislative history can be unreliable and the concern that manipulation may be more common today than in prior decades do not justify condemning judicial reliance on all such history. In order to address the claim of “systematic unreliability,” one must consider two principal contentions made in support of this claim: (i) the committee-based process of drafting legislative history is corrupted by the drafters themselves — congressional staff, lobbyists, and agency personnel; and (ii) the committee-based product cannot be imputed to Congress as a whole.

1. *The Corruption Argument*

It is widely recognized that congressional staff play the major role in drafting legislative history.¹⁹³ Commentary on court decisions does not differ from other committee report explanations in this respect. At least some members of the committee in whose name the report is filed, as well as many members of Congress at whom the materials are aimed, will lack the time and expertise to become familiar with any case law that is discussed.¹⁹⁴ These members will then rely on the initiative and judgment of their own professional staff, just as they do when it comes to understanding and endorsing text.¹⁹⁵ Such reliance is not troubling if one makes the sensible assumption that, as a general matter, professional staff re-

193. See, e.g., KOFMEHL, *supra* note 124, at 118-26; Costello, *supra* note 137, at 67; EVANS, *supra* note 85, at 2.

194. Considerations of time may be more consistently important than limited expertise. Despite assertions about their lack of legal sophistication, members are more likely to be familiar with case citations than some critics suggest. In the 102d Congress (1991-1992), 46% of all members listed law as their profession. See *Characteristics of Congress*, 49 CONG. Q., 118 (1991). This compares with 49% of all members in 1983-1984, 59% of all members in 1965-1966, and 57% of all members in 1945-1946. See WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 112 (6th ed. 1985); JAMES C. KIRBY, JR., *CONGRESS AND THE PUBLIC TRUST* 78 (1970); GEORGE B. GALLOWAY, *CONGRESS AT THE CROSSROADS* 28-29 (1946). One study suggests that lawyer-members “pay more attention to the courts and are much more familiar with legislative options in reacting to court decisions than are their non-lawyer colleagues.” Mark C. Miller, *Lawyers in Congress: What Difference Does It Make?*, 20 CONGRESS & PRESIDENCY 1, 12 (1993).

195. See *supra* section II.C (describing the use of staff and decentralization leading to staff resources for even junior members).

flect the substantive views of their principals and act with the trust and sanction of those principals.¹⁹⁶

While some staff on occasion may draft report language to promote legislative objectives that extend beyond or are at odds with the views of their boss, repeated actions taken to further independent agendas are likely to come to the member's attention and result in discipline or discharge. In this regard, certain factors may make congressional staff more loyal or dedicated as "agents" than would be true elsewhere in the labor market. First, staff are recruited and hired to work for particular chairs or other committee members. Loyalty and congruence of viewpoints are highly relevant hiring considerations if one is to promote the member's own legislative values and policies.¹⁹⁷ Further, considerations of political accountability make the member sensitive to conduct that may threaten her own job security and provide an incentive to monitor office performance. That incentive is enhanced by the prospect of publicity or media exposure for conduct at odds with the member's stated goals or objectives. Finally, congressional staff are unusually vulnerable "at will" employees, not covered by most federal statutory protections or by recent common law erosions of the at-will doctrine.¹⁹⁸

Apart from the central role played by committee staff, regulated entities likely to be affected at the postenactment stage often lobby for the inclusion of specific report language focused on statutory decisions by federal courts.¹⁹⁹ They may do so to assert a preferred resolution of ambiguous text or simply to assure sufficient instruction to minimize uncertainty and attendant litigation costs.²⁰⁰ Similarly, executive branch agencies may negotiate with committee staff to include legislative history about prior statutory decisions that will affect the way they perform as enforcers of the new law. Further, what appears in the committee report to "guide" the federal courts

196. See Popkin, *supra* note 4, at 309-10; *Stat. Interp. Hrg.*, *supra* note 27, at 32 (statement of Judge Stephen Breyer); Costello, *supra* note 137, at 67.

197. See FOX & HAMMOND, *supra* note 99, at 148, 153 (arguing that staff are hired for loyalty, expertise, and judgment and that most staff reflect or even reinforce the member's views and values); Price, *supra* note 124, at 320-25 (presenting an example of an aggressively proconsumer committee staff that reflected the chairman's desire to be known as a strong consumer advocate).

198. See Janet Hook, *Search for Consensus Delays Markups*, 51 CONG. Q. 2605, 2617 (1993) (reporting that the Joint Committee on Organization of Congress was likely to recommend that Congress for the first time must comply with the workplace laws it imposes on others).

199. See generally Eskridge, *supra* note 8, at 359-64.

200. See, e.g., Ferguson et al., *supra* note 27, at 806-08.

will probably be scrutinized by representatives of the regulated entities, by groups promoting the regulatory approach, and by agency personnel.

A skeptic might well suggest that allowing agency bureaucrats or interested groups to have drafting input, or even to assume substantial monitoring powers, invites systematic subversion of the text voted on by members.²⁰¹ In fact, the regular participation of these “outsiders” is unlikely to produce such results. Because the nonlegislative interests — the agencies charged with implementation, the groups promoting regulation, and the entities to be regulated — collectively bring both technical expertise and a diversity of perspectives to the legislative table, the prospect of insertions or manipulations that are systematically inconsistent with text is minimized.

In particular, agency personnel are promptly answerable to Congress through legislative oversight and annual appropriations. The close, ongoing relationship with key legislators and their staffs makes it unlikely that agency personnel will sanction uses of legislative history that regularly undermine or depart from the thrust of the text. Indeed, one scholar has suggested that the need to maintain internal morale in an agency of career professionals, as well as considerations of political accountability, may well militate in favor of an agency’s taking the most principled approach to drafting and monitoring the use of legislative history.²⁰²

As for so-called interest group agendas, these too are unlikely to depart systematically from textual objectives. For one thing, private interest groups may well endorse the principled or “public policy” ends of the legislation.²⁰³ Economically based interest groups may aggressively pursue a “public good” because it serves their long-term economic needs or even because it burnishes their public

201. See generally Popkin, *supra* note 4, at 311-12, and sources cited therein.

202. See Strauss, *supra* note 112, at 329-33. But cf. Note, *Justice Scalia’s Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 189 (suggesting that agencies may ignore committee report directives); *Stat. Interp. Hrg.*, *supra* note 27, at 106-10 (statement of Prof. Stephen F. Ross) (suggesting that agencies at times do ignore such directives and act opportunistically). An agency’s more immediate functional accountability to a contemporary Congress for interpretation of an enacting Congress’s legislative history creates a different dynamic from what exists between Congress and the courts. See generally Strauss, *supra* note 112.

203. See Shaviro, *supra* note 89, at 94-96 (noting that interest group members often join for broad purpose objectives, not just material wealth advancement, and that interest group leaders pursue combinations of goals just as members of Congress do); Popkin, *supra* note 4, at 312 (noting that private interest groups may support public values).

image.²⁰⁴ Further, many of the interest groups most active in the legislative process today are issue-oriented rather than economically oriented. Their vigilance regularly provides a counterbalance to the efforts of private economic interests. Issue-oriented groups include groups advocating protection for civil rights, a cleaner environment, reform of political campaign practices, and numerous other public policy objectives that do not further the economic interests of the groups' members. Indeed, such issue-oriented groups often offset one another during the legislative enactment process. The years-long battle over the Brady Bill, pitting pro- and antigun-control groups against each other, is only one prominent example.²⁰⁵ Under these circumstances, there is no reason to believe that the input to legislative history from "outsiders" *systematically* undermines the input of committee members and their staffs.

2. *The Unrepresentative Character Argument*

The most "influential" legislative history — that is, that which is taken most seriously by members, regulated entities, executive agencies, and courts — is a product of the committee system.²⁰⁶ Once again, committee report approval or disapproval of court decisions is part and parcel of this committee-based product. An important assumption underlying the claim of systematic unreliability

204. For example, during the 1980s many major chemical companies supported both the Labor Department's successful promulgation of its Hazard Communication Standard — requiring private manufacturers to provide information to workers who face risks from exposure to chemicals while on the job — and an unsuccessful effort in Congress to establish a national program for federal identification, notification, and monitoring of workers exposed to toxic substances. In addition to promoting the "public good" of improved occupational health and safety, chemical industry support for these substantial regulatory efforts also promoted possible preemption of more restrictive state and local regulation, as well as possible protection against excessive tort liability afforded by compliance with federal standards. Finally, industry support promoted a responsible public image, which was not unimportant to chemical manufacturers in the context of the 1984 mass disaster in Bhopal, India — when over 2000 persons were killed in a gas leak at a Union Carbide plant — and other less dramatic incidents in this country. *See generally* OSHA Hazard Communication Final Rule, Preamble, 48 Fed. Reg. 53,280, 53,282-83, 53,323 (1983) (discussing chemical industry support and preemptive efforts); S. REP. NO. 166, 100th Cong., 1st Sess. 16, 32-33 (1987) (discussing chemical industry support for S. 79, the High Risk Occupational Disease Notification and Prevention Act, and the effects of legislation on employer liability).

205. *See, e.g., Hearing Before the Subcomm. on Crime and Criminal Justice of the Comm. on the Judiciary to Consider H.R. 7, the Brady Handgun Violence Prevention Act*, 102d Cong., 1st Sess. (1991) (testimony from the National Rifle Assn. and Handgun Control); *Hearing Before the Subcomm. on Crime of the Comm. on the Judiciary to Consider H.R. 993, the Handgun Violence Prevention Act*, 101st Cong., 2d Sess. (1990) (testimony from Handgun Control, the Coalition to Stop Violence, the National Rifle Assn., and the Citizens' Committee for the Right to Keep and Bear Arms).

206. Committee reports and conference report explanations are the key examples, but floor statements by the bill manager and other leading sponsors also are likely to be drafted by committee staff. *See generally* КОФМЕЛ, *supra* note 124, at 123-24.

is that no good reason exists to impute the committee's product to Congress as a whole. Inasmuch as only a few members participate, even indirectly, in writing and ratifying this history — whereas the entire body is said to participate in writing and ratifying the statutory text — the prospects for manipulation of the many by these few are simply too great.²⁰⁷

The alleged dichotomy between how text and legislative history are “created” does not withstand scrutiny. As previously discussed, there is no uniformly generated “collective intent” accompanying each statutory text.²⁰⁸ Most members most of the time do not participate in any way in drafting the text on which they are asked to vote. Nor do these members derive whatever understanding they may have of the proposed statute from any general deliberative process in which they all can participate. Rather, the deliberative process that shapes each bill, and the votes of most legislators, involves a smaller circle: leaders and interested members from the committee of jurisdiction, committee staff, and concerned actors from the executive branch and the private sector.²⁰⁹ Because members and staff with specialized responsibility and expertise change from one bill to another, the picture that emerges is not of one large deliberative body producing a uniform institutional intent. Rather, the true picture is of a system of small deliberative bodies that over time allows most members to influence the meaning of some statutes.²¹⁰

Accordingly, there is no reason to conclude that committee-drafted legislative history is significantly less imputable to Congress than committee-drafted text. The same actors who draft legislative history are involved in drafting statutory language, monitoring the amendment process, and advising legislators about which way to vote. The fact that members vote on text does not give them the independence of judgment to “rise above” the information and arguments on which they must rely when casting their votes.²¹¹

207. See Popkin, *supra* note 4, at 313-14, and sources cited therein.

208. See *supra* text accompanying notes 99-108.

209. See KINGDON, *supra* note 79, at 123, 146-48, 169-70; Hall, *supra* note 80, at 161-62.

210. See Correia, *supra* note 183, at 1154-56.

211. There is nothing distinctively educational or reflective about the process of voting in Congress. Many votes on final passage of legislation are taken by unanimous consent based on a preapproved “script,” without members being present at all. See, e.g., 132 CONG. REC. 28,559-658 (1986) (recording the Senate’s passage of more than 20 bills by unanimous consent, including complex legislation such as the Bankruptcy Reform Act and the Rehabilitation Act Amendments (overriding *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)) while the only senators participating on the floor were Stevens for the majority and Byrd for the minority); 135 CONG. REC. S16,117-57 (daily ed. Nov. 17, 1989) (recording the

A related version of the “unrepresentative character” argument is that committee memberships do not adequately reflect the composition of the chamber as a whole. Some scholars point out that committee assignments are heavily influenced by member demand and that members seek to join committees on which they can pursue their intense policy preferences. The result, they argue, is a pattern of “preference outlier” committees, each of which expresses policy preferences in its area of jurisdiction that are more extreme and homogeneous than the preferences of the larger body.²¹² Other scholars acknowledge the importance of self-selection but observe that preferences are likely to exist on opposite sides of many issues and that these preferences tend to offset one another. For them, the result is most often a heterogeneous membership adequately reflecting both sides of the policy spectrum.²¹³

The debate over the preference-outlier status of congressional committees is beyond the scope of this article. But regardless of how extensive such status may be, it does not follow that committee-based legislative history will be “biased” in the sense that committee report commentary or related floor statements regularly would depart from the meaning of committee-drafted text. Certain factors operate to encourage accuracy and probity by the members themselves. In the short term, members must rely — and know that they must rely — on one another’s representations as to what a bill means. The institution depends upon the accuracy of committee-based information in moving its agenda each session. Further, legislators typically aspire to a long-term relationship with their colleagues and with the institution. Under these circumstances, the desire to be viewed as honest and fair even during fierce partisan disputes creates a strong incentive for committee leaders and floor managers not to overstate or understate the bill’s general or specific objectives.²¹⁴

passage of numerous bills on unanimous consent with members absent from the floor); 136 CONG. REC. S18,220-61 (daily ed. Oct. 25, 1990) (same); see also *supra* note 87 (discussing bills passed on Suspension Calendar with few members on the floor). Moreover, the vast majority of recorded votes involve members rushing to the floor when bells ring, casting their vote, and then returning to their prior business. See *supra* text accompanying note 147 (discussing technology’s effect on voting).

212. See KENNETH A. SHEPSLE, *THE GIANT JIGSAW PUZZLE* 246-48, 259-60 (1978); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 148 (1988).

213. See KREHBIEL, *supra* note 90, at 123, 130-33 (reporting that data indicates that of nine House standing committees studied, only one, Armed Services, fits the classic profile of homogeneous outlier preferences).

214. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter, 1994, at 3, 27 (“The willingness of the floor

In sum, neither the role played by nonlegislators nor the preeminence of committees is sufficient to establish that legislative history — including the commentary on judicial decisions — should be regarded as systematically unreliable. Further, whatever the risks of unreliability in particular cases, they cannot overcome the justifications for crediting committee report discourse as both a useful and necessary element of statutory interpretation.²¹⁵ In this regard, viewing statements of approval or disapproval as focusing on *either* the “legitimate” audience of legislators weighing their votes *or* the “illegitimate” audience of postenactment judges is unduly reductive.²¹⁶ Such a simplified vision slights the institutional accommodations and trade-offs that allow Congress to find its collective voice. As has been demonstrated, such accommodations and trade-offs often entail complicated and nuanced dimensions of expression.

A more apt description of committee report commentaries might recognize at least four distinct groups of listeners or readers. The committee report materials may be directed at members and their staffs, as a source of information and possible persuasion for anticipated floor proceedings. In addition, the commentaries may be directed at regulated entities, providing clarification and instruction as to how the new law should apply. They may also be directed at executive branch agencies, offering guidance about implementation and enforcement of the proposed new statute.²¹⁷ Finally, the committee report materials may be directed at the courts, offering

to give members of a committee gatekeeping authority over future bills as well as the committee's efforts in crafting a bill are at risk if they misconstrue the meaning of the bill that they propose . . . when acting in an official capacity as agent for the majority.”). See generally McNollgast, *supra* note 58, at 707, 741 (contrasting discourse by honest agents of the enacting coalition with unreliable “cheap talk” by members who are not part of that coalition or are not held accountable for their statements by the coalition). To be sure, individual committee leaders may, on occasion, decide to risk their reputations with their peers by using report language to misrepresent the meaning of the text. See Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, LAW & CONTEMP. PROBS., Winter, 1994, at 43, 47 (“The temptation [for opportunistic behavior] is especially great for those who intend to move on to higher office or to retirement . . .”). The problem of unreliability with respect to particular statements is addressed in the proposal set forth *infra* in Part IV.

215. See generally *supra* section II.B.

216. See *supra* text accompanying note 191.

217. One study suggests that committee staff are more interested in affecting the conduct of executive agencies than of courts. See Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 663 (1992). Agencies will be inclined to follow committee report instructions in recognition of their ongoing exposure to committee oversight and their prompt vulnerability to the appropriations process. Given these considerations of political accountability, the dialogue between committees and agencies may justify a different analytic approach from that adopted here. See also *supra* note 202.

an interpretive gloss on unambiguous provisions and an insight into the meaning of provisions that are inconclusive on their face.

The last audience is often not separable from one or more of the first three. Indeed, to the extent that committee report explanations reflect contributions from or appeals to individual members, interested outsiders, and agency personnel responsible for implementation, this may well make them *more* rather than *less* reliable indicators as to the meaning of inconclusive text.²¹⁸

3. Other Factors

Apart from analytic considerations, the perceptions of legislators themselves are worth noting. In recent years, the practice of relying on legislative history to discern the meaning of statutes has been endorsed by an array of current and former senators and representatives.²¹⁹ Among these legislators, it is perhaps not surprising that certain members of the historically Democratic majority in Congress have identified committee reports as the road map or "bone structure" of a statute, performing a "central explanatory function" and resolving ambiguities,²²⁰ or have asserted on behalf of "most" members that reports, and other sources of legislative history, "can explain and amplify legislative language in ways that are instructive to the courts"²²¹ as well as to the members themselves. It is significant, however, that prominent members of the

218. See *Stat. Interp. Hrg.*, *supra* note 27, at 34 (statement of Judge Stephen Breyer) (stating that responsible legislative history often reflects consensus on matters of interest to the relevant policymaking community).

On occasion, legislative history is characterized as being directed primarily at an administrative agency. See *American Hosp. Assn. v. NLRB*, 499 U.S. 606, 617 (1991) (stating that an admonition in a committee report was "best understood as a form of notice" to the agency). But even in such instances, courts should not ignore this form of notice. In "instructing" the agency through a committee report, Congress presumably expects a reviewing court to look with favor on the agency's honoring of its instruction and to look with disfavor on the agency's flaunting its instruction. This presumption carries added weight given that Congress has at its disposal other means of "instructing" an agency that would be less likely to come to the attention of a reviewing court. See William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, LAW & CONTEMP. PROBS., Winter, 1994, at 75, 81-82 (1994) (stating that Congress can send legislative signals to agencies through oversight hearings, revised appropriations levels, and informal contacts). But cf. *Stat. Interp. Hrg.*, *supra* note 27, at 26-29 (statement of Judge James L. Buckley) (viewing a committee report instruction to the NLRB as a trade-off for a key committee member's withdrawal of a controversial amendment, and urging courts to be skeptical of such "losers' history" even if agencies take it seriously).

219. See, e.g., Hatch, *supra* note 123, at 45-48; Mikva, *supra* note 3, at 385-86; *Stat. Interp. Hrg.*, *supra* note 27, at 21-22 (statement of Judge James L. Buckley); *id.* at 2 (statement of Rep. Kastenmeier); *id.* at 2-3 (statement of Rep. Moorhead); see also Senator Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685, 694-700 (1984) (invoking legislative history in the foreign policy context).

220. Mikva, *supra* note 28, at 184.

221. *Stat. Interp. Hrg.*, *supra* note 27, at 2 (statement of Rep. Kastenmeier).

Republican minority — while highly critical of abuses in the process — also conclude that the English Rule is unworkable in our setting,²²² that even as members of the minority they often looked to majority committee report explanations to understand what they were voting on,²²³ and that legislative history can serve to focus general statutory text, offer meaning when a provision is produced in the course of floor debate, and prevent slippage from agreements reached in Congress.²²⁴

This broad-based support for legislative history as reliable and valuable, at least in principle, is not surprising given that the alternative is far less workable. It is doubtful that Congress would be able to add to text the details and explanations now included in legislative history. The ambiguities and incompleteness of legislative language reflect an appreciation for both the need to draft rules of sufficient generality in an increasingly complex society²²⁵ and the need to conserve scarce institutional resources.²²⁶ Given the continuing presence of these twin constraints, one should not expect a substantial change in congressional working habits.²²⁷

Moreover, even if Congress were able to expand text in this manner, the result probably would not be a “better job” of statutory drafting. The effort to add details and illustrations would likely yield a text that is more precise but less coherent.²²⁸ Excessive attention to particulars might give rise to conflicts with a broader statutory purpose. Alternatively, more particularized text might become significantly underinclusive and overinclusive in ways that could not have been anticipated.²²⁹

222. See Hatch, *supra* note 123, at 47.

223. See *Stat. Interp. Hrg.*, *supra* note 27, at 21 (statement of Judge James L. Buckley).

224. Hatch, *supra* note 123, at 46-48; see also *Stat. Interp. Hrg.*, *supra* note 27, at 65, 67-68 (statements of Rep. Moorhead) (urging that courts pay attention to relevant explanatory materials). The fact that members of both parties have continued to participate in creating, negotiating, and relying on legislative history suggests that complaints are isolated voices of protest. See 128 CONG. REC. 16,918-19 (1982) (statement of Sen. Armstrong) (criticizing report language not written or read by members); 98 CONG. REC. 7299 (1952) (statement of Rep. Jenkins) (same); *id.* at 7429 (statement of Rep. Curtis) (same). See generally KOFMEHL, *supra* note 124, at 122.

225. See *supra* text accompanying notes 109-12.

226. See *supra* text accompanying notes 113-123.

227. See generally *Stat. Interp. Hrg.*, *supra* note 27; see also Popkin, *supra* note 4, at 311.

228. See A. Raymond Randolph, *Dictionaries, Plain Meaning and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY. 71, 78 (1994).

229. See *supra* text accompanying notes 109-12; Popkin, *supra* note 4, at 310-11. Under either option, this specificity may well leave a judge with more, not less, discretion to interpret in accordance with personal preferences. See Schwartz et al., *supra* note 90, at 55.

The risk of a less coherent text is further enhanced when one considers the method by which such details would likely be added. Whatever its shortcomings, the current, committee-centered legislative drafting process is a relatively "public" experience. There is considerable opportunity for notice to affected government and private groups and for participation by those groups. They can express their views in open hearings, reach substantive compromises, and suggest technical improvements or clarifications in proposed text as well as in legislative history. To the extent Congress legislates more furtively, without such input from interested and technically competent outsiders, it often produces a shoddier product: provisions written or modified in haste during floor debate, or rewritten during a hectic end-of-session conference, are oft-cited examples.²³⁰

Advocates of due process in lawmaking would presumably want to have laws made through an open, broadly accessible process. Rejection of legislative history inevitably devalues the open process of hearings, compromises, and participation by private and public groups.²³¹ But given the reality of procedural obstacles and resource limitations, such rushed and secretive drafting techniques are likely to gain more favor if Congress attempts to capture in text the many details and explanations now contained in committee reports.

4. *Anecdotal Unreliability*

Even if legislative history is not systematically unreliable, legitimate concerns remain about the potential for abuse. There are many professional staff who are encouraged to take initiatives on behalf of members, creating substantial opportunity for unreviewed

230. See, e.g., *Shine v. Shine*, 802 F.2d 583, 587 (1st Cir. 1986) (correcting a textual drafting error made in a "harried and hurried atmosphere" at the end of a session); see also *United States v. Locke*, 471 U.S. 84, 118-19 (1985) (Stevens, J., dissenting) (criticizing the Court's failure to correct careless drafting). Such carelessness occasionally has its lighter moments:

Smoking a big cigar, the Speaker [of the House of Representatives] got angry again over the slap-dash quality of the bill [that became the Omnibus Budget Reconciliation Act of 1981], with parts of it photocopied from memorandums, other parts handwritten at the last minute, and some final sections hastily crossed out in whorls of pencil marks. . . .

. . . .
But then he smiled, too, noting such cryptic and accidental entries in the bill as a name and phone number — "Ruth Seymour, 225-4844" — standing alone as if it were a special appropriation item.

Sorensen v. Secretary of the Treasury, 475 U.S. 851, 867 n.2 (1986) (Stevens, J., dissenting) (alteration in original) (quoting Francis X. Clines, *O'Neill Ready to Rejoin Battle Over the Budget*, N.Y. TIMES, July 1, 1981, at A16).

231. See Breyer, *supra* note 3, at 872-73.

exercises of discretion. There are many private groups and executive branch personnel who are as interested as the members and legislative staffs in leaving their mark on the legislative product.²³² There is abundant legislative history being produced, often in the form of lengthy committee reports, or floor colloquies or statements inserted unspoken into the Congressional Record, all providing opportunities for manipulation.²³³

The principal danger in such manipulation is that legislative history will contain explanations or assertions about the text that depart from the authoritatively expressed or widely shared understanding of what that text means. Such inconsistencies arise, for example, when the identified legislative history was not endorsed by the principal authors or would not have been embraced by the members who voted for the text. Assuming that the identified history went unnoticed or uncriticized by authors and other supporters, its promotion as "relevant" or "probative" before a court in subsequent litigation may be highly misleading.

Still, given that these instances of abuse are anecdotal rather than systemic, efforts to control the abuses must be targeted so as not to undermine the basic legislative process. Thus Congress and the courts ought to adopt cautionary practices and rules.

Congress already has in place some means for controlling potential abuses. Individual views in a committee report can point out a report's failure to represent adequately or accurately the views of the majority.²³⁴ Moreover, minority views can highlight areas of disagreement, including specific objections to assertions made by the committee majority. By focusing attention on areas of disagreement, the minority views provide notice to members, staff, and the leadership about the possible need to consider certain controversial matters when the bill reaches the floor. The table of contents for the committee report reflects the inclusion of supplemental or minority views, so that members and staff may immediately perceive the presence of controversy.²³⁵ Such consideration may lead to report language's being debated and even modified in the course of

232. See Shaviro, *supra* note 89, at 86-87 (noting that the emphasis of various "players" on being influential in the policymaking arena creates a bias for action over inaction and for more complexity in the drafting of statutes).

233. See *generally Stat. Interp. Hrg.*, *supra* note 27, at 140-41 (statement of Prof. William N. Eskridge).

234. See Costello, *supra* note 137, at 44-45.

235. See TIEFER, *supra* note 46, at 183-84. Under House and Senate rules, committee members have three calendar days in which to file supplemental, minority, or additional views. *Id.* at 184.

floor debate.²³⁶ In addition, Congress has received suggestions to amend its rules to improve the reliability of legislative history. Recent proposals include having committee members sign or vote on committee reports, as more tangible evidence of member awareness,²³⁷ and having sponsors and major players identify themselves as such when speaking on the floor.²³⁸

Current and proposed congressional controls can do something to address the issue of abuse. Judicial efforts to limit abuse are certainly appropriate as well. One such effort is recommended and discussed in Part IV.²³⁹

236. See, e.g., Hatch, *supra* note 123, at 46-47 (describing the floor debate that focused on rewriting portions of the committee report that accompanied the 1986 Balanced Budget Amendment); 136 CONG. REC. H8619 (daily ed. Oct. 2, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 24 (recording the statement of floor managers modifying the language of the committee report that accompanied the 1990 Older Workers Benefit Protection Act). Report language is often relied upon in floor debate by proponents as well as opponents of the legislation. See, e.g., 131 CONG. REC. 34,645 (1985) (statement of Rep. Glickman) (discussing Judiciary Committee report language supportive of Superfund Amendments and Reauthorization Act); 98 CONG. REC. 5938-39 (1952) (statement of Sen. Smith) (discussing Foreign Relations Committee report language supportive of Mutual Security Act).

237. See *Stat. Interp. Hrg.*, *supra* note 27, at 119-21 (statement of Prof. Stephen F. Ross); *id.* at 90 (statement of Prof. William N. Eskridge).

238. *Id.* at 123-24 (statement of Prof. Stephen F. Ross). Modest recommendations also have been made for improving legislative drafting techniques. See FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 89-93 (1990). These recommendations include (i) use of a checklist by legislative staff when reviewing proposed legislation for technical problems; and (ii) adoption of fallback or default rules for certain issues not specifically addressed in a statute, such as the applicable statute of limitations. See generally Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 122 (1992).

A further proposal would have Congress formally endorse legislative history, either through (i) a generic provision encouraging or requiring courts to consider certain types of legislative history when construing federal statutes, or (ii) a vote to approve the committee report, or other portions of the legislative record, on a bill-by-bill basis. See generally *Stat. Interp. Hrg.*, *supra* note 27, at 90, 92-93 (statement of Prof. William N. Eskridge). Apart from possible constitutional questions regarding congressional efforts to dictate the exercise of judicial authority, *but cf.* CAL. PENAL CODE § 4 (West 1988) (prohibiting courts from applying Rule of Lenity), statutory endorsement of legislative history raises practical concerns. A generic statute, focusing on certain types of history while excluding others, may well be insufficiently sensitive to the variations and complexities of the legislative process. A separate vote on approving particular legislative history for each statute might address that problem, but at considerable cost to Congress — full deliberation and debate on the explanations and illustrations accompanying the text would leave far less time for other legislative business.

239. A separate practical concern about relying on legislative history involves the issue of access for practicing attorneys and others seeking to understand and comply with the law. See *United States v. Public Utilities Commn.*, 345 U.S. 295, 319-21 (1953) (Jackson, J., concurring). Justice Jackson's concerns about lack of access appear to have been overstated even 40 years ago, at least with regard to committee reports and floor debates. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1278-83 (tent. ed. 1958) (noting that there are three or more depository libraries for U.S. government documents in every state, and that the Congressional Record and committee reports are routinely collected in these libraries).

C. Refusals to Credit Postenactment Legislative History

While legislative history in general has received criticism, congressional commentary on judicial interpretations of previously enacted text is subject to more targeted critical review. Both courts²⁴⁰ and commentators²⁴¹ have voiced reservations about taking the views expressed by members of a later Congress as in any way probative regarding the meaning of a statute enacted years or decades earlier. They argue that even assuming legislative history is a legitimate source of context to help attribute meaning to inconclusive text, the legitimacy derives from the fact that Congress generated the explanatory material as part of the enactment process; that is, the history sheds light on what the *enacting* Congress has done, or meant to do. The *later* Congress is a separate decisionmaking entity, which has no constitutional role in explaining or interpreting what the earlier body has done.

Indeed, the argument continues, once Congress has acted, the formal responsibility for saying what the law means rests with the courts, not Congress. When congressional committees purport to ratify or reject judicial interpretations of earlier-enacted text, they are improperly interfering with the function of the judiciary.²⁴² Considering such postenactment history also allows the original understanding of enacted text to be buffeted on the shifting waves of critical commentary expressed by numerous subsequent legislatures. This undermines the important value of predictability in our public laws.²⁴³

Access to legislative materials is less problematic today than in Justice Jackson's time. In technical areas such as tax law, ordinary people rely on experts to decipher the tax code, and the expert community of tax professionals has ready access to all pertinent legislative history. See Ferguson et al., *supra* note 27, at 807. In nontechnical areas, the U.S. Code may be available more immediately and at lesser expense to an attorney, especially in a small practice or a rural area, than are the Congressional Record, the U.S. Code Congressional and Administrative News (which contains committee reports and citations for enacted laws), or the transcript of committee hearings. Still, the online capabilities of Westlaw and LEXIS provide access to these materials as well. While cost is a relevant factor, the cost of these online services may not differ greatly from the cost of securing access to agency regulations. See generally Breyer, *supra* note 3, at 868-69.

240. See, e.g., *Consumer Prod. Safety Commn. v. GTE Sylvania*, 447 U.S. 102, 117-18 (1980); *United States v. Price*, 361 U.S. 304, 313 (1960).

241. See, e.g., Grabow, *supra* note 164, at 747-48; Posner, *supra* note 4, at 809-10; Aleinikoff, *supra* note 4, at 41 n.96.

242. See *Pierce v. Underwood*, 487 U.S. 552, 566 (1988); see also *Waterman Steamship Corp. v. United States*, 381 U.S. 252, 268-69 (1965) (noting that President Truman vetoed a 1950 amendment to a 1946 statute, expressing his disagreement with committee report assertions that the later amendment was a mere clarification, as opposed to a significant alteration, of the meaning of the original statute).

243. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & Econ. 875, 885 (1975); Posner, *supra* note 4, at 809-10; see

A partial response to these concerns is to clarify that the type of congressional commentary that is the focus of this article *is* generated as part of an enactment process — the reenactment of earlier text. Thus, for instance, when committee reports accompanying a contemporary reenactment explain the meaning of a textual provision enacted ten years earlier, that explanation bears on what the *current* Congress has done or has meant to do by leaving the earlier provision unmodified.²⁴⁴ Crediting the explanation as in principle authoritative amplifies the meaning of the earlier text on a prospective basis. Admittedly, efforts to apply this contemporary explanation to controversies that arose *before* the recent reenactment — that is, under the originally enacted statute — must be justified, if at all, on separate grounds.²⁴⁵ But the contemporary explanation is, at least in formal terms, a “relevant context” for understanding inconclusive aspects of the reenacted text to which it is attached.

Yet, assuming this subsequent legislative history is deemed “legitimate” in formal terms as an explanation of what the current Congress means, issues of practical reliability again arise. The later congressional commentary, while it accompanies a new enactment, is unconnected to any new language in the reenacted text.²⁴⁶ Many members, both on and off the committee responsible for drafting the report, were not members when the statute was originally enacted and have no reason to know, or care, whether the original text is being accurately or fairly characterized by the committee. Even those who were members at the time may forget or misrepresent what they and their colleagues understood the text to mean when they drafted and approved it. Accordingly, there is reason to question whether recent committee report commentary regarding unaltered textual provisions should be considered a reliable state-

also Easterbrook, *supra* note 5, at 538-39 (arguing that allowing postenactment legislative history to affect the meaning of earlier-enacted text “dishonor[s] the procedural aspects of the legislative process”).

244. See *United States v. Board of Commrs.*, 435 U.S. 110, 129-35 & n.25 (1978); *School Bd. v. Arline*, 480 U.S. 273, 278-79 (1987); *supra* note 174 (discussing *American Hosp. Assn. v. NLRB*, 899 F.2d 651, 658 (7th Cir. 1990), *affd. on other grounds*, 499 U.S. 606 (1991)).

245. See *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994) (relying on a general rule disfavoring retroactive application of statutes absent clear congressional intent to the contrary).

246. What is referred to as “reenactment of earlier text” typically takes one of two forms: (i) reauthorization of, for example, a federally funded assistance program, which often involves recodifying a lengthy text without specifying where changes have been made, if at all; or (ii) updating a regulatory statute, which generally involves text that specifies modifications or additions to an original law that is simply cross-referenced. In either case, members will have scant basis for discerning whether the report commentary refers to new text or text that is unchanged. *But see infra* note 249 and accompanying text.

ment of what the updated legislation means or what the current legislature intends.²⁴⁷

These practical concerns are important, but not dispositive. To begin, the congressional commentary at issue here is likely to be noticed on a regular basis, at least by the relevant legislative subgroup.²⁴⁸ The fact that there has been a judicial interpretation of the original text means that a controversy has arisen and is being litigated. If regulated entities, and groups promoting the regulatory approach, care enough to go to court, some of them probably will care enough to alert and pester relevant members of Congress. Indeed, such initiative presumably helps explain how the committee report comes to express approval or disapproval for a judicial interpretation in the first place.²⁴⁹

Moreover, the practical concern that members will be inattentive to report commentary unconnected to new text rests on the assumption that members pay close — or at least closer — attention to new text than to old text they are merely reenacting or cross-referencing. But, as previously noted, members often read report commentary rather than the bill itself in the first instance — in part because most bills *are* reenactments that modify existing U.S. Code provisions and are therefore largely incomprehensible as free-standing documents.²⁵⁰

Even with this likely awareness by the committee-based “policy community,” there may be ample institutional justification for the failure to update text on which the committee report is commenting. As discussed earlier, the issue the report explains — including an explanation that involves review of judicial interpretations — may be minor or subsidiary in the context of the bill as a whole. Alternatively, it may be awkward or burdensome to frame the issue succinctly as a matter of legislative draftsmanship. Under such circumstances, failure to include a textual analogue may reflect a judgment that the benefit of adding a clarification to text — even one commanding broad support — is outweighed by the risk that the modification in language would trigger procedural wrangling or col-

247. See *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988). See generally Eskridge, *supra* note 218, at 83-85 (describing the Rehnquist Court as noticeably more hostile to postenactment signals than was the Burger Court).

248. See *supra* text accompanying notes 208-10; see also *supra* note 92 (discussing specialized policy communities).

249. Cf. Katzmann, *supra* note 217, at 662 (explaining that staff awareness of case law relates in part to requests for legislative relief from a losing party or a large interest group).

250. See *supra* text accompanying note 108 (describing remarks of Sen. Specter).

lateral skirmishes resulting in delay or obstruction of the reenactment.²⁵¹

To be sure, the proposition that a particular committee report explanation would command broad contemporary congressional support rests on the assumption that Congress may be characterized as in some meaningful sense aware of the issue being explained. Such implied awareness is not self-evident where, as here, the explanation relates back to a text considered and enacted by a previous Congress.

But it is reasonable to determine whether such awareness should be imputed *not* on the basis of a priori pronouncements but rather by examining the particular factual circumstances. For example, assume a statute is reenacted with no textual changes at all,²⁵² after only an abbreviated legislative process,²⁵³ and the committee commentary involves a judicial decision that has received little or no public attention. In such an instance, there is only a weak justification for presuming that most members or their staffs have familiarized themselves with the previously enacted text on which the report is commenting, much less that they approve of the comments. On the other hand, if a reenacted statute contains numerous and substantial modifications in text, if it was enacted following a more inclusive legislative process, and if the case commented on by the committee has been more prominently featured in public debate, there is a stronger basis for imputing such familiarity and endorsement to Congress.²⁵⁴ The problem of where to draw lines between acceptable and unacceptable levels of presumed awareness is addressed in Part IV. But the fact that such lines can be drawn

251. See *supra* text accompanying notes 113-23; see also Farber & Frickey, *supra* note 89, at 467 (citing higher drafting costs at the time of reenactment if the courts ignore subsequent legislative history). Such risks or costs may be less substantial if the textual clarification is included from the start as part of the reenactment process. But when the texts being reenacted are the subject of frequent or ongoing litigation, judicial interpretations may arise or come to the attention of committee members only after the reenactment bill has been introduced.

252. This may occur in the case of periodic reauthorization — that is, the extending of an existing federal assistance program for another five years in its previously enacted form. Such reauthorizations will usually include at least a few textual changes, both because altered social conditions, or glitches in operation, invariably suggest the wisdom of *some* modifications, and because members of the current Congress generally want to take credit for something new as opposed to simply rubber-stamping an old program. See *supra* text accompanying notes 141-45.

253. See *supra* note 211 (referring to the unanimous consent process in the Senate and suspension of rules in the House).

254. Cf. *Johnson v. Transportation Agency*, 480 U.S. 616, 629-30 n.7 (1987) (discussing the fact that Congress's failure to alter judicially interpreted text in the course of a reenactment may be probative of the meaning of that text to varying degrees).

means that the issue is one of how to weigh the legislative history in each instance, rather than whether to admit or systematically discount such evidence altogether.

One issue not yet addressed is the concern that by crediting committee report explanations about the meaning of previously enacted text, courts will undermine the predictive value of our laws.²⁵⁵ It is true that if courts allow statutory language enacted years or decades earlier to be given additional or different meaning by a later Congress, they may compromise the "original understanding" reached by the principal legislative actors and relied upon by individuals and entities seeking to order their conduct. Nevertheless, making such an adjustment is hardly unusual in the field of statutory construction: courts regularly invoke more contemporary contexts to clarify or update earlier legislative understandings.

When consulting dictionary definitions of key statutory words, the Supreme Court often has looked to dictionaries that were published decades after the date the statutory language was originally enacted.²⁵⁶ When invoking the canons of construction, notably the canon that statutes should be interpreted to avoid constitutional problems, the Court has regularly consulted current constitutional doctrine rather than the doctrine that would have applied at the time of statutory enactment.²⁵⁷ Even when relying on agency inter-

255. See *supra* text accompanying note 243.

256. See, e.g., *Pioneer Inv. Servs. v. Brunswick Assocs.*, 113 S. Ct. 1489, 1494-96 (1992) (relying on a 1983 dictionary definition to explicate text originally enacted in 1938); *Mississippi v. Louisiana*, 113 S. Ct. 549, 553 (1992) (relying on a 1942 dictionary definition to explicate text originally enacted in 1911); *Davis v. United States*, 495 U.S. 472, 479-80 (1990) (relying on a 1950 dictionary definition to explicate text originally enacted in 1921); see also *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 324 n.2 (1988) (Scalia, J., concurring in part) (relying on a 1981 dictionary definition to explicate a nineteenth-century statutory text). But cf. *Looking It Up*, *supra* note 184, at 1447-48 (noting that the Court's recent choice of dictionaries shows "no [consistent or principled] relationship between the age of the dictionary and that of the statute under consideration").

257. See, e.g., *Lowe v. SEC*, 472 U.S. 181 (1985) (finding possible First Amendment problems if the Investment Advisers Act of 1940 is interpreted to cover publication of nonpersonalized investment newsletters, relying on commercial speech doctrine developed in the 1970s and 1980s); *NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490 (1979) (finding possible First Amendment problems if NLRA is interpreted to cover church-operated schools, relying on free exercise doctrine developed in the 1960s and 1970s). The canon that statutes should be construed so as to give effect to each also may result in the narrowing of earlier-enacted language to allow a later enactment to take full effect. But cf. *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (stating the canon the repeals by implication are not favored); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (citing *Morton* for the same proposition). See generally Aleinikoff, *supra* note 4, at 38-39.

pretations, the Court may invoke recent interpretations rather than those that were contemporaneous with original enactment.²⁵⁸

In each of these instances, the Court has updated earlier text without regard to cost in terms of predictability or notice based on an original understanding of that earlier text. Such action reflects an appreciation that statutes are meant to be effective over an extended period and that, accordingly, they must respond to social and legal developments that were unforeseen or even unforeseeable at the time of original enactment.²⁵⁹ The same considerations that may justify reliance on the "context" of postenactment dictionary usage, canons of construction, and agency interpretations also justify reliance on postenactment legislative history in this regard. The risk of abuse remains but is not dispositive.

D. *Refusals to Credit Legislative Inaction*

The previous section reviewed the difficulties associated with relying on subsequent legislative history — that is, recent committee report commentary regarding text that was enacted by an earlier Congress and is not materially altered after the related reenactment by a more recent Congress. One can also analyze these difficulties with reference to the problem of whether to credit legislative inaction.²⁶⁰

The failure to alter a specific textual provision after an intervening judicial interpretation of that provision is a form of legislative silence or inaction. Once again, both courts²⁶¹ and commenta-

258. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 584-93 (1983) (relying on altered concepts of national policy to sustain a 1970 IRS ruling that updated the meaning of nineteenth-century statutory language governing the tax-exempt status of charitable trusts).

259. See *supra* text in paragraphs following note 109.

260. Reservations about legislative inaction, like skepticism regarding subsequent legislative history, reflect a concern that precisely because Congress has never changed the particular text in question, there is no basis for assigning meaning to any *other* kind of "legislative event" that has since occurred. But whereas the debate over postenactment history focuses on the *affirmative* "event" of statements on the floor or in committee reports in a later Congress, the debate over inaction focuses on the *negative* "event" of textual silence in a later Congress in light of intervening interpretive statements from the judiciary. Not surprisingly, policy concerns regarding reliance on legislative inaction are often similar to those expressed with regard to crediting subsequent legislative history. See, e.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (arguing that any reliance on the intent of the current, inactive Congress unfairly distorts the elements of the original deal agreed to by the enacting Congress).

261. See, e.g., *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940); see also 480 U.S. at 671-72 (Scalia, J., dissenting); *Cleveland v. United States*, 329 U.S. 14, 22-24 (1946) (Rutledge, J., concurring).

tors²⁶² have raised concerns about attributing any legal significance to such institutional silence. Inaction, by definition, amounts to the absence of a "lawmaking occurrence"; accordingly, some have argued that such inaction should not be given any meaning at all.²⁶³ Congress on occasion may attribute legal significance to future legislative inaction by including "sunset" provisions that expire in a certain period of time unless reenacted by a subsequent Congress.²⁶⁴ But the very fact that Congress from time to time enacts laws giving legal significance to future congressional inaction supports the argument that no legislative meaning should inhere in future silences unless such meaning has been expressly provided for by the enacting Congress.

As was the case with respect to postenactment legislative history, a partial response to the formalist critique reaffirms that there is a "lawmaking occurrence" here — the reenactment or alteration of an earlier-enacted statute. Congress has not simply acquiesced in a judicial interpretation by failing to act in any way to override it. Rather, Congress has revisited the statute, engaged in new lawmaking to modify or extend the text as a whole, and — as part of that new law — left the interpreted textual provision unchanged. Because Congress has engaged in legislative *action*, the threshold concern about the absence of a legitimate lawmaking occurrence evaporates.²⁶⁵

Attributing meaning to a reenactment that fails to modify the text in question does, nevertheless, raise certain practical concerns.

262. See generally William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); Grabow, *supra* note 164; Laurence H. Tribe, *Toward a Syntax of the Unsaid*, 57 IND. L.J. 515 (1982).

263. See, e.g., Grabow, *supra* note 164, at 741, 746-47.

264. See, e.g., Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, §§ 3, 6, 100 Stat. 3342, 3342, 3344 (codified as amended at 29 U.S.C. §§ 623, 624 (1988)) (abolishing mandatory retirement effective January 1, 1987, and exempting tenured university faculty and public safety officers from the abolition of mandatory retirement through December 31, 1993). See generally Tribe, *supra* note 262, at 528.

265. Moreover, the formalist argument that true congressional acquiescence should *never* be given meaning may well go too far. Although there are many different possible explanations for Congress's failure to enact a law addressing an intervening judicial interpretation of earlier text, it does not follow that the failure to act is meaningless regardless of the surrounding legal landscape. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (finding "positive inaction" when Congress had repeatedly rejected amendments to override earlier Supreme Court precedents and apply antitrust laws to baseball, even though professional sports in general were subject to antitrust regulation); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983) (crediting Congress's repeated rejection of amendments to overturn an agency interpretation of an Internal Revenue Code provision that had denied tax exemption to racially discriminatory private schools at a time when racial discrimination was prohibited as contrary to public policy by numerous other statutes and Supreme Court rulings). See generally Grabow, *supra* note 164, at 741-44. The argument, however, need not be resolved in this context.

The decision to change some textual provisions but not others may reflect nothing more than a narrow congressional attention to the language being updated. Although some have contended that Congress has a duty, when revisiting a statute, to make known any disagreement with court interpretations of its former language,²⁶⁶ this inference of congressional responsibility surely goes too far in empirical terms. As has been discussed, Congress regularly has a complex and heavy legislative agenda. Each year, hundreds if not thousands of court cases interpret language from earlier-enacted statutes that are up for reauthorization or are being amended in some other section or title. It is unrealistic to presume that Congress or its committees are aware of decisions, especially lower court decisions, about which they have said absolutely nothing.²⁶⁷

But once again, that issue is not what confronts us here. Some degree of legislative awareness is demonstrated by the committee commentary itself. Whether the awareness expressed in the legislative history is a sufficient basis for imputing familiarity and agreement to Congress as a whole may vary from one instance to another.²⁶⁸ Distinguishing among the alternatives on a principled basis is essential if courts are to be able to decide when to credit committee commentary approving of intervening judicial interpretations.²⁶⁹ As was true with postenactment history, drawing these

266. See, e.g., *Lorillard, Inc. v. Pons*, 434 U.S. 575, 580 (1978); *Girouard v. United States*, 328 U.S. 61, 76 (1946) (Stone, C.J., dissenting).

267. Compare Eskridge, *supra* note 8, at 342-43 (describing substantial awareness of Supreme Court decisions by Judiciary Committees' members and staffs) with Katzmann, *supra* note 217, at 656-62 (noting that committee staffs were generally unaware of D.C. Circuit decisions — even leading or controversial ones).

268. Cf. *supra* text accompanying notes 252-54. As was the case with respect to postenactment committee report commentary, the failure to modify or reject an intervening judicial interpretation approved in the committee report may indicate (i) a lack of notice or understanding about the substance of the commentary; (ii) general agreement with the committee report commentary and no sense of urgency to codify that agreement; (iii) widespread approval of the commentary combined with a recognition that some modest controversy exists and a reluctance to delay or jeopardize the reenactment process by adding the issue to text; or (iv) an understanding that the commentary is quite controversial but there is no agreement on how to modify the underlying judicial interpretation. Cf. *Cleveland v. United States*, 329 U.S. 14, 22-23 (1946) (Rutledge, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

269. Similar alternatives are presented with regard to committee-expressed disapproval in certain circumstances, such as the 1978 conference committee disapproval of the Supreme Court's "pre-Act/post-Act" interpretation of *subterfuge* in *United Airlines v. McMann*, 434 U.S. 192 (1977), set forth *supra* at notes 39-48 and accompanying text. Congress's failure to modify the word *subterfuge* in text may indicate (i) a lack of awareness that pre-Act validity was even an issue; (ii) general agreement with the conference committee's disapproval but a conclusion that codification was unnecessary given that the *McMann* holding was already being overridden; (iii) support for the disapproval combined with a reluctance to delay the legislation by forcing a new issue into text at the last moment; or (iv) conscious lack of agreement on the pre-Act validity question. See *infra* text accompanying notes 384-95.

distinctions raises questions about how to weigh the legislative history evidence in each case or each type of case, not whether to consider that evidence at all.

In sum, the challenges mounted against judicial consideration of congressional commentary on earlier-enacted textual provisions are of two kinds — those based on legitimacy and those based on reliability. The challenges based on legitimacy are unpersuasive. Legislative history, while not itself text, may provide relevant context and is at least as legitimate in principle as other sources of context. Moreover, because this particular type of history accompanies a subsequent enactment, it avoids the formalist problems identified with respect to postenactment legislative history and legislative inaction.

The challenges based on reliability are less readily dismissed. Legislative history commenting on materially unaltered text raises special concerns about imputing broader awareness and approval to Congress as a whole. It is to those concerns that I now turn.

IV. A PROPOSAL FOR INTERPRETING LEGISLATIVE SIGNALS

By this point, it should be clear that a systematic judicial rejection or discounting of legislative signals — and in particular of legislative history commenting on earlier judicial interpretations of materially unaltered text — imposes significant costs on Congress. These costs include diminishing or diluting Congress's legislative output and also disrespecting Congress's chosen form of legislative organization. Further, while there are practical risks in having courts credit the subsequent committee commentary, those risks justify a careful analysis of the signals rather than their blanket exclusion or denigration.

Although the analysis could be pursued with respect to legislative history as a whole, I propose to devote primary attention to the type of history that has been my focus thus far: the treatment of judicial decisions in committee reports accompanying subsequent textual enactments. At the same time, I will continue to refer to the corpus of legislative signals in general. As indicated in the discussion concerning manipulation of these signals,²⁷⁰ the central issue in determining how much weight courts should give them is reliability: how reliable are the statements or conclusions contained in legislative history in reflecting the shared understanding of Congress as a whole?

270. See *supra* text accompanying notes 232-34.

A. *Examining the Issue of Reliability*

Certainly, some legislative history may be deemed highly reliable. Let me begin with three examples. In each instance, reliability attaches mainly because the history is a product of legislative mechanisms that the generality of members have embraced. Consequently, most members would readily have agreed that the text meant what the legislative history said it meant.

As a first example, one or both houses of Congress may take statements made in committee reports as the basis for altering collective legislative conduct. In the Alaska National Interest Lands Conservation Act of 1980,²⁷¹ Congress conferred a right of access to certain private lands, or "inholdings," located within national forest areas. The statutory text was inconclusive, however, as to whether it affected national forests nationwide or only those in Alaska.²⁷² Later in the same Congress, the Colorado Wilderness Act²⁷³ was in conference; the Senate version had conferred a similar right of access to inholdings in Colorado, while the House version was silent on the subject of access.²⁷⁴ The conferees agreed to delete the Senate language, on the express understanding that the Alaska Lands Act already covered access to national forests in Colorado.²⁷⁵ By accepting the House version on access and receding from the Senate version, for the reasons explained in the conference report and

271. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified as amended in scattered sections of 16 U.S.C. and 43 U.S.C. (1988 & Supp. V 1993)).

272. Alaska National Interest Lands Conservation Act § 1323(a), 16 U.S.C. § 3210(a) (1988); see *Montana Wilderness Assn. v. U.S. Forest Serv.*, No. 80-3374 (9th Cir. May 14, 1981), *reprinted in part in* ESKRIDGE & FRICKEY, *supra* note 89, at 743-49 (finding ambiguity in both the text and the legislative history regarding the application outside Alaska of the access provisions of the Alaska Lands Act, but determining that the text is most sensibly read to favor "Alaska-only" coverage and that the legislative history fails to overcome that reading).

273. Pub. L. No. 96-560, 94 Stat. 3265 (1980) (codified as amended at 16 U.S.C. §§ 192b-9, 1132, 1133 (1988 & Supp. V 1993)).

274. Compare H.R. 5487 as passed by the House, 125 CONG. REC. 35,133-34 (1979) (no provision on access) with H.R. 5487 as passed by the Senate, 126 CONG. REC. 27,280, 27,282 (1980) (§ 7 covers access).

275. See H.R. CONF. REP. NO. 1521, 96th Cong., 2d Sess. (1980), *reprinted in* 126 CONG. REC. 31,858 (1980). The Joint Explanatory Statement reads:

9. ACCESS

Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.

The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act.

reiterated on the Senate and House floors,²⁷⁶ Congress as a whole adopted the understanding that the earlier-enacted Alaska Lands Act conferred a nationwide right of access.²⁷⁷

A further example of highly reliable legislative history is report language designed by the relevant committees and understood by Congress to provide controlling guidance on a textual provision. In the Revenue Act of 1962,²⁷⁸ Congress confronted the issue of whether taxpayers were gaining unjustified tax-free benefits by deducting an array of personal entertainment costs as ordinary and necessary business expenses. President Kennedy had recommended that Congress completely disallow the deduction of the cost of such business entertainment to eliminate widespread abuses. Congress, while agreeing that abuses should be curbed, was unwilling to go along with a complete disallowance.²⁷⁹

The House Ways and Means Committee proposed adding a new section 274 to the Internal Revenue Code, allowing business entertainment costs to be deductible only if they were "directly related to the active conduct of the taxpayer's trade or business."²⁸⁰ The committee report language made clear that the "directly related to" standard was meant to exclude deductions for entertainment expenses aimed at promoting "goodwill" unless business was transacted or at least discussed during the entertainment.²⁸¹ When

276. See 126 CONG. REC. 32,403 (1980) (statement of Sen. Hart) ("The Conference Committee did not accept the Senate bill's provision on access to inholdings in Colorado wilderness areas, because Congress has recently enacted — as part of the Alaska lands bill — a similar provision to apply to access to inholdings in all public lands."); *id.* at 32,405 (statement of Sen. Armstrong) ("Access to privately owned inholdings . . . is especially important today [, and Senate access language] has been dropped from this final legislation only because even more comprehensive language is included in the Alaska Lands legislation . . ."); *id.* at 32,408 (printed comparison of House, Senate, and conference versions); see also *id.* at 31,882 (statement of Rep. Johnson) (inserting a "factsheet" into the record which states that the relevant access provisions are in the "Alaska Lands Bill").

277. See *Montana Wilderness Assn. v. U.S. Forest Serv.*, 655 F.2d 951 (9th Cir. 1981) (withdrawing an earlier decision on the basis of the new statute and in particular its legislative history), *cert. denied*, 455 U.S. 989 (1982). See generally ESKRIDGE & FRICKEY, *supra* note 89, at 743-59.

278. Pub. L. No. 87-834, § 4, 76 Stat. 960, 974-77 (1962) (codified as amended at 26 U.S.C. § 274 (1988 & Supp. V 1993)).

279. See H.R. REP. NO. 1447, 87th Cong., 2d Sess. 19 (1962); S. REP. NO. 1881, 87th Cong., 2d Sess. 24-25 (1962), reprinted in 1962 U.S.C.C.A.N. 3304, 3327-28.

280. H.R. 10,650, 87th Cong., 2d Sess. § 4, at 27-28 (reported Mar. 16, 1962); see H.R. REP. NO. 1447, *supra* note 279, at 19-26 (describing the text of H.R. 10,650 as it was reported on Mar. 16, 1962).

281. For example, the report explained,

[A taxpayer] will have to show more than a general expectation of deriving some income at some indefinite future time

If the expenditure is for entertainment which occurs under circumstances where there is little or no possibility of conducting business affairs or carrying on negotiations

the House bill reached the Senate, the Senate Finance Committee balked at such a restrictive approach to goodwill entertainment expenses. The committee added language inserting the words *or associated with* after the words *directly related to*. Thus, under the Senate version of section 274(a)(1), business entertainment costs would be deductible if "directly related to *or associated with* the active conduct of the taxpayer's trade or business."²⁸² In its report, the Finance Committee specified that the additional textual language — language made necessary "[t]o eliminate the harshness resulting from the House report" — was intended to permit deduction of expenses for goodwill entertainment.²⁸³

In conference, both the House and Senate language were retained, with an added reference that the Senate test should apply in cases in which the entertainment was linked sequentially to a substantial and bona fide business discussion.²⁸⁴ At the same time the conferees emphasized that goodwill entertainment expenses would be deductible as set forth in the Senate Finance Committee Report.²⁸⁵ In sum, although the concept of "goodwill entertainment"

or discussions relating thereto, the expenditure will generally be considered not to have been directly related to the active conduct of business.

H.R. REP. NO. 1447, *supra* note 279, at 20-21.

282. H.R. 10,650, 87th Cong., 2d Sess. § 4, at 41-42 (reported Aug. 16, 1962), *reprinted in* STAFF OF COMM. ON WAYS AND MEANS, 90TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF H.R. 10650, 87TH CONGRESS: THE REVENUE ACT OF 1962, at 1959, 1999-2000; *see* S. REP. NO. 1881, *supra* note 279, at 25-26, *reprinted in* 1962 U.S.C.C.A.N. at 3328-29 (describing changes from House version).

283. S. REP. NO. 1881, *supra* note 279, at 26, *reprinted in* 1962 U.S.C.C.A.N. at 3328; *see id.* at 25, *reprinted in* 1962 U.S.C.C.A.N. at 3328 (noting that the effect of the House provision "has been modified to permit the deduction of expenses for goodwill where a close association is established between the expense and the active conduct of a trade or business"); *id.* at 28-29, *reprinted in* 1962 U.S.C.C.A.N. at 3331 (stating that "[g]oodwill has long been recognized as a legitimate objective of business entertaining" and that such expenses "ordinarily will continue to be deductible" unless they are against public policy — for example, if they violate public morals as expressed in local law); *id.* at 29, *reprinted in* 1962 U.S.C.C.A.N. at 3332-33 (listing examples of expenses deductible as goodwill entertaining).

284. Thus, the final language of 26 U.S.C. § 274(a)(1), with the language added in conference italicized, allowed deduction for entertainment costs only if "the taxpayer establishes that the item was directly related to, or, *in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item* was associated with, the active conduct of the taxpayer's trade or business" 26 U.S.C. § 274(a)(1) (1988) (emphasis added).

285.

It is the understanding of the conferees, both on the part of the House and the Senate, that the alternative Senate "or associated with" test as described in the report of the Finance Committee would apply to certain entertaining primarily to encourage goodwill where the evidence of business connection is clear, whether or not business is actually transacted or discussed during the entertainment. . . . The conditions under which an item is "associated with" the active conduct of a trade or business are contained in the report of the Committee on Finance.

H.R. CONF. REP. NO. 2508, 87th Cong., 2d Sess. 15-16 (1962), *reprinted in* 108 CONG. REC. 21,708, 21,746 (1962) (statement of House Managers).

is never referred to in text, both authorizing committees and the conference committee explained the textual language as applying to that concept. The committees understood certain report language to be controlling in this regard, and both the House and the Senate were advised of that understanding through the conference report and in subsequent floor debate.²⁸⁶ Finally, Congress as a whole adopted that understanding by approving the conference report version of the text.

Still another example of highly reliable legislative history is an explanatory statement that one may objectively describe as encompassing the full range of interested legislative viewpoints. In the Older Workers Benefit Protection Act of 1990,²⁸⁷ Senators Pryor and Metzenbaum were coauthors of the legislation and leading spokesmen for its proponents, while Senator Hatch was the principal advocate and floor manager for the opposition. After the bill reached the Senate floor, Metzenbaum, Pryor, Hatch, and other senators long involved in the legislation began negotiations to resolve their differences.²⁸⁸ When they finally reached an agreement, the compromise included changes in the text of the bill that had been pending on the floor, accompanied by a detailed Statement of Managers explaining the new substitute bill.²⁸⁹ The substitute text and the jointly issued Statement of Managers were presented as a unified compromise on the Senate floor and were described and endorsed by Metzenbaum, Pryor, and Hatch.²⁹⁰ After a brief debate, the substitute passed by 94-1 in the Senate.²⁹¹ A week later, the identical substitute, accompanied by the identical Statement of Managers, was debated briefly in the House and then approved by a vote of 406-17.²⁹² Under these circumstances, the explanations

286. See 108 CONG. REC. 21,742 (1962) (statement of Rep. Mills); *id.* at 21,707 (statement of Sen. Kerr); *id.* at 21,710-12 (statements of Sens. Javits and Kerr). See generally Ferguson et al., *supra* note 27, at 813.

287. Pub. L. No. 101-433, 104 Stat. 978 (1990). The bill is discussed in detail *supra* at notes 53-67 and accompanying text.

288. See 136 CONG. REC. S13,405 (daily ed. Sept. 19, 1990) (statement of Sen. Mitchell), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 96.

289. See 136 CONG. REC. S13,594-97 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 46-51 (text), 51-53 (Statement of Managers).

290. See 136 CONG. REC. S13,597-98 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 54-55 (statement of Sen. Metzenbaum); *id.* at S13,603-04, *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 70-72 (statement of Sen. Pryor); *id.* at S13,599-600, *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 60-62 (statement of Sen. Hatch).

291. 136 CONG. REC. S13,611 (daily ed. Sept. 24, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 90.

292. See 136 CONG. REC. H8614-16 (daily ed. Oct. 2, 1990), *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 11-16 (Senate text); *id.* at H8619-20, *reprinted in* 1 LEGIS. HIST., *supra* note 59, at 24-26 (Statement of Managers); *id.* at H8616-27, *reprinted in* 1 LEGIS. HIST., *supra* note

and guidance contained in the Statement of Managers may be presumed to reflect the understanding of Congress.

What makes these three legislative history examples "reliable" as illuminating what Congress has done in the accompanying text? Their reliability stems from the fact that each represents an integral part of the shared understanding reached by Congress as a whole. In the first example, the Senate had voted to ensure access to wilderness inholdings in Colorado. The Senate then changed its position only because its designated representatives, the conferees, advised officially and openly that this very Congress had already conferred such access in a recently enacted law. Similarly, in the tax example, the designated technical experts for the House and Senate reached an understanding of statutory language and communicated that understanding to each full body in clear terms. The bodies then endorsed that statutory language as explained. In the age discrimination example, both chambers approved an understanding reached by political adversaries. In effect, Congress pronounced their statement authoritative because its authors reflected the entire ideological spectrum.

In each instance, the legislative history is reliable not because each member *has agreed* to it in the way a member "agrees to" text through a vote.²⁹³ Rather, the members have assigned primary responsibility for drafting a text and explaining or amplifying its meaning to a subgroup of colleagues trusted for their technical expertise, their ideological commitment, or both. The subgroup then has explained its agreed-upon position in a manner likely to be understood by the body as a whole at a time when members could have challenged or debated the explanation. Accordingly, one can conclude that the members either did agree, or surely would have agreed if asked, that the text they approved meant what their designated colleagues *said* it meant.

The reality of the relationship between reliable legislative history and the shared understanding reached by Congress as a whole is reinforced when one considers the other end of the spectrum — legislative history that may be deemed highly unreliable. For example, the views expressed in a committee hearing or even a committee report that accompanies a bill never taken up by the full House or Senate, much less enacted into law, seem wholly suspect. When

59, at 16-44 (debate); see also 136 CONG. REC. H8738 (daily ed. Oct. 3, 1990), reprinted in 1 LEGIS. HIST., *supra* note 59, at 10-11 (House vote on final passage).

293. Technically, a vote on the conference report is only a vote on text, not on the attached Statement of Managers. See Costello, *supra* note 137, at 48.

both chambers consider and approve the same textual provisions, they have effectively come to an institutional agreement to change a particular statutory scheme in certain ways.²⁹⁴ The *existence* of such an agreement makes it possible to ask — and determine — whether explanations contained in the accompanying history were part of Congress's understanding of what the now modified statute means.²⁹⁵ By contrast, the *absence* of such an agreement makes it more difficult to imagine any "shared understanding" attributable to Congress as a whole.²⁹⁶ More significantly for present purposes, the failure to secure even consideration of the proposed textual revisions by either chamber makes it impossible to conclude that the explanations accompanying the proposed changes would ever have been noticed, much less endorsed, by the entire Congress.²⁹⁷

B. *Three Central Considerations in Determining Reliability*

As one distinguishes legislative history that courts should label generally reliable from history they should regard as unreliable, certain key elements begin to emerge. For present purposes, I assume we are presented with our paradigmatic situation: a committee report²⁹⁸ that expresses approval or disapproval of prior judicial in-

294. By "statutory scheme," I refer to the related matrix of provisions in the U.S. Code. Thus, for instance, a new tax law may change the Internal Revenue Code, or specific titles or chapters thereof, in certain ways, or a new civil rights law may similarly change Title VII of the 1964 Civil Rights Act, and perhaps other titles as well.

295. This understanding may encompass the agreed-upon changes, the provisions left unchanged, and the statutory scheme as a whole. *See, e.g., supra* text accompanying notes 271-77 (discussing the Alaska Lands Act and the Colorado Wilderness Act).

296. *See supra* note 173; *supra* text accompanying notes 261-64 (discussing legislative inaction).

297. For example, S. REP. NO. 349, 101st Cong., 2d Sess. (1990), which accompanied the Employee Health and Safety Whistleblower Protection Act, analyzed and approved or questioned various state and federal court decisions addressing protection for whistleblowers. The bill, however, was never considered by the full Senate, and the companion bill, H.R. 3368, 101st Cong., 1st Sess. (1989), was never taken up in committee. Another example is the *Freedom of Information Act: Hearings Before Subcomm. on the Constitution of the Comm. on the Judiciary on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751*, 97th Cong., 1st Sess. (1981) (recording seven days of hearings in 1147 pages of testimony that discussed, criticized, and endorsed numerous federal court decisions). Textual changes favored by the committee were set forth at S. REP. NO. 690, 97th Cong., 2d Sess. (1982), accompanying S. 1730. The bill was never taken up on the Senate floor, and there was no companion bill in the House.

Once again, one need not reject all reliance on legislative inaction in order to reject reliance on the legislative history accompanying this particular form of inaction. As discussed *supra* at note 265, the failure to act may be given significance based on the surrounding legal landscape. But that involves imputing to Congress as an ongoing institution knowledge of the surrounding legal landscape, which all prior Congresses have created over time. Whatever the merits of that imputation, a different issue arises when one imputes to a particular Congress knowledge of commentary by its own subgroups when the commentary was never presented to or considered by members off the committee.

298. I have chosen the committee report as the paradigm for application of my three considerations. As previously discussed, legislation is usually drafted in committee, and the

terpretation of materially unaltered text and that accompanies a reenactment or modification of the statutory scheme containing the unaltered text. Absent a vote by the full House and Senate on the expression of committee approval or disapproval, I believe a reviewing court should seek to determine whether this expression *would have been* (i) understood, (ii) noticed, and (iii) accepted by a reasonable member of Congress. In this regard, a reviewing court should examine the legislative history to evaluate (i) how thoughtfully or elaborately the report expresses the approval or disapproval of the court decision; (ii) how salient or prominent the expression of approval or disapproval is within the legislative history as a whole; and (iii) how the approval or disapproval fits into the larger context of the statutory change that is being enacted.

To the extent that a committee report elaborates on its endorsement of a prior judicial interpretation, a reasonably thoughtful legislator who is not a member of the committee would be more likely to *understand* the meaning of the committee approval, either on her own or through a presentation from her staff. To the extent that the committee discussion is featured prominently in the report, or is amplified, reiterated, or even referred to during floor debate, a reasonably attentive legislator would be more likely to *notice* the existence of the committee approval. And to the extent that the

committee report is generally regarded as the most coherent and thoughtful explanation of the proposed statute as well as the problems that statute is meant to address. See *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (observing that committee reports represent the "considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation"), *quoted with approval in Garcia v. United States*, 469 U.S. 70, 76 (1984).

Apart from its claims to being coherent and genuinely reflective of the text, the committee report is in a format that is readily accessible to other members as well as the courts and the public. For all these reasons, committee reports are recognized as a more authoritative form of legislative history than hearings, floor debates, or statements by sponsors. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring); see also *ESKRIDGE & FRICKEY*, *supra* note 89, at 709.

These factors apply with at least equal force to conference committee reports. Conference reports include an explanation of all textual changes made to reconcile versions previously passed by the House and Senate. The explanatory statements, as well as the agreed-upon text, are generally read on the floor, or printed in the Congressional Record, or both, when the conference report is taken up for discussion. See *TIEFER*, *supra* note 46, at 825-31. See generally Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative History: A Statistical Analysis*, 22 *JURIMETRICS J.* 294, 304 (1982) (calculating that between 1938 and 1979 almost 50% of the Supreme Court's references to legislative history were to committee reports (including conference committee reports), about 20% to floor debates, and less than 15% to hearings). *But cf.* Popkin, *supra* note 4, at 317 (criticizing hastily written conference reports).

This does not mean that the analysis developed in Part IV applies only to committee reports. Such reports may be less authoritative when a bill has been drafted — or its provisions significantly amended — during floor debate. Under these circumstances, a statement of managers or a colloquy among leading participants may be more useful. See, for example, the Hatch-Pryor-Metzenbaum Statement, discussed *supra* at text accompanying notes 287-92.

discussion is consonant with the relevant objectives or overall purpose of the text that is being enacted, a reasonably responsible legislator would be more likely to *accept* that the committee approval faithfully reflects the statutory text as a matter of substance. If all three elements — elaboration, salience, and consonance — are present, then a reasonable legislator would be likely to agree that the committee commentary is an explanation or amplification of the meaning of text being voted on by Congress.

Conversely, a committee report's endorsement of a prior judicial interpretation may be expressed elliptically, as with a mere citation to the case, unelaborated in any way. The committee endorsement also may be presented in an obscure manner, as in an isolated footnote to the report, or with no subsequent reference at all during the floor debate in either chamber. Finally, the committee's expression of endorsement may be irrelevant to, or at odds with, the basic thrust of the textual changes being made by Congress. To the extent that the elements of elaboration, salience, and consonance are all absent, it is highly unlikely that a reasonably thoughtful, attentive, and responsible member of Congress would embrace the committee endorsement as connected in any way with the bill she was voting on.

It is worth emphasizing here that the focus of my proposed inquiry is not whether a majority of senators, or a designated "representative member" of the Senate, *did actually* understand the committee approval to be an amplification or extension of the enacted text. Such a factual inquiry will rarely if ever yield a determinate answer. No one polls the members about their support for — or even their knowledge of — particular aspects of legislative history. We have no way of ascertaining who has read or been briefed on the report prior to floor consideration, or for that matter who was listening when members discussed the report on the floor. Rather, the inquiry I propose is whether a hypothetically "reasonable" member of the Senate — a fictional construct to be sure — would have reached such an understanding based on the available legislative history.

Several concerns may be raised regarding this approach. An obvious question is whether one can justify encouraging reviewing courts to apply such fictional constructs when all that can be known with certainty is what text members voted to support. But judges already regularly employ similar fictional constructs as aids to statutory interpretation. Faced with text that is inconclusive in a particular controversy, judges look for alternative sources of

enlightenment as to the text's meaning.²⁹⁹ The principal alternative sources *other than* legislative history all depend on the notion of the "reasonable member." Thus judges already assume, either implicitly or explicitly, that the legislators who enacted the text should be thought of as having behaved in certain reasonable ways.

For example, Justice Scalia has stated that he will attribute meaning to statutory text based on two factors. The first requires looking for "which meaning is . . . most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute."³⁰⁰ Implicit in this formulation is the idea that the "whole Congress" consists of legislators who should be regarded as reasonably thoughtful about the linguistic world around them — that is, legislators who were "most likely to" have had in mind a meaning that is the closest to ordinary usage.³⁰¹ Justice Scalia's second factor involves looking for "which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, *by a benign fiction, we assume Congress always has in mind.*"³⁰² Here, the explicit "benign fiction" is that Congress consists of legislators who are reasonably attentive to the landscape of statutes and judicial interpretations that exists when they are considering and adopting a new text.³⁰³

Apart from ordinary usage and the surrounding legal structure, judges also rely on the canons of statutory construction as a source of meaning for inconclusive text.³⁰⁴ Once again, reliance is justified in part by the assumption that legislators should be thought of as reasonably attentive to and in agreement with the "background of

299. See *supra* text accompanying notes 21-28.

300. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

301. See also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POLY. 59, 65 (1988) (concluding that the court's role is to "look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words," implying that this is how the words should have sounded in the mind of a reasonable legislator).

302. 490 U.S. at 528 (emphasis added).

303. See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) ("One important assumption underlying the Court's decisions [interpreting 42 U.S.C. § 1983] is that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."); *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) (finding an inconclusive bankruptcy code provision best understood by reference to the structure of the remaining provisions). See generally Costello, *supra* note 137, at 63-65; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1319-21 (1990).

304. See generally Symposium: *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

customs and understandings of the way things are done.”³⁰⁵ For example, one scholar suggests that the linguistic canon *inclusio unius est exclusio alterius* is useful precisely because legislation is change enacted against a backdrop of continuity.³⁰⁶ Accordingly, the argument continues, legislators should be viewed as reasonably aware both of the changes they are making and of their willingness to remain silent regarding areas they have left unchanged.³⁰⁷ Similarly, the substantive canon that statutes should be interpreted to avoid constitutional problems rests in part on the assumption that legislators should be regarded as reasonably aware of the existence of potential constitutional conflicts, including judicial decisions identifying such conflicts, and reasonably responsible in not wanting to enact an unconstitutional law.³⁰⁸

In short, courts frequently invoke the benign fiction of “reasonable legislators acting reasonably” to justify reliance on statutory structure and on extrinsic sources such as ordinary usage, common law background, or certain canons of construction. It is no less plausible to invoke the same benign fiction when evaluating the reliability of legislative history that treats prior judicial decisions.³⁰⁹ If anything, the benign fiction of a legislator who is reasonably thoughtful, attentive, and responsible about legislative history may be even more legitimate and realistic. It may be more legitimate

305. Shapiro, *supra* note 156, at 942.

306. *Id.* at 927-28, 942.

307. *See id.* at 928-29, 942-43. Shapiro offers other distinct justifications for relying on the canons favoring continuity. *See, e.g., id.* at 943-44 (discussing “process values” of predictability and fair notice). But his argument that application of canons favoring continuity should be viewed as “the best reconstruction of what the drafters were trying and not trying to do,” *id.* at 943, rests on the “benign fiction” that legislators are reasonably attentive to the legislative status quo.

308. *See* Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 466 (1989) (“[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.”); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating that the canon “not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution”); *see also* Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991) (stating that Congress should be understood to legislate with the expectation that the common law principle of preclusion will apply); Johnson v. Home State Bank, 501 U.S. 78, 86 (1991) (stating that Congress is presumed to legislate with an understanding of prior judicial constructions of a statutory term).

309. Other commentators have linked the reliability of legislative history to assumptions about the reasonableness of legislators in certain settings. *See, e.g.,* Costello, *supra* note 137, at 68-69 (stating that when confronted with two equally plausible interpretations of ambiguous statutory text, a court should consider how a reasonable legislator would have interpreted the language as explained in the committee report); Ferguson et al., *supra* note 27, at 808 (arguing that legislators should be thought of as relying on report language authored by the expert tax staff to whom drafting responsibility was institutionally delegated).

because legislators considering the committee reports or floor statements of their colleagues are considering an institutional product, one that flows directly from Congress's exercise of its authority to order its own proceedings under Article I.³¹⁰ And it may be more realistic because many, if not most, legislators regularly do rely on committee report explanations to understand the meaning of the statutory scheme on which they are asked to vote.³¹¹

A further question is whether adoption of my proposed approach would alter the behavior of Congress, by allowing or even encouraging more opportunistic insertions of legislative history approving or disapproving judicial decisions. I think not, for at least two reasons. As a practical matter, members would still devote primary attention to developing and negotiating text rather than legislative history. Legislators can continue to serve their principal objectives — promoting public policy goals, securing status and respect from colleagues, and advancing reelection prospects with constituents³¹² — through the enactment of laws; the prospect of influencing judicial interpretation of those laws many years later will not produce major changes in legislators' motivations.

More important, any changes produced should tend to *discourage* opportunistic conduct. If courts reviewing congressional commentary on judicial decisions credit only those approvals or disapprovals that are well reasoned, prominently featured, and consistent with the larger statutory context, legislators and their staffs will have to address these considerations. Legislative history commentary that satisfies these considerations also is more likely to be noticed and understood by a reasonable legislator from off the committee and therefore to be broadly supported or — if it is controversial or manipulative — to be openly questioned or challenged by

310. See *supra* text accompanying notes 182-89. By contrast, the notion that legislators consider the ordinary usage of words that appear in text, or refer to the judicially developed canons of construction, rests on an assumption that legislators behave like other reasonable persons outside the legislative arena. This assumption may be plausible, but it is not as directly linked to specific legislative policymaking.

311. See *supra* text accompanying notes 99-123. I do not mean to suggest that the benign fictions invoked in support of ordinary usage, statutory structure, or the canons are unjustified. One need not reject alternative sources of meaning in order to find a place for legislative history as a legitimate and practically useful source. Cf. Shapiro, *supra* note 156, at 956-59 (arguing that reliance on a "guideline" or a "canon" must be combined with careful analysis of legislative purpose). But see Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 51-56 (1993) (criticizing the Court's use of dictionaries from a linguistic perspective); *Looking It Up*, *supra* note 184, at 1444-52 (criticizing the Court's use of dictionaries as unprincipled and perhaps manipulative).

312. See *supra* note 79.

other legislators. In short, adoption of the proposed approach should improve the quality of this legislative history.

Yet, however legitimate or realistic it may be from the perspective of the members, and even assuming *arguendo* it enhances the quality of commentary that is produced, one senator-turned-judge has criticized this benign fiction of the reasonable legislator as too elusive for judges to grasp.³¹³ He has argued that judges should not be expected to understand the political environment in which legislative history is produced, because judges, "confined to the printed page and occupying a world far removed from the pressure cooker life on Capitol Hill," cannot readily distinguish statements intended to enlighten or persuade colleagues from those motivated by the desire to address interest groups or other local constituencies, or even to manipulate courts.³¹⁴ Indeed, the argument continues, any gains in congressional efficiency will be more than offset by the losses in judicial efficiency when courts and litigants must spend countless hours sifting through thousands of pages of legislative history to try and determine what a reasonable legislator might have understood or accepted.³¹⁵

This argument is not persuasive, in part for reasons discussed earlier. As to motivation of the actors, the drafters of legislative history are acting as agents to the committee or member that employs them. The fact that they are more open to interest group expression or pressure than judges does not make them less honest. There is no basis for concluding they will act in a devious or irresponsible manner, and there is sound reason to believe the contrary.³¹⁶

Admittedly, there are challenges in the judicial task of distinguishing between legislative history that reflects a broad-based understanding and history that reflects a narrow or parochial perspective. But the task itself is not more intrinsically difficult than other challenging tasks of judicial interpretation, such as con-

313. See *Stat. Interp. Hrg.*, *supra* note 27, at 21-22 (statement of Judge James L. Buckley). This differs from, but is related to, the argument that legislative history is too inaccessible for litigants to be effectively charged with knowledge. Concerns about accessibility for litigants are addressed *supra* at note 239.

314. See *id.*

315. See generally *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring) (arguing that reliance on legislative history "condemns litigants . . . to subsidizing historical research by lawyers"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) (criticizing "exhaustive analyses" of legislative history).

316. See *supra* text accompanying notes 193-205.

struing the oral understandings surrounding a written contract³¹⁷ or the legislative intent behind an allegedly unconstitutional redistricting scheme.³¹⁸ Discerning motivation or attributing collective understanding, based on a record that documents oral as well as written statements, is a traditional judicial function that competent and fair-minded judges should be expected to perform.³¹⁹ Finally, to the extent that judges must work hard to become familiar with the complexities and nuances of legislative history, it is entirely appropriate that they do so for the reasons of legitimacy already mentioned. The three considerations set forth here are intended to facilitate that judicial effort.

C. *Corollaries to the Three Considerations*

Before applying the "reasonable legislator" construct to committee commentary that endorses or rejects judicial interpretation of materially unaltered text, I want to address two corollary issues. These are issues that may affect how the key elements of that construct are to be weighed. The first is whether to view committee endorsements or approvals of judicial interpretations in a different light from committee rejections or disapprovals. The other is whether to distinguish between committee commentary addressing text that is inconclusive due to lack of foresight and commentary addressing text that is inconclusive from lack of will.³²⁰

1. *Approvals and Disapprovals*

As a general matter, especially when Supreme Court interpretations are involved, committee commentary expressing approval ought to enjoy a presumption of support from a reasonable member of Congress. This is because committee approval simply involves endorsement of the status quo; Congress need not write new text in order to validate a Supreme Court result. Given the risks involved

317. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 570-72 (1960) (Brennan, J., concurring); *Pacific Northwest Bell Tel. Co. v. Communications Workers of Am.*, 310 F.2d 244, 248-49 (9th Cir. 1962).

318. See *Shaw v. Reno*, 113 S. Ct. 2816 (1993); see also *City of Mobile v. Bolden*, 446 U.S. 55 (1980); Zeppos, *supra* note 303, at 1342-43.

319. Cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 287 (1985) (responding to the criticism that judges will lack the imagination to reconstruct original legislative intent by noting that when judges invoke *any* source of context, "the irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously").

320. This distinction is explained *supra* at text accompanying notes 27-28.

in opening up a textual provision in order to modify its language,³²¹ committee leaders or bill managers may be disinclined to initiate such changes even as part of a related reenactment or reauthorization. Indeed, the primary practical reason for Congress to change text in this setting, as opposed to merely expressing approval in report language, is to prevent the Court from reversing itself later. Such reversals are not likely, both because the Supreme Court rarely concludes that it has erred³²² and because even if it reaches such a conclusion, the doctrine of stare decisis is likely to keep the Court constant.³²³

Although committee approval is presumptively reliable, the presumption is not irrebuttable. Thus, for example, if committee approval is expressed in a cursory, obscure, or isolated manner and is irrelevant to or inconsistent with the thrust of the statutory changes that are being made, then the approval may well not deserve the endorsement of a reviewing court.³²⁴

Moreover, the presumption accompanying approval is less weighty when committee approval of lower court decisions is involved. This reduced weight is due in part to the greater likelihood of reversal. Courts of appeal may modify or overturn district court decisions, appellate court doctrines may be revisited because of conflict with other circuits, and the Supreme Court may alter or supersede textual interpretations from any lower court. In light of the greater possibility of reversal, reasonable legislators who agree with a lower court holding should be more inclined to try and codify that holding. Any failure to do so is less clearly consistent with a firm desire to embrace the lower court's position.

The presumption accompanying approval of lower court decisions also is weaker because reasonable legislators are less likely to be aware of lower court cases. Unlike Supreme Court decisions,

321. See *supra* text accompanying notes 113-23 (discussing the risk that textual modifications on subsidiary matters will delay or dilute the overall legislative package).

322. Once the Court decides a statutory question, there may be no occasion to revisit the matter because lower court implementation fails to raise any "cert-worthy" disagreements. The Court may decide sua sponte to re-raise the correctness of its earlier holding, see, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (inviting the parties to address the question of whether its prior interpretation of 42 U.S.C. § 1981 should be overturned), but this is exceedingly rare.

323. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Patterson*, 491 U.S. at 172-75; *California v. FERC*, 495 U.S. 490 (1990). But cf. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (overruling an earlier decision on grounds of clear initial misapprehension plus effects of subsequently decided Supreme Court cases and a subsequently enacted related statute). See also *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (limiting the scope of stare decisis doctrine to exclude cases in which precedents are "unworkable or are badly reasoned").

324. See *infra* text accompanying notes 354-69.

which are fewer in number and receive extensive media coverage, most decisions by lower courts are not noticed even by committee leaders and their staff, much less by members outside the committees of jurisdiction.³²⁵ Accordingly, there is a greater chance that approval inserted into a committee report may result from awareness by only a small number of staffers — perhaps the product of an exchange with one interested group or agency official.³²⁶ Under these circumstances, the possibility of insincere or manipulative use of legislative history supports a more rigorous application of the three factors described above.

Not surprisingly, committee report *disapproval* of Supreme Court interpretations is presumptively unreliable for much the same reasons that justify reliance on committee approval. In order to invalidate a Supreme Court result, Congress must pass a law overriding that result. The failure to take such specific action carries particular weight here, both because Congress has focused on the statute in question by modifying or reenacting related textual provisions and because the committee responsible for initiating the textual changes has focused on the judicial construction of the distinct provision that is being left unchanged. It therefore seems entirely appropriate to infer that Congress as a whole was unwilling to translate committee commentary into text and that a reasonable member of Congress would not endorse the disapproval expressed by the committee.

Once again, however, the presumption should not be viewed as irrebuttable. When Congress reenacts or modifies a particular statutory scheme,³²⁷ the “distinct provision that is being left unchanged” may not be so distinct from the textual changes that Congress is actually making. Thus, for example, Congress may override a Supreme Court result by making specific textual changes, while at the same time failing to change other textual provisions also addressed or implicated by the Court’s opinion. Committee commentary accompanying the override text may voice disapproval for these additional aspects of the Court’s opinion, but the disapproving commentary may lack a precise textual analogue.³²⁸

325. See Katzmman, *supra* note 217, at 662.

326. See *id.* (finding that staffers tend to be aware of lower court decisions because the losing party or an interest group or trade association brings it to their attention while seeking a legislative “fix”).

327. See *supra* note 294 (defining *statutory scheme*).

328. See, for example, the statutes and Supreme Court decisions cited *supra* at note 11.

Admittedly, Congress could go further and incorporate its committee critique into text through additional statutory modifications. But the presence of an override provision means that Congress has rejected the Court's basic approach, and Congress's failure to do more should be analyzed from that perspective. In particular, the absence of additional changes raises a different and more familiar set of concerns than the failure to codify disapproval at all. The sponsors of the override text may have neglected to codify committee commentary that the override Congress would have wholeheartedly supported. Or these sponsors may have concluded that the commentary expressed views that, while widely shared, were not readily adaptable to text. Alternatively, the override Congress may have viewed additional codification as unnecessary because Congress had done all that was required to restore the status quo ante. Finally, Congress may be thought of as having concluded that the disapproval expressed in committee commentary was collateral or subsidiary to the override text. Thus, even if the commentary was not especially controversial and would have been broadly endorsed, the majority might have omitted it from the text to minimize procedural or tactical obstacles that could delay enactment.³²⁹

Under these circumstances, the presumption accompanying disapproval of Supreme Court decisions survives, but with less weight attached. Further analysis of the committee commentary is warranted to reveal which, if any, of the alternative explanations most plausibly accounts for the commentary's absence from text. To determine whether a reasonable legislator would understand the committee commentary to be an amplification of the text she was voting on, courts should pay close attention to the three considerations set forth above.

Commentary disapproving lower court decisions may be analyzed in similar terms when it accompanies a textual change overriding the lower court result. Moreover, the presumption of unreliability may be further weakened in the lower court context because of the sheer volume and rapidly evolving status of these decisions.³³⁰ Congress would be overwhelmed if it attempted to codify each committee-based disagreement with a lower court ruling, or even each committee-based judgment taking sides on an is-

329. See *supra* text accompanying notes 251 and 268. See generally *infra* text accompanying notes 384-412 (analyzing committee expressions of disapproval in two particular override settings). See also Aleinikoff & Shaw, *supra* note 4, at 692-96 (analyzing the tension between plain meaning and legislative purpose in a third override setting that included committee disapproval).

330. See *supra* note 16.

sue of tension or conflict among the lower courts. Indeed, a judicial rule requiring such codification would lead to courts' viewing the failure to codify a committee-based criticism as tantamount to congressional acquiescence if not approval. Such a rule might well have the unfortunate effect of chilling congressional inquiry into and understanding of lower court decisions, out of fear that expressions of awareness would almost always be cited as signifying acceptance of the result.

This does not mean, of course, that Congress's failure to codify its committee-based disapproval of a lower court decision is without significance. But in some instances, it will be plausible to ask whether a critical committee commentary — for example, taking sides in a lower court conflict — accompanying a reenactment of related text that does not override the criticized decision should be accorded weight based on the three considerations we have identified. At the same time, the potential for lack of member or staff awareness³³¹ counsels against overcoming the presumption too readily.

2. *Lack of Foresight and Lack of Will*

Often, statutory text on its face does not resolve a particular issue, but legislative history commenting on earlier judicial interpretation of that text suggests a solution. The fact that parties are now litigating the issue indicates that in some meaningful sense it has become "controversial." In deciding whether to rely on the legislative history, courts should distinguish between situations when legislators display some awareness of the potential for controversy and situations when they fail to do so.

As discussed earlier, Congress regularly does not anticipate or foresee the full range of instances to which a statute might apply.³³² Committee reports may include guidance amplifying the meaning of the text in certain specific settings.³³³ Often, this guidance will address matters not perceived as controversial at the time. The discussion appears in history rather than text because it is too commonplace to warrant inclusion in text, or because including it would suggest that failure to include other equally subsidiary observations has diminished their reliability, or even because capturing the discussion in text would be unduly cumbersome from the standpoint of

331. See *supra* text accompanying note 325.

332. See *supra* text accompanying notes 27, 109-12.

333. For the same reasons discussed *supra* at text accompanying notes 109-12, this guidance likewise is not meant to be exhaustive or all-inclusive.

drafting technique. Each of these rationales may apply to the particular type of committee report guidance that is our focus here: commentary endorsing or rejecting the holding or reasoning of an intervening judicial interpretation. As long as a reasonable member of Congress would have noticed, understood, and accepted the committee commentary, there is no reason to be especially suspicious about possible manipulative or insincere creation of such commentary.

There is greater cause for concern, however, when the legislative history addresses a politically contentious matter. Once again, the relevant committee actors have anticipated that the new text would apply to a specific situation, although Congress has left the text inconclusive as to that situation. But the presence of controversy is flagged by a committee report or floor debate that reflects conflicting views as to how the text is to apply. Under these circumstances, courts may be misled by legislative actors in the majority seeking a resolution of the controversy through legislative history.³³⁴

At the same time, courts also may be misled by legislative actors who are in a small minority but who seek to create the appearance of serious controversy about a matter Congress did not include in text. If courts will disregard specific committee commentary whenever that commentary is challenged through dissenting or minority views in the report, or through opposing remarks on the floor, disgruntled "losing" members will have an unhealthy incentive to neutralize legislative history that fairly and faithfully reflects what the majority would have endorsed.

The problem of distinguishing "truly" contentious from "rhetorically" contentious legislative history may be addressed by returning to the distinction between procedural and substantive reasons for not resolving an issue in text.³³⁵ Assume first that a handful of members opposes both a bill and the majority commentary on a "controversial matter" as expressed in the committee report accompanying the bill. Although the minority lacks the numerical strength to prevent passage, it still can cause delays by forcing debate and votes on amendments to "clarify" inconclusive text.³³⁶ The committee managers of the bill may decide to forgo offering such clarifying amendments, even though the majority

334. See Popkin, *supra* note 4, at 315; see also Jorgensen & Shepsle, *supra* note 214, at 46 (distinguishing between intended and unintended gaps in statutory text).

335. This distinction is first discussed *supra* at note 28.

336. See *supra* text accompanying notes 113-16.

would ultimately prevail on them. Perhaps they believe the situation that prompted the bill demands more urgent action, or perhaps they have other matters they wish to raise in committee before the Congress adjourns, or perhaps the congressional leadership does not want debate on the bill to tie up the floor.³³⁷ Under these circumstances, the *procedural* difficulties of effecting a change in text result in a politically contentious matter being addressed in legislative history. So long as the bill's supporters also support the commentary in this controversy, there is little reason to discount the committee commentary.³³⁸ Indeed, because the debate is openly joined and the disagreement parallels disagreement over support for the bill itself, it is more likely that considerations of salience and consonance³³⁹ have been satisfied.

On the other hand, there are doubtless occasions when other members who support the bill question the majority views expressed by the committee managers on a particular matter. The managers might well be able to add a clarifying amendment in committee, but this amendment might fail to hold the requisite majority or supermajority support on the floor. Removal of the amendment after it has been added may create an adverse inference as to the meaning of the once-again ambiguous text. Moreover, the proponents' failure to prevail on a controversial matter may undermine the confidence or commitment of other supporters. Under these circumstances, the managers may decide that given the *substantive* difficulties of effecting a change in text, they will continue to address the matter only through legislative history. Here, however, the contentiousness involves supporters as well as opponents. This broader scope of controversy will be demonstrated through concurring or supplemental report views filed by supporters on the committee and through floor statements made by supporters off the committee. The existence of such differences among supporters makes it less likely that a reasonable member aware of the differ-

337. See *supra* text accompanying notes 113-16.

338. The Supreme Court has often observed that statements of opponents are entitled to little weight as a substantive matter in construing a statute. See, e.g., *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1975); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1313 n.13 (1973); *Mastro Plastics v. NLRB*, 350 U.S. 270, 288 (1956). Under the proposed approach, however, such statements may enhance the reliability of *supporters'* statements, for reasons explained in text. Such enhancement may be less justified when the bill's opponents are a substantial minority — for example, a minority potentially numerous enough to filibuster clarifying amendments.

339. See *supra* text accompanying note 298.

ences would understand the conflicting history as reliably explaining the text.³⁴⁰

D. *Specific Applications of the Considerations and Corollaries*

Some caveats are in order before the various considerations and corollaries discussed above are applied to this article's paradigmatic legislative history.³⁴¹ Given the variety and complexity of factual situations portrayed in even this designated type of history, the examples chosen here cannot be defended in empirical terms as "typical" or "representative." At the same time, given its focus on legislative history to the exclusion of other contextual sources like the canons, ordinary usage, or the surrounding body of law, the discussion that follows may appear to oversimplify the difficult task of statutory interpretation.

Accordingly, it is important to be clear about the limited objectives of this section. I have chosen certain examples in an effort to demonstrate that the proposed approach can be a workable instrument in the hands of a reviewing court. I begin by contrasting two instances of committee commentary approving Supreme Court interpretations. The contrast serves to illustrate how the three considerations may be used to identify relevant differences in the reliability of committee approvals. I then consider several instances of committee reports disapproving Supreme Court interpretations. One such instance is the age discrimination example set forth in Part I. I also examine two other instances of committee disapproval to put the ADEA case in perspective. Finally, although this approach may assist a reviewing court in assessing certain types of legislative history, it is hardly a panacea. It need not be the only method of evaluating legislative history, and it should not be the only aid to reviewing and understanding inconclusive text.

340. Inevitably, there will be some difficulty in line drawing between the truly contentious and the rhetorically contentious — for example, when one or two supporters align themselves with the opposition on a particular matter, or when an opponent characterizes a supporter as "on my side on this issue." Moreover, the distinction presupposes that disagreement among supporters will become evident on the legislative record, and this may not always be true — for example, a lukewarm supporter may not care enough to express disagreement on some relatively minor issue. Still, the distinction drawn here is important in principle and is sufficiently workable to allow for meaningful refinements beyond an "all-or-nothing" approach to committee commentary that is politically controversial.

341. For an explanation of why I have chosen this particular type of legislative history, see *supra* note 298.

1. *Approvals: Comparing Reports from Two Statutes*

a. *1972 Equal Employment Opportunity Act.* In 1972 Congress passed the Equal Employment Opportunity Act,³⁴² creating enforcement authority for the Equal Employment Opportunity Commission (EEOC) and otherwise broadening protections available under Title VII of the 1964 Civil Rights Act.³⁴³ While the bill was being considered in committee in 1971, the Supreme Court decided *Griggs v. Duke Power Co.*,³⁴⁴ its first case interpreting Title VII. The Court in *Griggs* held that practices or procedures that were neutral on their face violated Title VII if they had a discriminatory impact on minorities and could not be justified as a matter of business necessity.³⁴⁵

Both the House and Senate committee reports accompanying the 1972 Act discussed at some length and expressly approved the holding and reasoning of *Griggs*.³⁴⁶ The reports emphasized that testing programs should be reexamined to ensure compliance with *Griggs* by public and private employers.³⁴⁷ In addition, each report cited *Griggs* to support its basic conclusion that because employment discrimination was more complex and pervasive than had been previously believed — characterized “in terms of ‘systems’ and ‘effects’ rather than simply intentional wrongs”³⁴⁸ — the EEOC needed broad and meaningful enforcement powers. *Griggs* also was discussed with approval by the bill’s manager during debate on the House floor³⁴⁹ and by several Senators, including the

342. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 5 U.S.C. and 42 U.S.C.).

343. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000a-h (1988)).

344. 401 U.S. 424 (1971).

345. 401 U.S. at 431 (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”). The Court’s reasoning has been applied to facially neutral practices such as education requirements, employment tests, and minimum height or weight requirements, which have a disparate impact on females. The Court’s “disparate impact” doctrine had no precise textual analogue: the statute on its face prohibited discriminatory treatment. See Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 253, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (1988)).

346. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 8, 20-22 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2144, 2155-57; S. REP. NO. 415, 92d Cong., 1st Sess. 5 & n.1, 14-15 (1971).

347. See H.R. REP. NO. 238, *supra* note 346, at 20-22, reprinted in 1972 U.S.C.C.A.N. at 2156-57; S. REP. NO. 415, *supra* note 346, at 14-15.

348. H.R. REP. NO. 238, *supra* note 346, at 8-9, reprinted in 1972 U.S.C.C.A.N. at 2144-45; S. REP. NO. 415, *supra* note 346, at 5.

349. See 117 CONG. REC. 31,961 (1971) (statement of Rep. Perkins).

bill's manager during Senate floor debate.³⁵⁰ The bill as enacted contained no change in the material text of Title VII.³⁵¹ But the endorsement of *Griggs* was regarded as authoritative for nearly two decades³⁵² before being reaffirmed in text in the last two years.³⁵³

b. 1975 Securities Act Amendments. In 1975 Congress enacted the Securities Act Amendments,³⁵⁴ making substantial revisions to the Securities Exchange Act of 1934.³⁵⁵ The amendments contained certain provisions expanding the scope of the self-regulatory responsibilities of national securities exchanges and registered se-

350. See 118 CONG. REC. 3371 (1972) (statement of Sen. Williams); *id.* at 944 (statement of Sen. Spong) (quoting from committee report); *id.* at 4937-38 (statement of Sen. Cranston) (quoting from committee report).

351. See Pub. L. No. 88-352, § 703(h), 78 Stat. 253, 257 (1964), (codified at 42 U.S.C. § 2000e-2(h) (1988)) (protecting employment decisions based on professionally developed ability tests). The Senate committee version did not propose any change in the language of § 703(h). The House committee version included language modifying § 703(h) to codify the *Griggs* holding. See H. REP. NO. 238, *supra* note 346, at 37, reprinted in 1972 U.S.C.C.A.N. at 2165 (noting that the bill as reported "changes the testing provisions to stipulate that such tests must be directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned"); *id.* at 22, reprinted in 1972 U.S.C.C.A.N. at 2157 (asserting that this new provision was "fully in accord with the decision of the Court [in *Griggs*]").

This committee language fell out of the House bill during an unrelated battle over EEOC powers on the House floor. Representative Erlenborn proposed a substitute on behalf of the Nixon administration. The focus of disagreement between the administration and House Democrats was on the nature of the EEOC's new enforcement mechanism. The House Democrats had proposed giving the EEOC the authority to issue cease and desist orders, modeled on the NLRB, whereas the Nixon administration wanted the EEOC to go to district court to enforce discrimination complaints. The administration prevailed on the Erlenborn Substitute. See 117 CONG. REC. 31,958 (1971) (statement of Rep. Bolling); *id.* at 31,979-81 (statement of Rep. Erlenborn); *id.* at 32,111 (vote on substitute); see also 118 CONG. REC. 7567 (1972) (statement of Rep. Erlenborn) (discussing conference report). No one on either side of the fight over EEOC enforcement powers appears to have criticized or questioned the committee report commentary on *Griggs*. See generally L. Camille Hébert, *Redefining the Burdens of Proof in Title VII Litigation: Will the Disparate Impact Theory Survive Wards Cove and the Civil Rights Act of 1990?*, 32 B.C. L. REV. 1, 42-45 (1990).

352. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982) (quoting 1972 committee report language as "demonstrat[ing] that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*"); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 765 n.21 (1976) (quoting with approval 1972 committee report language on "'systems' and 'effects'" concept of discrimination). See generally Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 11 n.53, 14-17 (1987) (noting the courts' extensive reliance on *Griggs* as endorsed by Congress).

353. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified at 42 U.S.C. 2000e-2 (1988)) (adding new § 703(k)). Of course, there is a separate and more complex question as to the precise scope and meaning of *Griggs*, which was hotly debated during deliberations over the 1991 Act. But disagreements over the exact scope of *Griggs* and cases that followed should not obscure the point that Congress in 1972 endorsed the Court's creation of a cause of action for disparate impact under Title VII, as well as a basic evidentiary approach to litigating that cause of action.

354. Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified as amended at 15 U.S.C. §§ 78a through 80b-17 (1988)).

355. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1988)).

curities associations — known as self-regulatory organizations, or SROs — and strengthening the oversight role of the Securities and Exchange Commission (SEC) with respect to these SROs.³⁵⁶ In approving one provision affecting arbitration proceedings between SROs and their members or participants, the House and Senate conferees stated their understanding that the amendment did not change the existing law as set forth in *Wilko v. Swan*.³⁵⁷ The Court in *Wilko* had invalidated an agreement to arbitrate certain future controversies arising under provisions of the 1933 Securities Act,³⁵⁸ concluding that compulsory recourse to the “suspect” arbitral forum was incompatible with Congress’s desire to protect the rights of buyers of securities.³⁵⁹

Twelve years after the conference report’s endorsement of *Wilko*, the Court in *Shearson/American Express, Inc. v. McMahon*³⁶⁰ held that an agreement to arbitrate certain future disputes arising under similar provisions of the 1934 Act was valid. The *McMahon* Court declined to apply *Wilko*’s holding to the 1934 Act, although many lower courts previously had done so.³⁶¹ The Court reasoned in part that *Wilko*’s suspicion of arbitrators and arbitral tribunals as inadequate to protect investors’ rights was difficult to reconcile with the 1975 amendments giving the SEC new oversight power to ensure full and fair arbitral proceedings.³⁶² The *McMahon* Court also noted the 1975 conference report language referring to *Wilko*, but rejected the argument that this language signified

356. Pub. L. No. 94-29, §§ 3, 16, 18, 89 Stat. 97, 100, 146-50, 156-58 (1975) (codified at 15 U.S.C. §§ 78c(a)(26), 78s(a-c), 78w(b-c) (1988)) (amending 1934 Act, §§ 3(a)(26), 19(a-c), 23(b-c)); see also S. REP. NO. 75, 94th Cong., 1st Sess. 2, 22-23, 28-29 (1975).

357. 346 U.S. 427 (1953). The conference report explanatory statement reads in relevant part as follows:

11. *Arbitration Proceedings.*

The Senate bill amended section 28 of the [1934 Act, 15 U.S.C. § 78bb] The House amendment contained no comparable provision. The House receded to the Senate. It was the clear understanding of the conferees that *this amendment did not change existing law, as articulated in Wilko v. Swan, 346 U.S. 427 (1953), concerning the effect of arbitration proceeding provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.*

H.R. CONF. REP. NO. 229, 94th Cong., 1st Sess. 111 (1975) (emphasis added). For the amended text of § 28, see Pub. L. No. 94-29, § 21, 89 Stat. 97, 160-61 (codified at 15 U.S.C. §§ 78bb(b-c) (1988)). The amended text addresses disputes among securities industry professionals, not disputes between SROs and investors. See *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 235-36 (1987); 482 U.S. at 246 n.4 (Blackmun, J., dissenting in part).

358. Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a-77aa (1988)).

359. 346 U.S. at 434-37.

360. 482 U.S. 220 (1987).

361. 482 U.S. at 227-38; see also 482 U.S. at 247-48 & n.6 (Blackmun, J., dissenting in part) (citing lower court decisions that extended *Wilko* to Exchange Act claims).

362. 482 U.S. at 233-34.

congressional approval for extending *Wilko* to claims under the 1934 Act.³⁶³

c. *Relevant Distinctions.* Applying our three considerations, there are important distinctions between the committee report approval of *Griggs* and the committee report approval of *Wilko*. First, the committees expressed their approval of *Griggs* in terms that are elaborate and would be understandable to a reasonably thoughtful member. The House and Senate committee reports explain the *Griggs* test and the Court's underlying analysis in some detail. They also apply that test to encourage specific responses from employers. By contrast, the approval of *Wilko* cites the case with no meaningful elaboration. Indeed, the conference report's reference to not disturbing "existing law . . . concerning the effect of arbitration proceeding provisions"³⁶⁴ omits any discussion of what the conferees understood this "existing law" to be.³⁶⁵

Second, the references to *Griggs* are frequent and prominent enough to be noticed by a reasonably attentive member. In addition to the extensive discussion in both committee reports, the bill managers as well as other legislators describe and approve *Griggs* in the course of floor debate. Again by contrast, *Wilko* is mentioned only in the one instance; no member refers to it even indirectly during floor debate on the conference report.³⁶⁶

Finally, the approval of *Griggs* comports with the overall thrust of the 1972 amendments to Title VII and thus would have been accepted by a reasonably responsible legislator. Congress in 1972 recognized that employment discrimination was more than simply the product of certain identifiable "bad actors." Its decision to expand coverage and enforcement authority reflects an emerging awareness of the deeper and more systemic nature of such discrimination. Approval of the *Griggs* decision plainly is consonant with that broader perspective.

363. 482 U.S. at 235-38. In dissent, Justice Blackmun relied in part on the conference report language. 482 U.S. at 246-47. Two years later, in a case involving arbitration agreements under the 1933 Act, the Court overruled *Wilko*, holding that it was no longer consistent with the Court's endorsement of federal statutory policies favoring arbitral resolution of disputes. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

364. For the full text, see *supra* note 357.

365. See *McMahon*, 482 U.S. at 237-38 (identifying three plausible understandings that conferees may have had in mind, only one of which supported extending *Wilko* to Exchange Act claims).

366. See 121 CONG. REC. 15,370-72 (1975) (Senate debate on conference report); *id.* at 15,848-50 (House debate on conference report); see also *id.* at 10,711-37 (debate on Senate bill); *id.* at 11,740-68 (debate on House bill).

On the other hand, the 1975 Securities Act Amendments "had more diverse objectives. In an effort to foster a more efficient securities market system, Congress directed new government intervention in some areas while deemphasizing regulation in others.³⁶⁷ Of particular relevance here, the provisions dealing with SROs may point away from ready access to a judicial forum. They strengthen self-regulation in the securities industry while giving the SEC, as opposed to the courts, general authority to ensure that SRO arbitration procedures are adequate and fully comport with the objectives of the Act.³⁶⁸ This is an authority the SEC did not possess in 1953 when *Wilko* was decided. Accordingly, there is at least some tension between the relevant objectives of the 1975 amendments and the approval of a *Wilko* decision that evinced a profound mistrust for arbitration.

In sum, the three considerations strongly suggest that committee report endorsement of *Griggs* should be credited as reliable by a reviewing court, while report approval of *Wilko* should not.³⁶⁹

2. Disapprovals: Three Distinct Settings

a. *The 1989 Budget Reconciliation Act: Suspicious Insertion.* Congress in 1989 enacted an Omnibus Budget Reconciliation

367. See, e.g., S. REP. NO. 75, *supra* note 356, at 2 (outlining the bill's objectives of "vesting in the SEC power to eliminate all unnecessary or inappropriate burdens on competition while at the same time granting to that agency complete and effective powers to pursue the goal [of] centralized trading of securities in the interest of both efficiency and investor protection"); 121 CONG. REC. 11,741 (1975) (statement of Rep. McCollister) (stating that the bill aimed to "create a regulatory framework which permits the evolution of the marketplace free from unnecessary and artificial restraints on competition while at the same time focusing adequate authority in the Securities and Exchange Commission"); see also *id.* at 10,731 (statement of Sen. Williams); *id.* at 11,740-41 (statement of Rep. Staggers).

368. See Pub. L. No. 94-29, § 16, 89 Stat. 148 (1975) (codified at 15 U.S.C. §§ 78s(b)(2), 78s(c) (1988)) (amending 1934 Act §§ 19(b)(2), 19(c)).

369. There are other grounds on which one might justify extending *Wilko*'s holding to claims brought under the 1934 Act: (i) assuming that Congress as a matter of law has foreclosed waiver of access to a judicial forum under the 1933 Act, and given that the waiver provision of the 1934 Act is identical in all material respects to the language of the 1933 Act, any subsequent change in the adequacy or inadequacy of arbitration as an alternate forum is simply irrelevant; (ii) even if *Wilko* held only that arbitration was inadequate to protect private investors' rights under the 1933 Act, the same reasoning applies to protect investors against professionals under the 1934 Act, regardless of intervening judicial rulings addressing disputes between more equally situated commercial parties; (iii) considerations of stare decisis — based on 32 years of appellate court decisions extending *Wilko* to the 1934 Act — suggest that any mistake in this extension is best remedied by Congress. See generally *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 249-61 (1987) (Blackmun, J., dissenting in part); 482 U.S. at 268-69 (Stevens, J., dissenting in part); Note, *Arbitrability of Claims Arising Under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548, 555-60. But under the analysis of this article, none of these arguments should be allowed to rely on the 1975 conference report language for support.

Act.³⁷⁰ Included in the legislation was a provision authorizing the Secretary of Labor to bring suit under a new civil penalty section of the Employee Retirement Income Security Act (ERISA) that addressed failures to comply with applicable health insurance continuation requirements.³⁷¹ The provision, which was projected to raise revenues for the federal government, was accompanied by language in the House Budget Committee Report. This language explained how the Secretary could bring such lawsuits against employers, plan administrators, insurance companies, or health maintenance organizations.³⁷²

The House committee report then went on to express concern over both the growing practice of insurance companies' denying medical claims in bad faith and the absence of suitably severe remedies for such denials.³⁷³ The report cited the recent Supreme Court decision in *Pilot Life Insurance Co. v. Dedeaux*³⁷⁴ as contributing to this unfair situation. In *Pilot Life*, the Court had interpreted ERISA as preempting a state common law remedy for bad faith denial of medical claims.³⁷⁵ The committee report, while not disapproving *Pilot Life's* decision preempting remedies at state common law, was highly critical of the Court's conclusion that remedies under federal common law were limited to those enumerated under section 502 of ERISA.³⁷⁶ The report urged that "in light of the legislative history on this issue" the federal courts should develop an

370. Pub. L. No. 101-239, 103 Stat. 2106 (1989). In reconciliation legislation, Congress acts to "reconcile" budgeted spending levels with actual amounts being expended by raising additional revenues or reducing expenditures in particular programs.

371. Pub. L. No. 101-239, § 2101, 103 Stat. 2106, 2123 (1989) (codified at 29 U.S.C. §§ 1132(a)(6), 1132(l) (Supp. V 1993)) (amending ERISA, §§ 502(a)(6), 502(l)). The provision authorized the Secretary to assess a civil penalty of 20% of the applicable recovery amount for cases involving breach of fiduciary responsibility.

372. H.R. REP. NO. 247, 101st Cong., 1st Sess. 55 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 1947-48. This report language was submitted by the Committee on Education and Labor, pursuant to normal Reconciliation procedure.

373. *Id.*

374. 481 U.S. 41 (1987).

375. See 481 U.S. at 47-57.

376. H.R. REP. NO. 247, *supra* note 372, at 56, reprinted in 1989 U.S.C.C.A.N. at 1948-49 (characterizing *Pilot Life* as declining to fashion a federal common law remedy that goes beyond § 502 and adding that "[t]he Committee disagrees with this latter conclusion"). The report further notes:

The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a Federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA.

Id. (emphasis added).

expansive federal common law of remedies, specifically including punitive and compensatory damages.³⁷⁷

This disapproval of *Pilot Life* should not be deemed reliable. To begin with, Congress took no action to override any aspect of *Pilot Life* or even to address the decision at all, and the committee report's criticism in the absence of such action is of doubtful provenance. Moreover, the particular expression of disapproval here satisfies at most one of our three considerations. The report language is elaborated and expressed in reasoned terms, so that the critique of *Pilot Life* would presumably be understood by a thoughtful legislator. Still, the report does not credibly explain why the committee has left unaltered statutory language that has been definitively interpreted by the Court in a way the committee finds objectionable.³⁷⁸ This failure to address contrary prevailing law in any way in text would be very troubling to a reasonably thoughtful member, suggesting a possible lack of resolve on the committee's part.³⁷⁹

In addition, the report's analysis occurs in a single paragraph of a committee report that runs over 1500 pages and includes unedited contributions from ten different House committees.³⁸⁰ There was no Senate committee report at all, and neither the conference committee report nor the floor debates include any reference to *Pilot Life*.³⁸¹ Accordingly, there is considerable reason to doubt whether the analysis would have been noticed by a reasonably attentive legislator.

Finally, the analysis urging policy changes in substantive law to expand individual remedies is contained in a committee report accompanying legislation designed to balance revenues and expenditures for the federal government. The *Pilot Life* discussion is at

377. *Id.*

378. The report's assertion that "the Committee [on Education and Labor] believes such action is unnecessary," *id.*, seems self-serving and less than credible, especially because the report acknowledges that this very committee in the past had considered amending the statute to add certain remedies not enumerated under § 502 yet had not done so. *Id.*

379. For a discussion of why disapproval is presumptively unreliable, see *supra* text in paragraph following note 326.

380. See H.R. REP. NO. 247, *supra* note 372, reprinted in part in 1989 U.S.C.C.A.N. at 1906. The ten committees listed in the table of contents made report contributions ranging from less than five pages (five of the committees) to over 500 pages (Ways & Means Committee) and totaling 1555 pages. The report language from Education and Labor runs 87 pages. Each committee submits its own report language to Ways & Means; all language is then "bundled" for insertion in the Omnibus Bill Report.

381. See H.R. CONF. REP. NO. 386, 101st Cong., 1st Sess. § 2101 (1989), reprinted in 135 CONG. REC. 30,828-29 (1989); *id.* at 30,948-49 (Joint Explanatory Statement); *id.* at 31,097-128 (House debate); *id.* at 31,403-31 (Senate debate).

best anomalous in light of the revenue-specific purpose of the provision itself.³⁸² Indeed, substantive legal analysis inserted as an isolated feature of an omnibus budget reconciliation report should be viewed as suspicious in general, based on both the salience and consonance factors.³⁸³ In this case, the analysis also seeks to reject Supreme Court precedent without changing relevant text at all. Under all these circumstances, the disapproval of *Pilot Life* is best viewed as untrustworthy history drafted for strategic purposes by a diligent staff assistant or interest group.

b. *The 1978 ADEA Amendments and Subterfuge: Lack of Foresight Without Political Contentiousness.* As discussed at length in Part I,³⁸⁴ Congress in 1978 enacted amendments to the ADEA. These amendments extended the upper age limit for the protected class from sixty-five to seventy for all but federal employees, abolished mandatory retirement altogether for federal employees, confirmed the right to a jury trial, and prohibited employee benefit plans from requiring or permitting involuntary retirement before age seventy.³⁸⁵ The last provision, which was meant to resolve a split in the courts of appeal, had already been approved by both houses when the Supreme Court reached the opposite conclusion in *McMann*.

After *McMann*, the House and Senate conferees retained the bill language that now constituted an override of the Supreme Court decision.³⁸⁶ As noted earlier, the conferees also added an explanatory statement to the conference report expressly rejecting the Court's reasoning on the subterfuge issue.³⁸⁷ In debating the report on the House floor, the bill manager and other members specifically endorsed the conferees' conclusion that an employee benefit plan that discriminates on the basis of age is *not* protected by virtue of its being in place prior to enactment of the ADEA.³⁸⁸ The ranking minority member in the Senate, who had been the principal

382. One could perhaps argue that by expanding individual remedies to include punitive damages, the federal government could reap more revenues by collecting penalties totaling 20% of a far greater "applicable recovery amount." See *supra* note 371. But no such argument is ever raised in the report's analysis.

383. Cf. Strauss, *supra* note 112, at 343 (legislative history accompanying omnibus reconciliation measures "may reflect little more than the tactics of exploitation and exasperation").

384. See generally *supra* text accompanying notes 29-67.

385. See *supra* text accompanying notes 39-45.

386. See *supra* text accompanying note 46.

387. See *supra* text accompanying note 47.

388. See 124 CONG. REC. 7881 (1978) (statement of Rep. Hawkins); *id.* at 7888 (statement of Rep. Waxman); see also *id.* at 7886 (statement of Rep. Pepper); *id.* at 7887 (statement of Rep. Weiss).

author of the ADEA, also spoke on the floor condemning the reasoning as well as the holding of *McMann*.³⁸⁹ Yet eleven years later, the Court in *Betts* declined to follow this legislative history.³⁹⁰

Our three considerations strongly suggest that the disapproval of *McMann* on the subterfuge issue is reliable and should be credited. First, the disapproval is expressed in elaborated and understandable terms. The conference report declares that plan provisions are not to be judged by whether they antedate the ADEA or its amendments, thereby expressly repudiating the *McMann* Court's subterfuge analysis.

Further, in contrast to the *Pilot Life* example, there is a credible explanation for why this disapproval does not appear in the statute. Congress was already overriding the *McMann* decision in text, by altering the language of section 4(f)(2) with respect to mandatory retirement. Once Congress invalidates the result reached by the Court, its failure to invalidate the result *twice* may reflect nothing more than a conclusion that it has done all that is needed.³⁹¹ In this instance, Congress's forbearance from amending section 4(f)(2) in a separate place was surely understandable, given that the *McMann* Court had focused on the mandatory retirement issue while analyzing subterfuge as a subsidiary matter.³⁹² From Congress's perspective, both chambers had fully addressed the primary issue prior to conference and did not need to revisit it. At the same time, the subsidiary matter of subterfuge was technically beyond the scope of conference. Therefore, efforts to alter text could have resulted in time-consuming parliamentary maneuvers and perhaps given rise to unrelated political risks.³⁹³

Significantly, there was no hint of political contentiousness surrounding the subterfuge issue. The most natural explanation for leaving disapproval out of text is not a lack of resolve by the confer-

389. See *id.* at 8218 (statement of Sen. Javits).

390. See *supra* text accompanying notes 49-52.

391. Cf. text accompanying notes 328-29. Congress *has* taken legislative action to invalidate the Court's result, and it is simply unrealistic to assert as a general matter that a failure to invalidate the result in several different ways raises the inference that Congress lacks the resolve to reject all other aspects of the Court's opinion. Although such an inference might become persuasive when the Court's additional analysis garners some support or even positive interest within Congress, there is no evidence of any such support or interest with respect to the subterfuge analysis.

392. See *supra* text accompanying notes 36-38. While the conference report could have characterized the Court's treatment of subterfuge more accurately as a "secondary holding" rather than simply as "reasoning," the report did get the basic distinction right: subterfuge was of subsidiary importance. See H.R. CONF. REP. NO. 950, *supra* note 11, at 8.

393. See *supra* note 46 (discussing conference rules); *supra* text accompanying notes 113-22 (discussing political risks).

ees but rather a failure to anticipate that the issue would ever become controversial in a benefit plan setting other than mandatory early retirement,³⁹⁴ coupled with a perceived need to get on with other legislative business. Under these circumstances, the conferees' decision to limit their expression of disapproval to report language was entirely sensible.

In addition to being reasoned and understandable, the disapproval is prominent and salient in the legislative history. The conferees' position on subterfuge was expressly reaffirmed on the floor of both the House and Senate by leading proponents of the bill. Finally, the disapproval is consonant with the overall thrust of the legislation. The 1978 ADEA amendments were meant to strengthen the rights of older workers. The legislation expanded coverage, added procedural protections, and contracted the scope of a key exemption. Disapproval of an interpretive approach that would have used this precise exemption to immunize all pre-Act plans is entirely consistent with the objectives of the 1978 amendments.

Accordingly, a reviewing court should credit the conference report position rejecting the *McMann* reasoning on subterfuge. The Supreme Court's refusal to do so in *Betts* was unjustified.³⁹⁵

394. This failure to anticipate may be inferred from the different ways in which members in their floor remarks characterized the conferees' rejection of the *McMann* reasoning on subterfuge. Compare 124 CONG. REC. 7881 (1978) (statement of Rep. Hawkins) (observing that the conferees rejected the Court's reasoning, "particularly its conclusion that an employee benefit plan which discriminates on the basis of age is protected by section 4(f)(2) because it predates the enactment of the ADEA" (emphasis added)) and *id.* at 7888 (statement of Rep. Waxman) (noting that under the conference report, "[p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act" (emphasis added)) with *id.* at 7887 (statement of Rep. Weiss) ("Under this amendment — contrary to the Supreme Court's rationale — a provision in a pension or seniority plan which would mandate early retirement would be unlawful regardless of whether the plan came into effect before or after the enactment of the ADEA or these amendments." (emphasis added)).

The conference report itself is quite clear about not immunizing plan provisions in general because they predate the Act. But it is highly unlikely that Representatives Hawkins, Waxman, or Weiss were contemplating the kind of differential disability benefits system that arose 11 years later in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989). Still, applying the conferees' understanding of what their legislation means to unanticipated circumstances should be no more troubling than applying the legislative language to those circumstances, provided that the conferees' understanding may reliably be imputed to Congress.

395. The *Betts* Court's refusal to credit 1978 legislative history approving the "economic purpose" justification for age-based distinctions in employee benefits also was controversial and ultimately was overridden by Congress. See *supra* notes 52, 56. A discussion of that history, which involves primarily floor statements not specifically directed at prior judicial interpretations of the statute, is beyond the scope of this article. See S. REP. NO. 263, 101st Cong., 2d Sess. 9-13 (1990); H.R. REP. NO. 664, 101st Cong., 2d Sess. 11-15 (1990), reprinted in 1990 U.S.C.A.N. 1509, 1514-18 (accompanying Older Workers Benefit Protection Act).

c. *The 1978 Pregnancy Discrimination Act and Employee Spouses: Some Foresight and Some Political Contentiousness.* In 1978 Congress enacted the Pregnancy Discrimination Act (PDA),³⁹⁶ amending Title VII to provide for a broadened definition of sex discrimination that included discrimination on the basis of pregnancy.³⁹⁷ The PDA was a direct response to the Supreme Court's decision in *General Electric Co. v. Gilbert*,³⁹⁸ in which the Court had held that the exclusion of pregnancy-related disabilities from a company's disability insurance plan was a decision based on a disabling condition rather than on gender.³⁹⁹

A final chapter on the meaning of *subterfuge* remains to be written. In the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12,101-12,213 (Supp. III 1991)), Congress prohibited disability-based discrimination in employment, transportation, and public accommodations. Section 501(c) specified that certain provisions regarding insurance classification and underwriting "shall not be used as a subterfuge to evade the purposes of" chapters I and III of the Act. ADA § 501(c), 42 U.S.C. § 12201(c) (Supp. IV 1992). At the time the ADA was enacted in July 1990, the *Betts* decision had not yet been overridden. Congress was still more than two months away from enacting the OWBPA.

There are differences in precise language between the ADA ("shall not be used as a subterfuge to evade . . .") and the ADEA as it was then in effect ("which is not a subterfuge to evade . . ."). Moreover, there is ample legislative history to the ADA rejecting unequivocally the subterfuge analysis from *Betts*. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. II (Education and Labor), at 136 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 419 (stating that § 501(c) "may not be used to evade the [Act's] protections . . . regardless of the date an insurance plan or employer benefit plan was adopted"); *id.*, pt. III (Judiciary), at 71, reprinted in 1990 U.S.C.C.A.N. 445, 494; S. REP. NO. 116, 101st Cong., 2d Sess. 85 (1990); see also 136 CONG. REC. S9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy) (explaining that the term *subterfuge* does not require a purposeful intent to evade the ADA, does not shield an insurance plan based on its pre-ADA existence, and "should not be interpreted in the manner in which the Supreme Court interpreted the term in [*Betts*]"); *id.* at H4623 (statement of Rep. Owens) ("It is not our intent that the restrictive reading of *Betts*, with which we do not agree, should be carried over to the ADA."); *id.* at H4626 (statement of Rep. Waxman).

One might conclude from all this that the Court, after twice being rebuffed in its definitional approach to subterfuge, should not seek to impose its definition a third time in the face of continuing signals of congressional hostility. On the other hand, the Court may revive its subterfuge analysis, on the theory that Congress had not yet expunged the term from the ADEA when that term was enacted into law in the ADA. Some commentators have advanced the argument that Congress in effect endorsed the *Betts* approach — even though it expressly condemned that approach in ADA legislative history and acted to override the *Betts* decision a short time later. See David A. Copus & Glen D. Nager, *Benefit Plan Limitations After the Americans With Disabilities Act*, 19 EMPLOYEE REL. L.J. 77 (1993). But cf. Ronald S. Cooper, *EEOC Issues Guidance on Applying the ADA to Health Insurance Plans*, 2 EMPLOYMENT TESTING L. & POLY. REP. 125, 128-29 (1993) (adopting a more cautious analysis).

396. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)).

397. See the new § 701(k) of the 1964 Civil Rights Act, codified at 42 U.S.C. § 2000e(k) (1988).

398. 429 U.S. 125 (1976).

399. 429 U.S. at 133-40. The legislative history makes clear that Congress acted intentionally to override *Gilbert*. See, e.g., S. REP. NO. 331, 95th Cong., 1st Sess. 2-3 (1977); H.R. REP. NO. 948, 95th Cong. 2d Sess. 2-4 (1978); 123 CONG. REC. 7539-41 (1977) (statement of Sen. Williams upon introducing the Senate bill); *id.* at 10,581 (statement of Rep. Hawkins upon introducing the House bill); 124 CONG. REC. 36,817 (1978) (statement of Sen. Williams

Subsequently, disagreement flared over whether the PDA applied to pregnancy-related differentials in benefits provided for an employee's spouse. Typically, the controversy arose when an employer's health insurance plan offered medical coverage for employee spouses but limited coverage for the spouse's pregnancy. The result was that male employees with spouses had less generous medical packages than female employees with spouses.⁴⁰⁰ The controversy stemmed from two facts: first, *Gilbert* had involved a plan excluding pregnant employees; and second, the text of the PDA was inconclusive on its face as to whether the new definition applied to employment-related pregnancy discrimination in general or, more narrowly, to pregnancy-related discrimination directed at female employees.⁴⁰¹ The issue of whether Congress, in its legislative history to the PDA, disapproved only the holding in *Gilbert* or also the Court's reasoning was relevant in resolving the controversy over coverage.

Both the House and Senate committee reports expressly rejected the reasoning as well as the holding of *Gilbert*.⁴⁰² Each report, after setting forth the Court's ruling, then paraphrased or quoted extensively from the *Gilbert* dissenters' contentions that any classification involving pregnancy is necessarily sex-related. They also embraced these dissenting views as "correctly express[ing] both

during the debate on the conference report); *id.* at 38,573 (1978) (statement of Rep. Hawkins during the debate on the conference report).

400. The lower courts were divided over whether this differential violated Title VII as amended by the PDA. Compare *EEOC v. Lockheed Missiles & Space Co.*, 680 F.2d 1243 (9th Cir. 1982) (holding that the statute applies to pregnant employees only), *vacated*, 463 U.S. 1202 (1983) and *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F.2d 1469 (7th Cir. 1983) (same), *vacated*, 724 F.2d 52 (7th Cir. 1983) with *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 667 F.2d 448 (4th Cir. 1982), *affd.*, 682 F.2d 113 (4th Cir. 1982) (*en banc*) (holding that the statute covers pregnancy-related spousal benefits), *affd.*, 462 U.S. 669 (1983). The Supreme Court resolved the conflict by deciding in favor of broader coverage. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

401. The first sentence of new § 701(k) consists of two clauses connected by a semicolon: The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work

42 U.S.C. § 2000e(k) (1988). The first clause, standing alone, suggests that employment-related pregnancy discrimination amounts to sex discrimination in all settings. The second clause, standing alone, suggests that "employment-related purposes" are only those affecting one's "ability or inability to work," and that coverage, therefore, is limited to pregnant employees. There was disagreement as to whether the meaning of the first clause was limited by the employee-specific language of the second clause. Compare *Newport News Shipbuilding*, 667 F.2d at 451 with 667 F.2d at 451-52 (Hall, J., dissenting). See generally *Newport News Shipbuilding*, 462 U.S. at 678 n.14; 462 U.S. at 688 (Rehnquist, J., dissenting).

402. See S. REP. NO. 331, *supra* note 399, at 2-3; H.R. REP. NO. 948, *supra* note 399, at 2.

the principle and the meaning of title VII."⁴⁰³ This understanding of Title VII was reaffirmed on both the Senate and House floors by leading supporters of the legislation.⁴⁰⁴

At the same time, while rejecting the reasoning of *Gilbert*, each report also concentrated heavily on the application of this reasoning to working women.⁴⁰⁵ The plight of female employees who become pregnant was overwhelmingly the focus of floor debate in both the House and the Senate.⁴⁰⁶ Moreover, the Senate committee report identified the issue of how the new statute would affect pregnancy-related discrimination in medical coverage among employee dependents but expressly declined to resolve the issue.⁴⁰⁷ The employee dependents issue also surfaced during Senate floor debate, with members seemingly in disagreement as to whether the PDA covered pregnancy-related benefits discrimination.⁴⁰⁸

403. S. REP. NO. 331, *supra* note 399, at 2; *see also* H.R. REP. NO. 948, *supra* note 399, at 2 ("It is the committee's view that the dissenting Justices correctly interpreted the Act.").

404. *See, e.g.*, 124 CONG. REC. 21,435 (1978) (statement of Rep. Hawkins) (stating that in rejecting *Gilbert*, the bill "clarif[ies] congressional intent that sex discrimination includes discrimination based on pregnancy"); *id.* at 21,437 (statement of Rep. Green) (explaining that the bill overturns *Gilbert* "to prohibit sex discrimination in employment on the basis of pregnancy, childbirth, or related medical conditions"); *see also* 123 CONG. REC. 29,387 (1977) (statement of Sen. Javits) (quoting Stevens's dissent); *id.* at 29,641 (statement of Sen. Bayh) (quoting Stevens's dissent).

405. *See, e.g.*, S. REP. NO. 331, *supra* note 399, at 3 (stating that the bill was introduced to change the definition of sex discrimination and "to insure that working women are protected against all forms of employment discrimination based on sex"); *id.* at 4 ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."); H.R. REP. NO. 948, *supra* note 399, at 6 ("This bill would require employers who provide medical benefits for their employees to cover the medical and hospital costs of pregnancy . . . under the same terms and conditions of coverage for other medical conditions."); *id.* ("In addition to the impact of this bill on fringe benefit programs, other employment policies which adversely affect pregnant workers are also covered.").

406. *See, e.g.*, 124 CONG. REC. 21,435 (1978) (statement of Rep. Hawkins); *id.* at 21,436 (statement of Rep. Sarasin); *id.* at 21,438 (statement of Rep. Weiss); *id.* at 21,439 (statements of Reps. Akaka & Corrada); 123 CONG. REC. 29,385 (1977) (statement of Sen. Williams); *id.* at 29,387 (statement of Sen. Javits); *id.* at 29,388 (statement of Sen. Kennedy).

407.

Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees

....

... This bill would not mandate that women dependents be compared with women employees

On the other hand, the question of whether an employer who does cover dependents . . . may exclude conditions related to pregnancy from that coverage is a different matter. . . . It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

S. REP. NO. 331, *supra* note 399, at 5-6. The House report includes no discussion at all of the employee dependents issue.

408. Compare 123 CONG. REC. 29,642 (1977) (statement of Sen. Bayh) (expressing a belief that "if companies choose to provide full coverage to the dependents of their female

This presents a close question under the proposed approach, but on balance the committee report disapproval of the reasoning in *Gilbert* is too politically contentious to be deemed reliable legislative history with respect to employee spouses. The report language is elaborate and well-reasoned, and accordingly the critique of *Gilbert*'s analysis about pregnancy-related exclusions' not being gender-based would be accessible to a reasonably thoughtful member. If the committee report and floor debates had been silent on the issue of coverage for employee dependents, then the fact that coverage for dependents was not specifically mentioned in text might well be understandable.⁴⁰⁹ But the discussion in the Senate was hardly silent in this regard. The committee deliberated yet acknowledged its failure to resolve the issue.⁴¹⁰ The decision to include report commentary leaving open the extent of coverage for employee dependents is unusual and suggests at least the possibility of controversy. That possibility became a reality on the Senate floor, where debate disclosed disagreement on the employee dependent issue among the bill's supporters, including several senators who were members of the committee.⁴¹¹

employees, then they must provide such complete coverage to the dependents of their male employees") and *id.* at 29,663 (statement of Sen. Cranston) (stating that although the "committee did not directly answer the question . . . my own view [is] that such a plan [covering spouses of women employees but not spouses of male employees with respect to pregnancy] would indeed be discriminatory" under Title VII) with *id.* at 29,643-44 (colloquy between Sens. Williams and Hatch) (limiting Act to female employees who are or may become pregnant).

409. Congress did override the Court's decision, and its discussion of that override in history is predictably focused on pregnant employees. Discrimination against pregnant employees was the issue presented in *Gilbert*, and it is obviously the most visible and dominant setting for pregnancy-related discrimination in the workplace. Given the report language asserting that any pregnancy-related differentials in the workplace were now discriminatory, there is no reason to infer that failure to address the distinctly subsidiary and derivative matter of employee dependents is anything but inadvertent. *Cf. supra* text accompanying notes 391-94 (discussing ADEA and subterfuge).

The decision to bring up the bill on the suspension calendar further supports this hypothesis. See 124 CONG. REC. 21,434 (1978). The bill was sufficiently noncontroversial in the House to warrant its expedited ratification on the floor. See *id.* at 21,450 (approval by 376-43). The one controversial feature, added as a compromise in committee, was an amendment specifying that "pregnancy" and "related medical conditions" do not include abortions except when the life of the mother is endangered. This language was not in the Senate-passed version, and therefore a conference was almost unavoidable. The House leadership may also have pressed for prompt floor action to ensure enough time for conference before the end of Congress; ultimately, conference report approvals came on October 13 and 14, 1978, and Congress adjourned on October 14. H.R. CONF. REP. NO. 1786, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 4765 (accompanying Civil Rights Act of 1964 — Pregnancy Discrimination).

410. See *supra* text accompanying note 407.

411. See *supra* text accompanying note 408. Senators Williams, Cranston, Bayh, and Hatch each voted for the bill on final passage. 123 CONG. REC. 29,664 (1977). All but Senator Bayh were members of the Committee on Human Resources, which reported the bill. S. REP. NO. 331, *supra* note 399, at 12.

Under these circumstances, there is ample reason to doubt that reasonable senators, exposed to the committee report and the floor debate, would understand this history to reflect an intent either to cover or not to cover employee dependents. Accordingly, a reviewing court should regard the committee report's disapproval of *Gilbert* as inconclusive with regard to the scope of coverage and should rely instead on other contextual sources in order to resolve the employee dependent controversy.⁴¹²

CONCLUSION

In this article, I have argued that courts should take legislative history seriously as a contextual source of meaning when they interpret statutes. Today more than ever, Congress uses this history to enhance its statutory work product by avoiding both an unnaturally confining quest for linguistic precision and an unduly burdensome pressure on the legislative calendar. To the extent that courts systematically ignore or devalue such history, they undermine Congress's reasonable efforts to manage its agenda in a complex and controversial world. They also impose substantial costs on the leg-

Classifying Senator Hatch as a true supporter is somewhat troubling, inasmuch as he did not vote favorably in committee and proposed a number of weakening or hostile amendments on the floor, always joined by an opponent of the legislation. *See* S. REP. NO. 331, *supra* note 399, at 12 (Hatch not recorded as voting on motion to report bill favorably); 123 CONG. REC. 29,644-60 (1977) (recording the offering of various amendments by Hatch, each supported by Helms and opposed by Williams, each withdrawn, modified, or defeated). But the statement that the PDA was not intended to cover spouses of male employees is not a statement from Senator Hatch alone, which might be suspect; rather it is contained in a colloquy between Senator Hatch and the bill's author and principal supporter, Senator Williams. *See id.* at 29,643-44.

412. There are several alternative contextual reference points available. *First* is reasoning by analogy from the language of the PDA to the surrounding body of law other than the law in *Gilbert*. The Court has elsewhere read text seemingly limited to protecting blacks as simply "emphasizing 'the racial character of the rights being protected'" and not restricting the statute's protection to nonwhites. *See McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (quoting *Georgia v. Rachel*, 384 U.S. 780, 791 (1966)) (applying § 1981). Similarly, the text of the PDA referring to "ability or inability to work" could be read as emphasizing the functional basis of the pregnancy-related conditions to be covered, without restricting the statute's protection to pregnancy among female employees. *Second* is the meaning of pre-PDA Title VII law, and in particular the extent to which medical insurance is covered by "terms and conditions of employment" under § 703(a). *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983); *see also Wambheim v. J.C. Penney Co.*, 642 F.2d 362, 365 (9th Cir. 1981) (holding that a head-of-household qualification for *dependent* medical benefits constitutes a prima facie violation of the Title VII ban on sex discrimination because only 37% of women employees would receive dependent coverage, compared with 95% of men). A pregnancy limitation for *dependent* medical benefits has similar, predictably disparate effects, this time on male employees. *Third* is deference to agency interpretation. Unlike the agency guidelines criticized in *Gilbert*, EEOC interpretive guidelines on the PDA (covering employee spouses) did not conflict with positions previously announced by the Commission.

islative process, which are likely to result in diminished and diluted legislative products.

The refusal by some jurists and scholars to take these materials seriously is striking when contrasted with the courts' stance regarding contextual materials produced by the other two branches of government. Courts often look to concurring judicial opinions in an effort to understand and apply the meaning of the majority decision.⁴¹³ The concurring opinion is not the law, but it may well offer guidance as to how the law should be applied in new or unexpected circumstances. Similarly, courts regularly refer to administrative agency interpretations and opinions that are not expressed as legislative rules or formal adjudications.⁴¹⁴ They do so recognizing that, "while not controlling . . . by reason of their authority, [these statements] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."⁴¹⁵ At least some less formal materials produced as part of the legislative enterprise constitute a comparable "body of experience and informed judgment." Yet these materials will not be appropriately credited if generalized suspicion and criticism of the legislative process results in an unwillingness or inability to understand that process.

Critics of legislative history are surely right to point to its shortcomings. As such history has proliferated in recent years, concerns about lack of reliability have grown more persistent. Even defenders of legislative history as an interpretive aid have rightly called for a more consistent or uniform approach to statutory construction in an effort to control misuses.⁴¹⁶

The considerations proposed and applied here are a preliminary effort to respond to this challenge. Although the applications discussed have been limited to one specific type of history, the analysis could be extended to other areas. Obviously an "objective" approach runs the risk of becoming overly mechanistic and not sufficiently sensitive to the nuances of each statutory setting. But that risk is outweighed by the benefits for reviewing courts and also for Congress. By adopting a more objective means of determining reliability, this approach should make it less likely that judicial resort

413. See, e.g., *First Natl. Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-77 (1981) (relying on Justice Stewart's concurring opinion in *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 223 (1964)).

414. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

415. 323 U.S. at 140.

416. See, e.g., Wald, *supra* note 3, at 214.

to legislative history will simply be a way of "looking over a crowd and picking out your friends."⁴¹⁷ At the same time, by articulating explicit standards, the approach encourages legislators and their staffs to ensure that history they deem important is expressed in sufficiently reasoned and prominent terms. One important result could be to improve the quality of legislative history in general. That, presumably, should please critics as well as proponents of its use.

417. *Id.* (quoting an observation made by Judge Harold Leventhal).