

IS TEXTUALISM IMPOSSIBLE?

THE VIEW FROM A DECISION THEORY OF STATUTORY INTERPRETATION*

Note to readers: This Article forms the core of Chapter 4 of my draft manuscript, MISREADING LAW. Justice Scalia's last book was entitled READING LAW. In that book, Justice Scalia embraces purpose if inferred from text. What, then, is left to the grand debates between purposivists and textualists? The answer: legislative history. Textualism's most hotly contested interpretive thesis is that judges may not look beyond semantic meaning to interpret a statute; my book argues that courts must look beyond semantic meaning to legislative context. More importantly, since judges do in fact look to legislative history, the book offers a way to simplify legislative history by reverse-engineering legislative text. Chapters 1 and 2 present a parsimonious positive theory of Congress based on electoral incentives and the supermajoritarian difficulty. Chapter 3 reprises my 2012 Yale Law Journal piece, A Decision Theory of Statutory Interpretation, but adds evidence showing that judges do in fact apply certain major aspects of decision theory, if inconsistently and without theorization. Chapter 4 (appearing below) responds to the claim that legislative intent does not exist and that text must prevail even if it does. Here, I assert that Congress's context must be consulted, even when the statute's semantic meaning appears clear. Chapter 5 answers the objection that any theory relying on legislative history is unconstitutional. We have a law of civil procedure, criminal procedure, and administrative procedure; call this a prolegomena to a law of legislative procedure.

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“Intent is unfortunately a confusing word.”

*Dean James Landis*¹

“So taken are we with models derived from ordinary conversation we are inclined to ignore the formalities necessary for political discourse in a numerous and diverse society.”

*Jeremy Waldron*²

Recently, I elaborated a theory of statutory interpretation foregrounding Congress’s basic lawmaking processes.³ Call this “legislative decision theory.” That theory is subject to two important objections. Textualists claim that Congress, as a group, can have no intent.⁴ It follows from this that any theory looking beyond text, including decision theory, must be wrong. Call this “the group-impossibility objection.” An even more insistent argument made by textualists is that the only way to determine controlling text is by excluding legislative history. Call this the “exclusivist” thesis. Any theory using legislative history, including legislative decision theory, must respond to both of these arguments.

In this Article, I argue that the group-impossibility objection and the exclusivity thesis are wrong. Congress has no mind, but it does act. If we redefine intent as the meta-intent to act under certain procedures, then it is not impossible for Congress to have an intent so-defined. To use the concept of intent to deny group agency⁵ (that groups act meaningfully) is to make an extremely implausible claim. Our social life and indeed our democracy is not possible without acknowledging that groups exist and act in the world.

¹ James M. Landis, *A Note on ‘Statutory Interpretation,’* 43 HARV. L. REV. 886, 888 (1929-30).

² JEREMY WALDRON, *LAW & DISAGREEMENT* 70 (1999).

³ Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L. J. 70 (2012). I originally described this as “decision theory” simpliciter; here I have added “legislative” decision theory to distinguish it from welfarist accounts. *Id.* at 73 n.4 (explaining this distinction). The term “decision” remains crucial to this theory as it more properly conveys the legitimacy of congressional processes, and avoids the deep ambiguities of intent I explore later in the paper. *See infra* Conclusion, Part VI.

⁴ ANTONIN SCALIA & AMY GUTMANN, *A MATTER OF INTERPRETATION : FEDERAL COURTS AND THE LAW : AN ESSAY* 17 (1997) (“Government by unexpressed intent is simply tyrannical. It is the law that governs, not the intent of the lawgiver.”).

⁵ For a discussion of what I mean by group agency, *see infra* text accompanying notes ____.

If Congress is to be disregarded because it has no intent, should we also disregard entities for which we might have more affection, such as Yale or Apple Corporation or the Ford Foundation? Does the group intent objection mean that a large part of our world simply disappears in mental ether because we attribute intent to these groups?

Textualists will parry this claim with the “exclusivist” thesis. They will argue that, even if they have overstated the case against “intent,” and concede that Congress does act in public ways, the only relevant act is the text of the statute. I argue here that the exclusivist thesis is wrong. First, it is inconsistent with textualists’ own arguments that text requires context; Congress’s procedural context is important context that can change meaning about individual intent, speakers’ meaning, and textual decisions. Second, it is impossible to know *ex ante* whether a judge has avoided a textual conflict or otherwise chosen his or her favorite “cocktail party” text (just as purposivists have been accused of picking their friends at a “cocktail party”).⁶ Third, if the text is an act, then there is no reason to think that prior public legislative communications are not acts in the same sense: they are public, legitimated by Congress’s rules, and supported by constitutional authority.⁷ If these claims are correct, decision theory is possible and legislative history necessary procedural context under any modality of intent. It follows that textualism in its strong form—excluding legislative process in every case—is impossible.

This Article has six Parts. The first three parts address the group-impossibility objection, arguing that groups do act under sequential procedures and in that sense have intents; the second three Parts address the exclusivity thesis, arguing that strong form textualism is impossible—even in cases where semantic meaning is clear, interpreters must consult congressional context to understand legislative meaning. In Part I, I summarize legislative decision theory. In Part II, I explain the group-impossibility objection, as first expressed by Max Radin⁸ and later elaborated by Ronald Dworkin⁹ and

⁶ See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of guests for one’s friends.”).

⁷ Article I section 5 of the Constitution authorizes each House to determine the rules of its proceedings. U.S. Const. Art. I, sec. 5. Section 5 is not simply a placeholder provision. As compared to canons, for example, legislative procedures have explicit constitutional authority. More importantly, if one were to remove or change this clause, the President or the courts could, in effect, control the Congress by setting its rules.

⁸ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1929-30). As John Manning has explained, “[t]he textualists’ intent skepticism can be traced to the work of Max Radin, a noted legal realist.” John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 n. 81 (2003) (recapitulating Radin’s argument against intent); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372-73 (1990) (discussing the textualists’ debt to Radin).

⁹ RONALD DWORIN, *LAW’S EMPIRE* 314, 335-36 (1998) (“So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds and then we must worry about how to consolidate individual intentions into a collective fictitious intention.”); see RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 19 (2012)) (arguing that Dworkin asserts a “tacit premise . . . that the legislature cannot have an intention because it is an institution.”)

Justice Scalia. In Part III, I argue that the group-impossibility thesis is incorrect, based on a typology of intent modalities (intent as mind, communication, and situation), and analyze the question of intent as it relates to group agency. In Part IV, I argue that, without consulting legislative context, courts pick and choose texts, fail to resolve textual conflicts, and misinterpret texts. If this is correct, then textualism's exclusivist thesis fails. In Part V, I consider how textualists and purposivists have looked at legislative history and argue that each has made errors without using congressional context. Part VI explains why statutes must be seen as more than the product of minds or communications, more than semantic content, lest they be seen as no different from a poem or novella or opera. Our democracy cannot rest upon such a Spartan theory of semantic meaning without eradicating its most basic institutions.

I. DECISION THEORY: A BRIEF INTRODUCTION

If legislative decision theory were a bumper sticker, it might read: Statutory Interpretation Finally Goes to Congress. For more than half a century, legal process theory has dominated the field of statutory interpretation, and led to a textualist counterrevolution.¹⁰ Until now, neither authors nor opponents of legal process theory have delved much into congressional procedure. Chapter 5 of Hart & Sacks's *The Legal Process*, entitled "*The Legislative Process*," weighs in at a healthy 314 pages, but less than 5 percent of those pages deal with congressional rules or procedure.¹¹ Justice Scalia's famous Tanner lectures make mention of some congressional processes in a paragraph or two but mostly for the purpose of deeming congressional intent impossible.¹² As Jerry Mashaw once explained, none of the primary theories of statutory interpretation have a positive theory of how Congress works.¹³

¹⁰ Legal process has been the preferred theory of those who propound it, such as Justice Breyer, and the major target of those who reject it, such as Justice Scalia. Both Justices were schooled in the technique at Harvard and so it is not surprising that it would be dominant, in positive and negative forms, on the Supreme Court. See William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865 (2013).

¹¹ HENRY MELVIN HART ET AL., *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (1994). The legislative process part of the chapter appears at page 724-26, and does note the filibuster, suggesting it is limited to bills "proposing action on the rights of the Negro." *Id.* at 725; see also *id.* at 975-777 (reporting the rules governing conference committees). To its great credit, the materials do address one of Congress's most important functions, appropriations, and reprint at length hearings on a matter involving flood insurance which, today after various tremendous hurricanes, appears surprisingly relevant. See *id.* at 985-1002.

¹² ANTONIN SCALIA & AMY GUTMANN, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY* 17 (1997) ("Government by unexpressed intent is simply tyrannical. It is the law that governs, not the intent of the lawgiver."); *id.* at 32 ("[W]ith respect to 99.99 percent of issues of construction reaching the courts, there is no legislative intent."); *id.* ("That a majority of both houses of Congress . . . entertained any view with regard to [relatively minor] issues is utterly beyond belief."). See Eskridge, *New Textualism*, *supra* note 8, at 651-52 (arguing that Justice Scalia adopted Radin's critique against collective intention).

¹³ Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, ____ (1989) ("a normative theory of interpretation without a positive theory of politics may lead us . . . to defeat our own ends.").

Enter legislative “decision theory.” The essence of the theory is that the meaning of a federal statute is a function of the process structured by basic principles of congressional procedure.¹⁴ Decision theory does not require expertise in parliamentary procedure but the kind of knowledge it takes to intelligently interpret a trial; it demands knowledge of basic principles of congressional structure and process.¹⁵ From there, it seeks to reverse engineer statutory text. Legislative decision theory looks for text and how textual decisions are made. It is sparse and targeted; it does not require judges to write a full multi-year history of a statute. Instead, it tries to find where the key text or texts developed in the legislative process.¹⁶ All of this is common sense, is already applied in by judges (in part and unsystematically),¹⁷ but recommends significant reforms in how legislative materials are considered. In fact, it *upends* the traditional notion of legislative history as forward-progressing narrative, and requires interpreters to reimagine legislative history in reverse.

The theory is powerful because it rests on common sense understandings about context. Look at a game of chess with no knowledge of the rules and the players’ actions amount to strange and chaotic moves on a red and black board. Reading a trial transcript without knowing trial procedure could yield just as much confusion. An analogous illiteracy should not apply to Congress. To give just a few examples, legislative decisions are made at the end of the process, not the beginning, so that text produced later in the process *trumps* text produced earlier in the process. Similarly, it cannot be that the authoritative meaning of a statute should be concocted from the statements of those who *opposed* the legislation (without some justification): No one confuses a dissenting opinion with a majority opinion, nor should one confuse losers’ with winners’ legislative history. Finally, congressional procedure may provide interpretive guidance in cases of textual conflict; if Congress’s rules tell a conference committee not to change a bill, then one should assume that new language added by conference presents no significant change.¹⁸

¹⁴ Nourse, *Decision Theory*, *supra* note ____.

¹⁵ For example, to understand the basics of a trial, one does not need to memorize all exceptions to the hearsay rule. One must understand that there are pleadings, motions, preliminary hearings, voir dire, jury instructions etc. Similarly, the level of knowledge about congressional process one needs to intelligently read the congressional record is quite similar: one needs to know that bills are introduced, that this will often be met with competing proposals, that bills in the House have to go through the Rules Committee, that bills in the Senate have to hurdle cloture, that points of order are procedural objections, that conference committees resolve differences between the Houses etc.

¹⁶ For an example of this, see Nourse, *Decision Theory*, *supra* note ____, at 93-98.

¹⁷ For an explanation of how courts do apply basic principles consonant with this theory, see Victoria Nourse, *Decision Theory in the Courts* (unpublished manuscript).

¹⁸ See Nourse, *Decision Theory*, *supra* note ____, at 94-95 (explaining this principle). By this, I am not suggesting that courts enforce Congress’s rules; so, for example, no one should think that members may go down the street to the D.C. Circuit and ask that the “point of order” provisions in Congress’s rules be enforced with an order to the Senate or the House. Instead, legislative decision theory asks courts to use Congress’s context to understand members’ meaning. This is fully consistent with courts’ present practice

Decision theory differs in several significant ways from both textualism and purposivism—the two most prominent theories judges use to interpret statutes. It differs from purposivism as it seeks *textual* decisions not general *purposes*. It views purposivism as inadequate without a theory of how Congress makes its decisions (which purposivism does not have). Legislative decision theory looks for decisions on particular texts, targeting the relevant point of decision; it makes the search for decision easier by targeting the relevant texts (this is substantially aided by new computer databases)¹⁹ and *reversing* the priority of materials. As a result, it rejects conventional wisdom about legislative history, including the notion that one should be writing narrative “histories” of statutes, and more particular claims such as the purported superiority of committee reports.²⁰ It acknowledges that statutory “purpose” may ultimately become relevant, but as a matter of statutory *construction* rather than interpretation. When purposivists *attribute* a purpose to the Congress, they are imposing, not *finding* Congress’s meaning. This may be a proper theory of statutory construction, but it is not a theory of Congress’s meaning.

Legislative decision theory also differs significantly from textualism. By “textualism,” I mean the practice of drawing boundaries around text and claiming that the text’s meaning can be exhausted by semantic content plus syntax (and perhaps the text of similar statutes or canons.²¹ Like all theories of statutory interpretation, it starts with the text. But it does not end with text. Legislative decision theory argues that it is impossible to find the meaning of a congressional text without understanding the procedural *context* from which the text emerged. Even when semantic content appears clear from the face of the statute, the inquiry cannot stop: a faithful agent of Congress must understand Congress’s meaning and that meaning can only be found by looking to Congress’s textual decisions in procedural context. As even textualists will admit, meaning requires context, and the communicative context is crucial to interpretation. In

which refuses to enforce rules but does not claim ignorance of them in cases where there are significant collateral consequences. *See id.* at ____

¹⁹ Some argue not that intent is impossible as a logical matter, as did Radin, but as a practical matter. Vermeule. Computer databases now allow precise searches for terms using control F as a tool. I have timed students on finding discussions of particular amendments, cloture, and particular terms; searches that would have once taken lengthy periods, now take minutes. The practicality objection deserves greater analysis but has been largely overtaken by technology.

²⁰ It is the conventional wisdom among enthusiasts of legislative history that committee reports are the “gold standard” of legislative history. Legislative decision theory rejects this claim as wildly overstated.

²¹ This is the definition I take to be used by textualists who draw a strong distinction between textualism and purposivism. See, e.g., John Manning, *Lessons from A Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1566 n. 42 (2008) (“The main dividing line on the present Supreme Court is between textualists, who emphasize the conventional semantic meaning of the enacted texts, and purposivists, who emphasize the goals that Congress sought to pursue in enacting the text.”). Textualists maintain that they are not literalists in that semantic content may go beyond the “four corners of the text” to include “specialized conventions and linguistic practices peculiar to law,” as well as “off-the-rack canons of construction peculiar to the legal community,” which help to flesh out semantic content. See John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 81-83 (2006).

the case of statutory communications, the communicative situation includes the process by which the statute was constructed.²²

II. THE HISTORY OF THE GROUP-IMPOSSIBILITY OBJECTION

It should seem strange that we talk of legislative intents rather than legislative decisions. We write easily of Supreme Court decisions as “decisions.” That the Supreme Court may change its “mind”—that the Court may overturn its own precedent—does not prevent us from calling its work “a decision.” That the decision is partial—that the Court may divide 5-4—does not prevent us from calling its work “a decision.” That the decision is in part delegated—that the Court allows clerks to draft opinions—does not prevent us from calling its work “a decision.” We dub the Supreme Court’s written work a decision—however subject to change or division or delegation—because its action has a finality within the judicial world. All of this could be said of Congress’s decisions in committee reports or in text, but it is not. These are public acts—even though subject to revision, delegation or complete reversal. And, yet, there is no more basic linguistic practice in statutory interpretation than describing these public acts as “legislative intent.”

The term “legislative intent” is as ancient as American²³ and British statutory interpretation.²⁴ Nowhere is its meaning more important, however, than when it comes to the “group impossibility thesis” — the claim that Congress can have no intent.²⁵ The “group impossibility thesis” was first proposed in a seminal article written in the 1930s by the realist-skeptic Max Radin.²⁶ His argumentative ax was blunt: A group legislature has no intent precisely because of its collective character:²⁷ “The intention of the legislature is undiscoverable in any real sense”²⁸ Radin’s critique has become a

²² At a meta-level, one can interpret legislative decision theory as an argument that no theory of statutory interpretation can develop an economy of trust which does not know or understand the speaker (here Congress)—and that this applies to both purposivism and textualism. See SCOTT SHAPIRO, *LEGALITY* (2011) (arguing for a meta-theory of interpretation emphasizing an economy of trust).

²³ *Helms’ Lessee v. Howard*, 2 H. & McH. 57, 1784 WL 39 *23 (Md. Gen. 1784) (“the intent of the legislature is to be collected from all parts of the act.”); *Robin v. Hardaway*, Jeff. 109, 1772 WL 11 (Va. Gen. 1772) (quoting Blackstone on the “intent of the legislature”).

²⁴ “The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable.” 1 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 58 (Cooley ed. 1876, orig. pub. 1765-69).

²⁵ Similar ideas can be found in Aquinas and Hobbes, for example. THOMAS AQUINAS, *Summa Theologica* of St. Thomas Aquinas I-II, q. 91 a.; see FINNIS, *AQUINAS*, 255-8 n. 19; THOMAS HOBBS, *LEVIATHAN*, ch. XXVI, at 211 (reprint 1651) (1929) (“[I]t is not the Letter, but the Intendment, or Meaning; that is to say, the authentic interpretation of the Law (which is the sense of the Legislator,) in which the nature of the Law consisteth.”).

²⁶ A search within Westlaw’s law journal database for “radin /s intent” yields over 150 citations, although this is surely an underestimate of his influence.

²⁷ *Id.* at 870.

²⁸ *Id.* For purposes of this paper, I define the group impossibility thesis in these terms: Radin (and his followers) do not think it literally impossible to form a group intent; instead, they demand that each person in the group have the same mental state, so that it is practically impossible.

classic in the legal theory of realism but, for our purposes, is more important for its extraordinary lasting power and extravagant effect on statutory interpretation theory throughout the academy. Citation to Radin is ubiquitous by both textualists and purposivists.²⁹

In the 1980s and 1990s, Justice Scalia embraced Radin’s critique as the baseline from which to launch his plea for textualism and against purposivism: there being no collective intent, text alone remains.³⁰ Of course, Radin, the left-wing realist-skeptic, would have been shocked to learn that his approach had been appropriated by an avowed formalist conservative.³¹ This reversal of fortune, however, was made possible, in part, because of intellectual failure. The dominant school of thought in statutory interpretation, the legal process school, pioneered in the Hart & Sacks materials,³² never

²⁹ For only some of the citations to Radin’s intent argument by two prominent statutory interpretation figures, see William Eskridge, *The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in A Nutshell*, 61 GEO. L. REV. 1731, 1736 & n. 32 (1993); William Eskridge, *The New Textualism*, 37 U.C.L. LAW. REV. 621, 643 n. 79 (1990); William Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 635 n. 118 (1990); William Eskridge, *Statutory Interpretation as Practical Reasoning*, 40 STAN. L. REV. 321, 332 (1990); William Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012 n.13 (1989); William Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 n. 113 (1987); John Manning, *The Role of the Philadelphia Convention in Constitutional Law*, 80 GEO. WASH. L. REV. 1753, 1761 & n.37 (2012); John Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U.L. REV. 1349, 1364 (2012); John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430-31 (2005); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 n. 81 (2003); Scalia & Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610 (2012) (Manning asking Scalia about Radin’s critique).

³⁰ See Eskridge, *New Textualism*, *supra* note ___, at 651-52 (“[H]is attack was primarily a realist one. Judge Scalia followed the Radin critique of the concept of legislative intent.”).

³¹ “In 1939, a conservative attorney general, Earl Warren, blocked Radin for alleged left-wing sympathies,” for a position on the California Supreme Court. Hans A. Linde, *Hercules in a Populist Age*, 103 HARV. L. REV. 2067, 2069 (1990). *60 Minutes: Justice Scalia on the Record*, CBSNews, com (Feb. 11, 2009) (“I mean, I confess to being a social conservative, but it does not affect my views on cases.”); see also JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 76 (2009) (describing his life before being a Justice when being a conservative was “isolated, lonely...like a weirdo.”)

³² HENRY MELVIN HART ET AL., *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (1994). Hart and Sacks were not alone in their advocacy of purposivism. See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947) but their “exceptional” materials on legal process have “provided the name, the agenda, and much of the analytical structure for a generation of legal thought.” William N. Eskridge Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, HART ET AL. *supra*, at lii. Purposivists recognized the claim that legislatures may not have anticipated particular, specific results, and sought to use “purpose” to solve that problem. See Archibald Cox, *Judge Learned Hand the Interpretation of Statutes*, 60 HARV. L. REV. 370, 374 (1947) (arguing that even though legislatures form no specific intent concerning many interpretive controversies judges may nonetheless resolve doubtful uses by reference to “the general purpose” that “lies behind the statutory words.”); see Hart et al., *supra* at 89 (questioning whether, during a “general codification of the law of inheritance, the “likelihood that the legislature . . . consciously said to itself . . . ‘as an incident of all the other things we are now doing, we are here deliberately deciding,’” the specific question whether the murdering heir should receive an inheritance.); *id.* at 92-93 (contrasting an approach seeking the “intention of the legislature” on the “question” before the court with an approach which deemed the court bound to background “principles and policies” unless it had

answered Radin’s skeptical critique in a way satisfying to scholars of statutory interpretation and, having left it standing, was soon impaled by it.

At first glance, it might seem as if Hart and Sacks’s move to “purpose” answered Radin’s challenge. But, as Radin’s own article makes quite clear, substituting purpose for intent does not, *as a conceptual matter, take care of the matter of group agency*; it may change the concept of intent considerably, for better and for worse.³³ It does not eliminate the skeptic’s anxiety about multiple actors. Radin’s critique against purposivism applies just as easily to intentionalism: if there can be no collective intent, there can be no collective purpose. In fact, at least as far as the collectivity critique, there appears no difference between the terms “purpose” and “intent.”³⁴

Hart & Sacks recognized this, emphasizing the complexity of attributing a purpose to a statute, explaining that the legislature could have multiple purposes.³⁵ They argued that a judge could determine the most reasonable purpose, the one offering the best account of the law. Hart & Sacks shifted from a speaker’s meaning view to a listener’s meaning view, moving the debate from statutory interpretation (the discovery of meaning) to statutory *construction* (the determination of legal effect).³⁶ Hart & Sacks’s solution may well be one followed by today’s great purposivist judges,³⁷ but it has never quieted purposivism’s critics. Detractors emphasize that purposivism expands the domain of statutes and that there are “multiple purposes” to any statute and therefore the attribution of a single purpose may be arbitrary or activist.³⁸ At the very least, the

made a different “purpose” “clear openly and responsibly.”); see John Manning, *Textualism as Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677 n. 11 (1997) (“those who focus on general purpose stress the difficulty in reconstructing specific intent.”)

³³ The term “intent” may signal, for example, a “mischief” and thus a prototypical problem rather than a more general end-in-view. Early statutory interpretation may well have equated intent with mischief. See Nourse, *Statutory Interpretation at the Founding* (manuscript in process). On the distinction between prototypical and legalist meaning, see Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997 (2011).

³⁴ Radin, *supra* note ____, at 878 (“[T]o interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed.”); *id.* at 876 (if one carries purpose as far as it will go, “the avowed and ultimate purposes of all statutes, because of all law, are justice and security.”).

³⁵ See, e.g., HART ET AL. *supra* note ____, at 1378 (recommending that the interpreter assume that the “legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”); see *id.* at 1188-96, 1374-77 (suggesting that prototypical instances of statutory application can evoke multiple purposes).

³⁶ Lawrence B. Solum, *Orginalism and Constitutional Construction*, 82 FORDHAM U. L. REV. (forthcoming 2013); Lawrence Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 101, 101 (2010).

³⁷ STEPHEN BREYER, *ACTIVE LIBERTY* 85-101 (2005) (defending purposive interpretation).

³⁸ See, e.g., John Manning, *The New Purposivism*, 2011 S. CT. REV. 113, 151 (2011) [hereinafter Manning, *Purposivism*] (discussing Radin’s famous identification of the multiple purpose “conceptual” problem). This is sometimes called the problem of generality, *id.* after Radin’s claim that one could state the purpose of all laws at a very high level of generality as “justice and security.” Radin, *supra* note ____, at 876. Stephen Williams, *Rule and Purpose in Legal Interpretation*, 61 U. COLO. L. REV. 809, 811 (1990) (“Notice that as soon as the analysis of purpose is divorced from the means selected, all limits are off.

“multiple purpose” critique has been a prominent arrow in the quiver of objections against purposivism.³⁹ This objection fueled textualists’ arguments against purposivist forms of intentionalism. As John Manning explained, “[t]he textualists’ intent skepticism can be traced to the work of Max Radin”⁴⁰ and his group impossibility objection.

If nothing else, no one can say that skepticism about groups because of their collective nature has gone away. If anything, it has intensified over time as it has been endorsed by the greats of modern jurisprudence and political science. Ronald Dworkin repeated the argument almost verbatim in his work, calling it the speakers’ meaning view, ultimately rejecting it for a super-strong version of the Hart & Sacks “constructionist” thesis.⁴¹ Dworkin claimed, just like Radin, that the multiplicity of the legislature made it impossible to collect an original intent.⁴² Jeremy Waldron picked this up in slightly more sophisticated fashion, again evoking many of Radin’s sentiments; his target was largely constitutional interpretation but in a long chapter on statutory interpretation he repeated Radin’s claims about collectivity as inconsistent with intent.⁴³ Finally, the great Kenneth Shepsle gave positive political theory’s imprimatur to the group-impossibility objection by the title of his paper, “Congress is a They, Not an It.”⁴⁴

Every purpose can always be restated at a higher level of generality.”). Whether described as the “generality” problem or the “multiple purpose” problem, the claims made here remain the same.

³⁹ William N. Eskridge, *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation In A Nutshell*, 61 GEO. WASH. L. REV. 1731, 1744-45 (1993) (explaining the critique of purposivism: “that purpose is too easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations. Purposive statutory interpretation, therefore, might be even less determinate than more traditional approaches. This has been a standard criticism of legal process interpretation . . .”).

⁴⁰ See Manning, *Purposivism*, *supra* note 35, at 151; John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 429 (2010).

⁴¹ DWORKIN, *supra* note ___, at ___ “When a friend says something, we may ask, “What did he mean by that?” . . . our answer to that question describes something about his state of mind when he spoke.” Under the “speakers’ meaning” view, judges look to legislative history. . . to discover what “state of mind” the legislators tried to communicate. Legislative materials are “evidence” of the legislators’ “mental state[s].” So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds It appears that Dworkin misunderstood the notion of speaker’s meaning derived from the philosophy of language, which focuses on the meaning the speaker intended to convey to her audience on the basis of the audience’s recognition of the speaker’s communicative intentions. See H.P. Grice, *Utterer’s Meaning, Sentence-Meaning, and Word Meaning*, 4 FOUND. LANGUAGE 225, 225 (1968).

⁴² Under Dworkin’s theory, a judge is required to “combine . . . various opinions into some composite group intention.” *Id.* at ___; see *id.* at 335-36 (“we must worry about how to consolidate individual intentions into a collective fictitious intention.”).

⁴³ WALDRON, *supra* note ___, at ___.

⁴⁴ Kenneth Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992). This is not the uniform view among political scientists. Others embrace legislative intent. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417-1542 (2003).

III. *The Group-Impossibility Objection's Error*

The group-impossibility thesis is correct in a trivial, semantic sense, but deeply wrong in an important, empirical sense. By definition, no group has a single human mind. Of course, few dispute that proposition; it is a trivial claim. It is not a trivial claim, however, to believe that groups do not nor cannot act as group agents. This is an extravagant argument. To believe that collectivities cannot act as group agents is to reject most of our social world from Microsoft to Harvard to the Catholic Church. To see this, we must first, however, be clear about the meaning of “intent” and disaggregate it from the question of group agency. Bottom line: there is such a thing as legislative intent, but only if we define intent in a particular way that does not carry with it embedded assumptions that, by definition, only apply to individuals.

For some time now, scholars in jurisprudence, statutory interpretation and political economy have questioned whether collectivities “intend” in any way other than a metaphorical sense. The philosopher Jeremy Waldron and before him Ronald Dworkin⁴⁵ have argued against the concept of legislative intent, as have other fine jurisprudential minds, such as Joseph Raz and John Gardner.⁴⁶ Recently, however, the philosopher Phillip Pettit and political economist Christian List have provided the conceptual foundation for an important response to these claims. List and Pettit decry as “extreme” the idea that collectivities have no group agency, branding it “eliminativism.”⁴⁷ Eliminativists reject the agency of a vast range of entities within the social world with which we interact on a daily basis and to whom we attribute agency and thus responsibility.⁴⁸ Eliminativists, in short, have gone too far in eradicating social life.

If this is correct, there are important implications for the group-impossibility objection. If the group-impossibility argument claims that Congress is a collectivity and because it is a collectivity it cannot act as a group agent, then the argument eliminates group agency. What do I mean by group agency? In this article, I use this term to mean

⁴⁵ WALDRON, *supra* note 2, at 119-46; DWORKIN, *supra* note ____, at 19 (arguing against collective intention); see John Gardner, *Some Types of Law*, in COMMON LAW THEORY (Edlin ed. 2007) 51, 56 n. 14 (2007) (identifying Dworkin and Waldron as “notable doubters” of the thought that an institution may have intentions).

⁴⁶ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* 284 (2009) (arguing that law is intentional but simply that the act of legislating is intentional, which is a “very minimal,” and does not include any understanding of the content of the legislation.”); John Gardner, *Some Types of Law* 56 n. 80 (Edlin ed. 2007) (“Parliament often has no intention to make the particular changes in the law that it ends up making when it legislates,” but has a more humble intention to act to change the law). This may be akin to the notion I suggest below, *supra* note ____, that intention may be used to describe an act that is not involuntary or accidental.

⁴⁷ LIST & PETTIT, *supra* note ____, at 74 (“If the emergentist tradition reified and mystified group agents, hailing them like transcendent realities, the eliminativist tradition went to the other extreme.”).

⁴⁸ *Id.* at 5 (“Once we recognize a collective entity as an agent, we can interact with it, criticize it, and make demands on it, in a manner not possible with a nonagential system.”) Margaret Gilbert has used the term “singularism” to describe a similar phenomenon. MARGARET GILBERT, ON SOCIAL FACTS (1989); LIST & PETTIT, *supra* note ____, at 74 (“Singularism asserts that there are no pluralistic agents, in any literal sense of the term, only the singular agents constituted by individual human beings . . .”).

public action, recognized by those inside the group as legitimate. When a corporation issues a report or Congress passes a statute it “acts.” (This is a descriptive term, not a prescriptive one). Acts differ from intents, meanings, and beliefs because they are *observable and do not exist solely in one or more minds*. Putting on one’s shoes is different from thinking about putting on one’s shoes and telling someone else that you are about to put on your shoes. As Austin argued so long ago, that an act may take the form of speech or words does not deny it the status of an action as distinct from a mere mental state. Within the context of legislative procedure, congressional communications have meaning as acts in the lawmaking process. An act that the group would recognize as an action authorized by the group as part of that group’s organization or procedure is an exercise of group agency.⁴⁹

A. Three Modalities of Intent

Intention is everywhere in life and in law. And it is “confusing.”⁵⁰ Philosophers have debated, and continue to debate, the meaning of intention.⁵¹ So, too, do linguists and literary theorists and intellectual historians.⁵² More recently, psychologists and social psychologists have entered the field with experimental evidence suggesting that the attribution of intention begins at the earliest of ages.⁵³ For some time now, we have known that humans are particularly adept at reading the “minds” of others.⁵⁴ At a minimal level, it seems undeniable that Congress acts with some intention. Few believe that statutes appear by accident. Votes are not delivered at the point of a gun. However, once one passes this “minimalist” threshold, serious arguments arise about the existence of a group intent within the statutory interpretation literature. Here, my hope, if nothing else, is to bring greater clarity to arguments about intent based on a new typology of intent modalities. Ultimately, I hope to show how assumptions about particular intent

⁴⁹ For example, just as a corporate report, such as a 10K filing, is viewed as a legitimate group action (even though it may have been written by only part of the organization), and never be read by the Board of Directors, so too are similar actions (committee reports) legitimate public acts of Congress, not mere mental states.

⁵⁰ Landis, *supra* note 1, at 888.

⁵¹ G.E.M. ANSCOMBE, *INTENTION* (1963) (seminal philosophical analysis); MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* (1999); DANIEL C. DENNETT, *THE INTENTIONAL STANCE* (1989); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY ON THE PHILOSOPHY OF MIND* (1983); *see* Kieran Setiya, *Intention*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2011), <http://plato.stanford.edu/archives/spr2011/entries/intention/>.

⁵² PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1989); *MEANING & CONTEXT: QUENTIN SKINNER & HIS CRITICS* (Tully ed. 1988); *INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION* (Malle et al ed. 2004) (analyses by psychologists, social psychologists and philosophers).

⁵³ Amanda Woodward et al, *How Infants Make Sense of Intentional Action*, in *INTENTION AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION* 150-51 (Bertram F. Malle et al. eds, 2001) (summarizing existing theories and contending that “infants, before they acquire the communicative tool box of the 12-24-month-old, understand some aspects of intentional action.”).

⁵⁴ DENNETT, *supra* note ____, at 51 (“folk psychology . . . can explain the fact that we do so well predicting each other’s behavior on such slender and peripheral evidence Treating each other as intentional systems works . . . because we really are well designed by evolution . . .”).

modalities may lead to simplistic, and question-begging, views about Congress as a group agent.

1. The Mental Intent Modality

When I say that I “intend to do something,” the reader is likely to think of a mental state, particularly in law where mental states play such an important role in tort and criminal law.⁵⁵ When lawyers seek “legislative intent” they sometimes mean that what they aim to “reconstruct” the mental state of members who voted on a bill.⁵⁶ Put in other words, they are talking of intent as mental state. Philosophers note that it is not necessary for an individual to have a sign in his head saying “I intend to do something,” as lawyers often posit. An individual may in fact do something automatically, without a separate “mental event”—in which case the intention and the act coincide. Put another way, the mental states that constitute an intention can be dispositional; they need not be occurrent. Lawyers in other disciplines, such as crime and tort, often attribute “intent” to voluntary action in this sense; intent does not require an occurrent internal mental event, but is inferred from behavior.⁵⁷ In the field of statutory interpretation, however, the general view holds to the notion that there is a separate “mental event” associated with the creation of statutory text.

2. The Communicative Intent Modality

Intent-as-communication is a staple of standard versions of statutory interpretation theory.⁵⁸ Ronald Dworkin explained this notion (one he disavowed),⁵⁹ as the “speaker’s meaning” view.⁶⁰ That view “assumes that legislation is an occasion or instance of communication.”⁶¹ The “ruling model of this theory is the familiar model of ordinary speech.”⁶² In ordinary speech, as linguists, literary theorists and others have shown, it is common sense to hold that statements are made with the purpose to

⁵⁵ See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118-19 (5th ed. 2009) (describing *mens rea*—the latin term associated with intent—and discussing the concept of murder as the “intentional killing of a human being.”)

⁵⁶ Richard A. Posner, *Statutory Interpretation--in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983). (“I suggest that the task for the judge called upon to interpret a statute is best described as imaginative reconstruction.”)

⁵⁷ DENNETT, *supra* note ___, at 15 (“the intentional strategy consists of treating the object whose behavior you want to predict as a rational agent with beliefs and desires and other mental stages”).

⁵⁸ Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989) (positing a hypothetical involving a command giving garbled orders).

⁵⁹ Dworkin’s target is the species of constitutional argument known as originalism, but his arguments are couched in more general interpretive guise and are specifically focused on statutory interpretation in part, see chapter 9 of LAW’S EMPIRE, entitled “Statutes.” DWORKIN, *supra* note ___, at 313-354.

⁶⁰ DWORKIN, *supra* note ___, at 315.

⁶¹ *Id.*

⁶² *Id.*

communicate. As Stanley Fish, one of intention's most zealous⁶³ interpretive defenders explains, "interpretation always and necessarily involves the specification of intention."⁶⁴ Under the idea of intent as "communication," "[e]veryone who is an interpreter," including statutory analysts, are in "the intention business."⁶⁵ This view is distinct from the mental state approach because it requires the conveyance of meaning from one party to another: one can have a mental state (for example, a secret wish) and yet never communicate that internal state to another.⁶⁶ This modality thus raises the potential for a mistaken attribution of intention, faulty communication of that intention, as well as improper uptake on the part of the listener.⁶⁷

3. The Pragmatic Intent Modality

A different meaning of intent focuses on communicative situation. Pragmatism in its original philosophical sense takes the view that one cannot know one's ends without acting to achieve those ends. Intent under such a view is not merely a mental state but a mental state contemplating "present and future conduct,"⁶⁸ and, more importantly, may not be knowable except by observing action in context—in the situation. Contrary to the "snapshot picture"—frozen in time—of mind or communication, under this pragmatic idea of intent, intents may change over time as "new information is available."⁶⁹

Like pragmatist theories of meaning more generally, pragmatic intent is context-relative—it focuses on the communicative *situation*.⁷⁰ Background context will influence the intention or plan: one cannot know how to win the game of chess if one does not know the background context—the rules of chess or the significance of red and black within the context of those rules. The pragmatic intent modality assumes that unstated

⁶³ Stanley Fish, *The Play of Surfaces* at 300 in *LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE* (Leyh ed. 1992). *Id.* ("there cannot be a distinction between interpreters who look to intention and interpreters who don't, only a distinction between the differing accounts of intention put forward by rival interpreters."). *Id.* at 301 ("[T]he act of construing will begin by assuming an agent endowed with purposes.").

⁶⁴ *Id.* at 300. Fish is debating constitutional interpretation in this piece but his statements are equally applicable and have been invoked to explain the speakers meaning theory in WALDRON, *supra* note 2, at 124-25.

⁶⁵ *Id.* at 301.

⁶⁶ I am rejecting a theory of communication here in which the speaker encodes and the listener decodes the utterance. That theory would allow for secret intentions that no listener could have grasped. Instead, the theory of communication asserted here depends upon the communicative intentions of the speaker. *See* Grice, *supra* note ____, at ____.

⁶⁷ Elizabeth Mertz, *An Afterword: Tapping the Promise of Relational Contract Theory--"Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 923 (2000) (analyzing the complex ways that "'chunks' of written language become 'texts' (entextualization), are removed from prior contexts (decontextualization), and are reconfigured in new settings (recontextualization)").

⁶⁸ BRATMAN, *supra* note ____, at 3; *see id.* at 2 (intentions are "elements of stable, partial plans of action concerning present and future conduct."); *id.* (intending "involves a commitment over time.").

⁶⁹ *Id.* at ____ ("Many times, in the face of new and relevant information, we recognize that it would be folly to stick rigidly with our prior intention.")

⁷⁰ BRATMAN, *supra* note __; GRICE, *supra* note ____.

background context is important; it is not enough that intent is a mental state or a communicated mental state. To return to the shoe example: one needs more than a mental picture of tying a shoe, and more than a statement or order to tie one's shoes, one needs real shoes and laces and a floor, not to mention feet (the background context).

Perhaps most importantly,⁷¹ pragmatic intent is not (like our earlier versions of intent) inherently singularist,⁷² by which I mean limited to a single individual at a moment in time. Instead, it contemplates acting with more than one person over time. Once one acknowledges that intent may be reflected in action, it is possible to imagine “we-intentions.”⁷³ So, for example, two people can agree in advance to tie each other's shoes, or they can simply act to tie each other's shoes (in the absence of a joint mental state or a shared agreement). In either case, we can say that they have the intent to tie shoes. As long as they act to tie each other shoes, it does not matter whether they had a mental picture contemplating such action or an overt communicative agreement to tie each other's shoes.

B. *The Group-Impossibility Objection and its Ideas of Intent*

Armed with these ideas of intent, we can return to Radin's collectivity objection and see that it depends upon assumptions about intent that beg the question he seeks to answer.⁷⁴ Radin wrote that “the chances that of several hundred men each will have *exactly the same determinate situations in mind* . . . are infinitesimally small.”⁷⁵ He posits cases where “the minds of the legislature [are] uniform.”⁷⁶ He suggests that a minority's objection bars collective intent.⁷⁷ He states overtly that Congress would have an intent if everyone agreed, if they had “exactly the same” intent.⁷⁸ In a corollary to this claim, Radin argues that there can be no group intent because only a “few” members have the same intent.

⁷¹ One potential meaning absent from this list is “intent as reason.” See WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 58-61 (Thomas M. Cooley ed. 1876) (1765-69). In statutory interpretation, a purposivist might argue that intent reflects a reason about a statute, for example, and that this is what is meant by “intent.” Like motivation or other meanings for intent, this idea is subject to all of the claims I make here about intent as mental state assuming it is static, private, and idealized as a mental event. There is no reason not to think of intent as reason but to do so is unhelpful in situations of group agents since the implicit analogy to mind causes worries about whether groups can have internal, private, mental reasons.

⁷² GILBERT, *supra* note ____, at ____.

⁷³ BRATMAN, *supra* note ____, at ____.

⁷⁴ This was how James Landis, in his response, understood Radin's argument: “To insist that *each individual legislator* besides his eye must also have expressed the meaning he attaches to the bill . . . is to disregard the realities of legislative procedure.” Landis, *supra* note 1, at 888 (emphasis added).

⁷⁵ Radin, *supra* note ____, at 870.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

Three immediate objections arise. The first is unanimity: no one believes that collective entities, whether they are corporations or universities only act when everyone shares a unanimous intention or set of factual assumptions.⁷⁹ Yet Radin wants “exactly the same” intents “in mind,” minds that are “uniform,” several hundred men with “the same . . . situations in mind.”⁸⁰ Faculties and corporations and churches make decisions all the time in the face of disagreement. Moreover, there is nothing in the law that suggests to the contrary: we do not hold corporations to account only when all members of the organization line up and sign an affidavit agreeing to the decision. Perhaps more importantly, no one believes that majoritarian decisions are impossible or illegitimate because a majority does not include everyone; indeed majoritarianism assumes disagreement.⁸¹

The second implausible assumption goes to the static nature of group agency. The “same intent” objection implies that representatives share the same intent at the same time. To quote Radin again: “the chances that of several hundred men each will have *exactly the same determinate situations in mind* . . . are infinitesimally small.”⁸² This assumption deserves scrutiny. Faculties and unions and churches make decisions over time, not instantaneously.⁸³ No one says a corporation or university or labor union has not made a decision because of the time it takes to make that decision. Perhaps most importantly, we know that Congress makes decisions through procedures over time.⁸⁴ As

⁷⁹ The “same intent” problem may not be unique to Radin. Ekins argues that both John Gardner and Joseph Raz’s theories of minimal or humble intention suffer from this problem. EKINS, *supra* note ___, at 114. (“Raz and Gardner . . . [make] the unsound assumption that the legislature’s intention must be an intention held by each legislator (or each legislator in the majority.”)).

⁸⁰ Radin, *supra* note ___, at 870.

⁸¹ One might argue that some of the organizations I have identified are not necessarily “democratic,” but follow hierarchical norms. In fact, school boards, unions, non-profit organizations, and the proverbial town hall purport to operate by democratic, majoritarian principles. Even the modern corporation has a form, at least in theory, of shareholder democracy. These organizations operate with respect to some form of procedure seen as legitimate for that form of organization and most organizations include some forms of hierarchy even as they claim resolute democracy (take, for example, the House of Representatives or labor unions). See, e.g., BUSINESS, *infra* note ___ at 252 (“The degree of centralization or decentralization of authority is determined by the overall pattern of delegation within the organization.”).

⁸² Radin, *supra* note ___, at 870.

⁸³ For a contrarian example proving the oddity of the assumption that intent is instantaneous, see the discussion of the ultra-machismo “Claro” culture by Diego Gambetta, “Claro!”: *An Essay on Discursive Machismo* in DELIBERATIVE DEMOCRACY 19 (Elster ed. 1998). “Claro!” is Spanish for “Obvious” “I knew it all along!” “Nothing you say surprises me”—a belittling snap response that greets those who express an argument, especially if not at all obvious, in countries of that culture. . . . In a culture of this kind, . . . agents . . . are unlikely to listen to one another’s arguments, let alone be persuaded by them.” *Id.* at 20-21.

⁸⁴ See ART. I, sec. 5. The House and Senate rules can be easily found online. Karen L. Haas, *Rules of the House of Representatives, One Hundred Twelfth Congress*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 5, 2011), <http://clerk.house.gov/legislative/house-rules.pdf>; Rules of the Senate, Committee on Rules & Admin. U.S. Senate, <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>.

Jeremy Waldron has rightly emphasized, these procedures are Congress's "constitution."⁸⁵

Finally, Radin makes a seemingly more plausible argument by asserting that there can be no group agency because only a "few members" may agree or sponsor legislation. He writes: a "legislature certainly has no intention whatever in connection with words which some two or three men drafted"⁸⁶ Unlike the earlier two objections, this objection recognizes what appears, at first glance, to be empirical reality: typically, the most knowledgeable legislators on any piece of legislation are those with the most stake in its passage, the drafters and their strong supporters. As the political scientist Richard Hall has found, participation in legislating tends to be concentrated on a few who stake their political futures on the difficult course of bill passage.⁸⁷ However, given that the Senate requires massive consensus, this view of the "partial Congress" is radically incomplete. Senators who write for two or three people, as opposed to 60,⁸⁸ are engaged in a fool's errand.⁸⁹ Members must anticipate not only a majority but a supermajority. If drafting be the work of "the few," legislating is the work of "the many" (and under supermajoritarianism, the "super-many").

Ultimately, this claim of the "few" suffers from the same theoretical objection as its cousin, the unanimity argument. If we are prepared to accept the notion that groups do act, we should also know that they often act through "a few members." Ultimately, the claim of "the few" — that a few write the law—goes too far: it applies to all collective action. Corporations and unions and universities delegate decisionmaking to smaller groups to reduce the transaction costs of decisionmaking: delegation is considered part of the culture and proper practice of corporate management.⁹⁰ The few may draft a joint

⁸⁵ WALDRON, *supra* note 2, at 123 ("These procedures amount to the constitution of the legislature.").

⁸⁶ Radin, *supra* note ____, at 870.

⁸⁷ RICHARD HALL, PARTICIPATION IN CONGRESS (1998).

⁸⁸ Almost every bill requires a supermajority in the Senate to pass the cloture barrier, *see* GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 10 (2006) ("The Senate's rules that protect unlimited debate ... effectively require supermajorities for the passage of legislation"); *see* 157 CONG. REC. S311 (daily ed. Jan. 27, 2011) (statement of Sen. Tom Harkin) (noting that in the 110th and 111th Congresses, there were "275 filibusters in just over 4 years. It has spun out of control. This is not just a cold statistic of 275 filibusters. It means the filibuster, instead of a rare tool to slow things down, has become an everyday weapon of obstruction, of veto.").

⁸⁹ Anyone who knows much about legislation knows that to draft legislation is an act of anticipation of others' preferences. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 10 (1992). One must draft to satisfy not only one's own constituents, but also other members and their constituents. If the sole representative wants her draft to become law, she must anticipate a tremendous variety of vetogates. William Eskridge, *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1443 (2008).

⁹⁰ Organizational literature takes delegation as a basic part of proper management. ANDREW DUBRIN, ESSENTIALS OF MANAGEMENT 149 (2008) ("A well-managed organization encourages all managers to delegate as many nonprogrammed decisions as possible."); HAROLD KOONTZ et al., ESSENTIALS OF MANAGEMENT 184 (7th ed. 2008) ("delegation is . . . an elementary act of managing."); W. PRIDE ET AL. BUSINESS (11th ed. 2008) ("The third major step in the organizing process is distribution of

letter, but the many sign it. Thus conceived, this objection turns out to be a soft form of eliminativism.⁹¹ If the final decision is the result of less than all, and that fact brands the decision as illegitimate, then all collective bodies and their actions are potentially illegitimate-because-partial.

The most important point to see about Radin's argument, however, is the idea of "intent" on which it relies—an idea revealing the fundamental weakness of his claims. Radin's idea of intention is our first idea of intention, as a static private mental event. He writes of "situations *in mind*" and "pictures *in mind*."⁹² He muses that legislators have "different ideas and beliefs," specifically equating this with a mental event:

The chances that of several hundred men each will have exactly the same determination situations *in mind* ...are infinitesimally small. The chance is still smaller that ...the litigated issues, will not only be *within the minds* of all these men but will be certain to be selected by all of them as the present limit [to which the statute] should be narrowed.⁹³

Lest one think Radin not committed to the idea of "intent-as-mental-state," consider his argument that, in an extreme case, "it might be that we could learn all that was *in the mind of the draftsman*."⁹⁴ Or his argument that "[e]ven if the contents of *the minds* of the legislature were uniform, we have no means of knowing the content except by the external utterances or behavior."⁹⁵

Given this idea of individual intent, Radin *must be a group skeptic*: If intent lies within the private world of individuals' minds, then it is impossible to conclude that groups have intent. Groups do not have minds. This shows, however, that this particular argument against group agency begs the question, relying upon a contestable assumption about intent. Radin almost admits this when he states, "[t]hat the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition."⁹⁶ Assuming an idea of intent by definition incompatible with group agency, it follows that Radin's argument cannot be anything but a claim against group agency writ large.

power in the organization....The degree of centralization or decentralization of authority is determined by the overall pattern of delegation within the organization.").

⁹¹ Note that this partiality critique applies to the *text* as much as the legislative history. Partiality is a reason to be skeptical of the entire legislative process, including legislative text: if the few write the text, then it has no priority, nor legitimacy, as the product of the group, since formal adoption by the whole rests upon a false sense of legitimacy.

⁹² Radin, *supra* note ____, at 867.

⁹³ *Id.* at 870.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Radin's arguments are not substantially improved by the more sophisticated arguments made by Dworkin and others against group intent based on the speaker's meaning model. Dworkin argues, like Radin, that collectivity poses a particularly difficult problem for interpretation.⁹⁷ Let us assume that Dworkin borrows two meanings of intent—intent as occurrent mental event⁹⁸ and intent as communication between two persons. As Dworkin writes: “So long as we think legislative intention is a matter of what *someone* has in mind *and means to communicate* by a vote, . . . we must worry about how to consolidate individual intentions into a collective fictitious intention.”⁹⁹ In either case, we see the same problems. Even if we imagine that the individual is “communicating,” this does not solve the problem of combining individual minds or communications. Indeed, Dworkin is at pains to use the combinatorial problem to launch his alternative theory of statutory construction, one asserting the need to apply the best view of the law.

If this is correct, then the group-impossibility thesis should be rejected as question-begging. If you assume at the start that intent reduces to the occurrent mental state of an individual, then groups cannot have intent by definition since they do not have minds. Define intent as I(singular) and it cannot be I(group)—except in the rare case where each and every member has identical occurrent mental states or, to put it less formally, unless one can show that each person has the same thought “in his or her head” at the same time. Similar arguments can be applied even if we change our idea from intent as mental state to intent as communication. If we assume at the start that intent signals a communication from one person to another, then we beg the question in favor of individuals again. Define communication as C(singular) and it cannot be C(group).

C. *Decision Theory, the Modalities of Intent, and Group Intent*

If this Article were merely to set forth a typology of intent modalities, and subject our discussions of intent to a far more disciplined vocabulary, it would make significant headway in the grand debates about group intention in statutory interpretation. These modalities help to show that the standard Radin/Scalia/Dworkin argument depends heavily on weak, question-begging premises. Of course, that claim would not explain how one would in fact construct a plausible account of group intent, a project that Radin,

⁹⁷ DWORKIN, *supra* note ____, at 335-36 (“So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds and then we must worry about how to consolidate individual intentions into a collective fictitious intention.”).

⁹⁸ *Id.*; *see id.* at 317 (the judge must consider “the hopes or expectations or more detailed political opinions [legislators] have *in mind* when voting . . .”) (emphasis added); *id.* at 318 (“He accepts that he must take more pains to discover the *mental* attitudes that lie behind legislation than the *mental* states of people in pubs.”) (emphasis added); *id.* at 318 (“Whose *mental* states count in fixing the intention behind the endangers Species Act?) (emphasis added).

⁹⁹ RONALD DWORKIN, *LAW’S EMPIRE* 314, 335-36 (1998) (emphasis added).

Dworkin and Scalia did not tackle because they deemed it impossible. I turn to that effort here.

1. The Virtues of Decision Theory for All Intent Modalities

In my own view, as we will see later in Part VI, statutory interpretation requires more than a theory of meaning, it requires a theory of legislative action. Action provides a crucial context in which meaning is formulated. Legislative decision theory is not only a theory of meaning, but also a theory of action. To the extent decision theory endorses a theory of meaning, however, it enriches the discussion by adding context, and this is true of cases involving individualistic or communicative modalities of intent.¹⁰⁰ Decision theory is helpful to determine meaning if we are searching for a picture in someone's mind; if we mean intent as a matter of communication between legislators or institutions; and if we are talking about how sequential planning—action—builds a law.

Legislative decision theory posits that actions taken within an organization like Congress cannot be understood without understanding their context. Even if we were to try to seek an individual legislators' "intent" in the sense of a likely mental state, congressional context matters. To take a simple example, let us say that you want to know what is in the mind of someone who says "go to the floor!" One might assume that the speaker intended that his audience drop to the floor to do pushups. But in the congressional context, it means something else: if a Senator asks you to "go to the floor" it means to go to a particular place in the Senate known as "the floor," the Senate Chamber.

Decision theory also helps us to understand a speakers' meaning view of intent in which statutory interpreters believe that a statement is a communication or command from one person to another.¹⁰¹ Consider a statement made by Hubert Humphrey in the debate about the 1964 Civil Rights Act. At issue was an amendment offered by Senator Tower on the question of what kinds of tests employers could give employees. Humphrey said: the "*Motorola* [decision]¹⁰² has been discussed, discussed and *cussed*."¹⁰³ The bare statement suggests that Humphrey was trying to communicate to others his firm opposition to the *Motorola* decision. In fact, in the context of the debate, Humphrey was saying that *Motorola* was irrelevant because the issue had already been addressed in the post-cloture compromise text before the Senate.¹⁰⁴

¹⁰⁰ My thanks to Bill Eskridge for making this point to me. If I have blown it this explication, the error is mine alone.

¹⁰¹ Posner, *supra* note ____, at ____.

¹⁰² *Motorola* was an Illinois employment board decision ruling that a general ability test was discriminatory for applicants for assembly-line jobs. *Myart v. Motorola, Inc.* No. 63C-127 (Ill. Fair Emp't Practices Comm'n Feb. 27, 1964) reprinted in 110 Cong.Rec. 5662, 5664 (1964).

¹⁰³ 110 Cong. Rec. 13,504 (1964) (emphasis added).

¹⁰⁴ Nourse, *Decision Theory*, *supra* note ____, at 114-118 (explaining this debate).

More importantly, legislative decision theory helps us focus on conduct over time, not simply a freeze frame set of mental events or statements. Congressional process tells us that views change, and they change in the context of a structure leading to action—a law. Imagine if we were to freeze frame the views of Senators on civil rights in 1964. Many Senators’ views about race, *ex ante*, would appear quite rigidly racist. Now, fast forward to the longest debate in history on the Civil Rights Act. As the debate went on, at least some legislators changed their views. And they changed their views not because their beliefs about race changed but because their views about the wisdom of voting for the bill—action in congressional context—changed.

2. Legislative Decision Theory and Group Intent

If legislative decision theory allows for greater understanding of all modalities of intent, it has the added virtue, for our purposes, of helping us construct a plausible vision of group intent. The core of legislative decision theory is congressional procedure and the core of any theory of group intent must also be group procedure. To get some intuition for this, we must first rid ourselves of the notion that intent is inevitably “embodied.” Sometimes when we talk of intent, it seems almost impossible not to believe in a physical mind. That a group is not individually “embodied,” does not logically bar the functional equivalent of the embodied. So, for example, a wheelchair is not made of human biological material, but it performs the same function as bodily material, namely legs. So too, here, group procedures are not embodied, but they are the functional equivalent of what is generally seen as embodied in mind (i.e. intent). Just as the wheelchair allows an individual to move, so too a group’s procedures allow it to act as a group and, in this sense, have group intent.¹⁰⁵

The pragmatic modality of intent, by focusing on action in context, allows for “we-intentions” that are more than the additive sum of individual mental states or communications. These intentions can be shared consciously or not, with or without overt communication between the parties. For example, suppose that a group of Senators file a cloture petition. Those Senators have signed their name to a document, acting to close debate. From this *action*, we can infer that the members share a “we-intention.” This does not require that Senators communicate with each other; they may simply sign without discussion. Nor does it suggest that the signatories have precisely similar mental pictures in their heads (reading: “we want cloture”). Signing the letter may be a thoughtless act. But if the members act in parallel,¹⁰⁶ even without a mental event or communication, we can infer that they had the we-intention to do the act.

¹⁰⁵ To borrow another disembodied metaphor, consider a computer programmed to spit out legislation, a metaphor used by Jeremy Waldron to reject the notion of group intent. In my view, the program for that computer operates just like congressional procedure. In this sense, the computer metaphor supports rather than undermines claims for group intent. Just because the computer is “disembodied” does not mean that its program is not the functional equivalent of procedures governing groups.

¹⁰⁶ BRATMAN, *supra* note ____, at ____ (making this claim with respect to a plan to paint a house, noting that the plan can be inferred from joint action).

In the legislative context, this is important for two reasons. First, legislative decision theory depends upon basic understandings about joint congressional action, namely congressional procedure. Principles of congressional action are “we-intentions” in the *pragmatic sense of the term* “intention.” Members act based on rules and procedures. Let me be clear that this does not require that all members agree to those procedures, have mental states agreeing to those procedures, have communicated about the procedures, or have even read the procedures. All they have to do as a group is act according to the procedures. If the group shows by its actions a “we-intention” to abide by congressional process that is enough for the pragmatic modality of intent. Lest this confuse, as “intent” almost immediately forces us into thinking of mental states, there are easy examples of similar coordinated action. Chess players who simply sit down to play the game without a word are operating based on a “we-intention” to jointly play the game of chess in the pragmatic modality of intent.¹⁰⁷

Second, the “we-intention” of congressional *procedure* can be conceived as a “meta-intention” in the following sense. It is a “we-intention” to provide a framework for individual we-intentions in the future.¹⁰⁸ A pragmatic we-intention¹⁰⁹ with respect to congressional *procedure* governs processes for *every* statute. For example, acting pursuant to congressional procedure reflects a pragmatic “we-intent” that if a majority votes for the statute, that vote prevails for every member in the group—no matter what their mental state or what they have communicated about the bill. Those who oppose the statute share a pragmatic we-intent with those who favor the statute to *act* as a group “we” as far as the resulting legislation. And, why is this? Because, as even group-intent skeptics like Jeremy Waldron¹¹⁰ and Ken Shepsle¹¹¹ understand, if there is any core to a group, it is the organization and procedures governing that group. Group agency of any entity, whether it is a church, a corporation, or a university, depends upon such procedures. If this is correct, groups do have intents; or, at the very least, their procedures allow the functional equivalent of group intention—agency.

To summarize: Group intent does not exist in minds or statements alone, but may be inferred from acts. Acting pursuant to congressional procedure reflects a group intent

¹⁰⁷ Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 340 (1992) (“A joint activity can be cooperative down to a certain level and yet competitive beyond that [In playing chess,] [y]ou and I do not intend that our subplans mesh all the way down. But you and I do intend that our subplans mesh down to the level of the relevant rules and practices. Our chess playing. . . . is jointly intentional, and it involves shared cooperation down to the cited level.”).

¹⁰⁸ Special thanks to David Luban for clarifying this distinction.

¹⁰⁹ Nothing in my claim about a “we-intention” to act pursuant to the rules requires that there be a we-intent on any particular statute whereby intent one means shared mental states or statements or even votes.

¹¹⁰ WALDRON, *supra* note 2, at ____.

¹¹¹ KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 374 (2d ed. 2010) (arguing that “[p]rocedures are required to cut through all this instability,” given that “there is no equilibrium to majority voting.”); *but see* Shepsle, *supra* note ____ (arguing against the notion of legislative intent).

to allow any particular piece of legislation to constitute the act of the group. (Think of the rules as a signpost saying: “Any act that follows according to these procedures is now stamped as legitimate group action and when you (individual representative) act in this way, you have acted with group intention.”). There may be no uniform mental state, but there can still be a group intent *that the legislation be treated as a group action*—that it is seen as a law rather than the sum of individual minds or communications or fleeting mental states. This applies to all of the steps within congressional process legitimated by the rules. No member says, for example, when a law is passed, that it was the product of the minds of an individual Senator alone, or the statements of individual Senators and, because of that, the law does not have the character of law or congressional action (group action). The same is true of any procedural move within the rules: no member disregards or refuses to act on an amendment or a committee report or a cloture motion because it is simply the act of a particular Senator or a few individuals or a set of minds. Actions according to the rules have group legitimacy and reflect group intent because they are actions according to congressional rule and procedural context.

Readers should not misconstrue this as the claim that Congress only has group intent with respect to its procedures. Congress has a group intent that the resulting law, or committee report, or cloture motion, is an action of the group. Reconsider the chess example. No one says that the chess game cannot have taken place, or that any move is not the playing of chess, because individuals sat at the board. Simply because they are playing by the rules of the game, we can infer a shared intent to play the game, and conclude that each game and each move is conducted pursuant to the rules is a legitimate action of a group activity conducted with the group intent to play “chess.” Lest this not convince, consider the actions of corporations pursuant to rules. We can say that action following the corporation’s procedures to issue 10K reports is a group action and reflects group intent to issue the 10K. We do not dismiss this action because there were individuals involved or because the individuals had minds or because individuals talked to each other creating the report.

D. Group Agency, Sequential Procedure, and Feedback

It should be enough to dispose of the group-impossibility thesis by explicating, as I have, the ways in which intent operates in different modalities and how the standard argument against group intent begs the question. But lest one is not convinced, it is important to recognize how implausible the claim should be, despite its embrace by such extraordinary minds as Radin, Dworkin and Scalia. The anti-collectivity argument has rather extravagant implications. If we take the argument to its logical end, groups have no agency unless they act in fascistic mental or communicative lockstep or by the direction of some mysterious, unknown and unknowable super-mind. This is not how the world works. Groups do exist and they act; they act through sequential procedure and organization and delegation; if this is true of corporations and churches, it is also true of Congress.

Lest one remain skeptical, it is important to see how recent work on “group agency” parallels my claims about group intention. The philosopher Philip Pettit and

political economist Christian List have recently modeled what they call “group agency” in an attempt to put to rest sophisticated claims made by political economists that groups can never act rationally under the Arrovian cycling thesis.¹¹² Although that thesis is beyond the purview of this paper, List & Pettit’s arguments provide substantial analytic support for rejecting the group-impossibility objection. Even if one rejects my version of group intent, at the very least, their arguments suggest that the skeptical “cash value” of group intent skepticism—that groups cannot act—should be rejected.

List and Pettit argue that group decisions emerge as a result of sequential processes involving feedback. “[A] group’s performance as an agent depends on how it is organized: on its rules and procedures for forming its propositional attitudes . . . and for putting them into action.”¹¹³ Procedures allow decisions that do not correspond to the intentions of any particular member but may nevertheless be said to constitute group agency. Feedback allows individuals to shift from their original preferences to ones that they “judge . . . better for the group to accept.”¹¹⁴ To endorse this account of group agency, it is important to recognize what the theory does not entail. It does not entail some spectral intent hovering above the group. Pettit and List reject this view of the “group-mind” as a failed legacy of an “emergentist” tradition in which group-think emerges in mysterious fashion.

List and Pettit are also quick to explain that their model *does not eliminate individuals*. Groups and individuals both exist and neither can be reduced to each other. The formal model uses the concept of supervenience¹¹⁵ to describe the relationship of individuals to groups. Imagine that we have datapoints arrayed on a graph and you place these datapoints based on particular numerical positions (3 on the horizontal axis, 4 on the vertical axis). Now do this for 100 datapoints, placing them on the graph based on their coordinates (5/6; 10/3; 4/2 etc.). By the time we are done, we see that the datapoints create a square shape. The square shape is the group attitude; it is more than the individual datapoints but it does not eradicate those individual datapoints. The bottom line: one does not have to give up methodological individualism, or posit a “group mind,” to believe that it is possible for a group to act in ways that no individual member prefers *ex ante* or even *ex post*.

¹¹² CHRISTIAN LIST & PHILLIP PETTIT, GROUP AGENCY 58 (2011). Their argument is aimed at addressing the problems of incoherency suggested by positive political theory and Arrow’s theorem. That part of their analysis is beyond the scope of this paper. It is worth noting, of course, that the first major blow to the Arrovian thesis by Ken Shepsle depends upon the role of congressional rules and procedures.

¹¹³ LIST & PETTIT, *supra* note ____, at 81.

¹¹⁴ LIST & PETTIT, *supra* note ____, at 63.

¹¹⁵ This is how List and Pettit explain supervenience: “Think of the relation between the shapes made by dots on a grid and the positions or coordinates of the dots. . . . Nothing causal needs to happen in order for the positions to give rise to the shapes; suitably positioned, the dots simply constitute the shapes Fix the number and positions of the dots and, as a matter of logical necessity, the shapes will be fixed as well. ” *Id.* at 65.

Although List and Pettit make a variety of arguments about group agency, for my purposes, the central conceptual innovation is that sequential procedures are points of preference aggregation and revision. In this, List and Pettit reject the caricatured assumption that “preferences are fixed.”¹¹⁶ In fact, as economists have known for several decades, preferences do change and they should change with new information, under basic theories of rationality such as Bayesian statistical models. They should and do change also because new reasons arise about alternative courses of action, including new procedural reasons.¹¹⁷ Put in other words, rules and procedures may force endogenous preference-shifting. In this sense, there are no stable exogenous preferences; as long as those preferences cannot yield a result without proceeding through a gauntlet of rules, preferences will shift as a result of those rules or, if not, they will yield no result at all.

List and Pettit’s insights on group agency are more than theoretical, they are also realistic: it is a fact that Congress works through sequential procedures.¹¹⁸ One would need no such rules if members could simply sit down and determine, on a moment’s notice, how they would vote.¹¹⁹ That, after all, is the claim made by those who accept a static, internal, notion of intent. In fact, legislation is always beset by the vagaries of time and uncertainty. *Ex ante*, members often do not know the preferences of other members or even their own constituents. That uncertainty is managed by procedural means: procedures force members to reveal their preferences. With new information about preferences, other members in turn may change their views.

To pass legislation, members must obtain the support of others—at least a majority if not a supermajority. Procedures allow for feedback as to how others will vote on a proposal or what bill changes are necessary to secure a member’s vote. So, for example, let us say the Chairman of a committee proposes a bill and that bill is then heard in committee. At the markup, changes are made. The new bill may no longer reflect the

¹¹⁶ Franz Dietrich & Christian List, *Where Do Preferences Come From?*, 42 INT’L J. OF GAME THEORY 613 (2013).

¹¹⁷ Economists have been grappling with this for some time and concede that preferences can change with new information, *see id.* at 12-13, 16, as in Bayesian analysis, where initial probabilities are changed based on new information. Dietrich and List argue that differing alternatives can change one’s preferences, even if there is no new information. *Id.* One need not accept that account to accept the relevance of sequential procedures asserted here, as these procedures are means to provide new information (information about the voting preferences of other members).

¹¹⁸ BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESS IN THE U.S. CONGRESS 10-110 (4th ed. 2012).

¹¹⁹ I am not arguing against the stability of members’ preferences, although it might appear that way. *See, e.g.*, K.T. Poole & Howard Rosenthal, *Patterns of Congressional Voting*, 35 AM. J. POL. SCI. 228 (1991). Aggregate data prove the obvious truth that members try to vote consistently on issues—no one wants to be a “flip-flopper” at election time. However, at the margin, on first votes, non-roll call votes, important procedural motion (i.e. cloture) votes for which there is no clear precedent or effect, members have considerable leeway to “form their preferences.” Political pressure and social change may as well yield “evolution” of members’ views on controversial issues. *See, for example*, recent transformations on the question of gay marriage by various politicians. “*Sen. Nelson Endorses Same-Sex Marriage*,” CNN.com (Apr. 4, 2013) (“Florida Sen. Bill Nelson on Thursday joined a wave of Democratic Senators announcing their support for same sex marriage, reversing his position...”).

preference of any single committee member, but does reflect the shared preference to move the legislation to the floor for debate. If the bill ultimately passes, it too may not reflect the individual or additive preferences of individual members. This should not dismay; it is inherent in the process.

To see how rules force aggregation and preference change, consider the effect of the Senate's cloture rule on the Civil Rights Act of 1964. Before the Senate voted to close debate—which then required 67 votes—Republicans filibustering the bill anticipated the possibility that they would suffer future electoral defeat if they did not accept a compromise.¹²⁰ As Everett Dirksen put it, civil rights was an idea whose “time had come.”¹²¹ Bill opponents like Dirksen had a strong preference to limit the powers of the Equal Employment Opportunity Commission (EEOC) to intervene in individual employment cases.¹²² This was a pro-business position supported by a supermajority (at least 67 Senators), whatever their preference was with respect to racial discrimination or the underlying bill. *Ex ante*, prior to bill debate, members' preferences were likely to have been all over the board. Some would rather have had no bill (it was the longest and fiercest filibuster in history). A majority might have preferred a stronger EEOC. But once faced with the likelihood of cloture, and the possibility of electoral consequences,¹²³ preferences changed. Members who *ex ante* preferred no bill changed their preference to vote for cloture on a bill with limited EEOC powers.¹²⁴ Members who *ex ante* preferred a stronger EEOC changed their preference to a weaker EEOC to allow the bill to hurdle the cloture barrier.¹²⁵

Vetogates are occasions for testing preference aggregations reached by subordinate bodies. When the Senate debates a bill, members who disagree with the committee's position may challenge that preference aggregation by offering amendments.¹²⁶ They may not only challenge committee decisions but any type of collective decision, including all-important cloture negotiations. Typically, before cloture is achieved, a compromise bill will be “substituted” for the committee bill.¹²⁷ For example, in the case of the 1964 Civil Rights bill, the Mansfield-Dirksen substitute was offered.¹²⁸ That bill included a number of compromises tempering the law's impact

¹²⁰ ESKRIDGE, FRICKEY & GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 19-21 (4th ed. 2007).

¹²¹ *Id.* at 20 (Senator Dirksen quoting Victor Hugo).

¹²² *Id.* at 19 (4th ed. 2007) (Dirksen “procured the Administration's support for provisions in the jobs title limiting the authority of the EEOC . . .”).

¹²³ *Id.* at 19-21. This example reveals what is implicit in the examples given in this Part, which is that perceived electoral pressure (a bill whose “time” has come) is an important and often dominant force motivating individuals to shift preferences.

¹²⁴ *Id.* at 19-20.

¹²⁵ *Id.* at 19-20.

¹²⁶ In the House, the Rules Committee, which issues the rules for debate on any bill can second-guess committees' judgments and offer the opportunity for amendments. SINCLAIR, *supra* note 166, at 36-44.

¹²⁷ *Id.* at 50, 53-56, 72-77, 78-85

¹²⁸ ESKRIDGE ET AL., *supra* note ____, at 19-20.

on business.¹²⁹ In making these compromises on the pre-cloture bill, members are trying to anticipate what the full body would accept. Under the rules, however, individuals are always free to “check” the cloture-compromise by offering amendments. Consider Senator Tower’s post-cloture amendment on employment testing. Compromises on testing had already made their way into the Mansfield-Dirksen substitute text, but Senator Tower offered the amendment anyway, as a means of checking whether the members as a whole would accept that compromise. He lost;¹³⁰ bill proponents insisting that the issue had already been decided in the substitute, and that Tower’s amendment was simply an attempt to relitigate the question.¹³¹

Legislative procedures allow checking opportunities, providing new information affecting members’ preferences until a bill has passed both Houses. Stability is a function of sequential process because the process imposes transaction costs on legislative action. The closer one gets to a final bill, the more hurdles or vetogates one has to overcome, the more likely members will not revisit earlier decisions lest this upset the bill’s supporting coalition. In the case of the 1964 Civil Rights Act, for example, House members chose not to go to conference to reconcile the differences between the House-passed and Senate-passed bills on the theory that the Senate victory was so fragile, it would not survive another round of voting and negotiation.¹³²

IV. *Is Textualism Impossible?*

Textualists will reply that, even if these arguments are correct, text remains the exclusive means for interpreting statutes. Call this the “exclusivity thesis”—that there can be no recourse to legislative history. In this Part, I argue that legislative decision theory shows why the exclusivity thesis is wrong. Textualists misread text if they do not attend to congressional context and, if this is right, the exclusivity thesis falters. Indeed, if this is correct, the exclusive, strong form of textualism is impossible whereby “strong form” I mean a commitment *never*¹³³ to look at legislative history. We are all textualists in the weak sense that everyone starts with the text. However, the strong, exclusivist, variety of textualism faces a significant challenge. Textualism is necessary, but not sufficient, to interpret a statute.

There are two serious problems with textualists’ exclusivity argument. The first problem is hypocrisy. Textualists concede that there is no way to understand the

¹²⁹ *Id.* at 19.

¹³⁰ Eventually, a compromise was reached which amended the existing compromise. See Nourse, *Decision Theory*, *supra* note ___, at 114-15.

¹³¹ For a fuller discussion of this issue, see Nourse, *Decision Theory*, *supra* note ___, at 114-18.

¹³² ESKRIDGE et al., *supra* note ___, at 22.

¹³³ This is an exaggeration of course since even Justice Scalia occasionally says recourse to legislative history may be appropriate to see if the unthinkable was in fact “unthought.” *Green v. Bock Laundry* (citation). As explained below, some textualists actually believe legislative history can be mined for usage, as they should if they believe in semantic content.

meaning of a term without context.¹³⁴ They urge that they are not literalists but understand the basic modern findings of linguistics that meaning is inherently contextual.¹³⁵ They avidly consult particular kinds of context, such as canons or dictionaries as evidence of semantic meaning. The question becomes, of course, why procedural context should not count as context and why it should not take priority if the textualist aims to be a faithful agent of Congress rather than Blackstone or Webster's. As Scott Soames and other philosophers of language have shown, semantic content is exceedingly sparse.¹³⁶ Many statutes are written using terms that, from a philosopher's perspective, are "extravagantly vague"¹³⁷ (e.g. terms such as reasonableness, neglect, harm). Because these statutes cover a wide range of conduct, "it is not even possible" let alone desirable to specify their precise semantic content.¹³⁸ If this is correct, semantic content will run out and judges will be left seeking meaning elsewhere. The question is whether that "elsewhere" should include situational, legislative, context.

The second problem is bias. In interpreting statutes, all statutory interpreters agree not to apply the "will of the judge," but the "will of Congress."¹³⁹ But every judge is faced with the ancient problem of the philosopher in the cave: that one's perspective (in this case, the perspective of the judicial institution) may be darkened to the world (in this case, darkened to the world of Congress. (After all, no law school teaches much about Congress, so why should there be such knowledge). Put in other words, we can never know, *ex ante*, whether Congress will have made a decision on a particular text different from the one made by intuitive judicial reflection. As the great contracts scholar Corbin argued, every interpreter uses some extrinsic evidence, even if is only the interpreter's own life: "when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of *his own personal*

¹³⁴ BRYAN GARNER & ANTONIN SCALIA, *READING LAW* at 33 (2012) (equating semantic meaning and context: "The principle of semantic content of words is limited to permissible meanings . . . But some do not accept it: They seek to arrive at legal meanings through some method other than discerning the contextual meaning of words and sentences and paragraphs."); *see id.* (arguing that the context embraces textual purpose, historical usage, and syntactic setting).

¹³⁵ Modern textualists start from the premises that "a large number of contextual understandings will be assumed by all speakers of a language," and that many such understandings will be "largely invariant across English speakers at a given time." Manning, *The Absurdity Doctrine*, *supra* note ___ at 2458; *see id.* at ___ ("In contrast with the plain meaning school's emphasis on literal meaning, modern textualism screens out many absurdities at the threshold by accounting for the contextual nuances of language, especially the particular nuances and conventions that the subcommunity of legal speakers has developed to facilitate effective legal communication.")

¹³⁶ Scott Soames, *The Value of Vagueness* at ___ in ANDREI MARMOR AND SCOTT SOAMES, *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* (2011).

¹³⁷ *Id.* at ___.

¹³⁸ *Id.* at ___.

¹³⁹ GARNER & SCALIA, Introduction, *supra* note ___, at ___.

education and experience.”¹⁴⁰ If this is correct, the only way to protect against *ex ante* judicial bias is to look outside the four corners of the statute to legislative context.

Let us begin with an obvious example: *Public Citizen v. U.S. Department of Justice*.¹⁴¹ The question was whether the American Bar Association’s committees recommending judicial nominees were required to comply with the Federal Advisory Committee Act (FACA), a sunshine law. The statute was triggered when the President “established” or “utilized” any committee of two or more persons. The President had obviously not “established” the American Bar Association but, on the other hand, he did appear to have “utilized” their advice on judicial nominations. Justice Brennan noted that if “utilized” was read literally it would cover a vast number of private entities, including the President’s own political party. Rejecting that interpretation, the majority invoked the canon Justice Scalia and others now revile, known as absurdity: if a statute would lead to absurd results, a court may look beyond the text to the “spirit” of the law.¹⁴² Ultimately, the majority concluded that the term “utilize” in the statute could not possibly mean “utilize” and appeared to cut it out of the statute.¹⁴³

Legislative context is crucial to explain why Congress wrote a statute that appears to cover President Obama and his daughters at breakfast (assuming they were to give him advice).¹⁴⁴ There was a textual conflict in the statute—both houses had passed the term “establish” (leaving the ABA out), but the conference committee added the term “utilize” (potentially covering the ABA). If we follow the interpretive implications of Congress’s conference committee process, we can easily find a sound basis to interpret the word “utilize” as not significantly different than “established,” because this is how an average congressman would understand the conference committee report. Everyone knows that additions are made in conference committee reports. To minimize the impact of such a practice, the rules allow for objection (a point of order) but only when the addition amounts to a substantial change; under this rule, members may assume that new language does not substantially change the meanings of texts passed by both houses. Congressional process thus provides important contextual information to interpret the term “utilize.” If this is correct, then legislative process can provide crucial context in cases where canons and dictionaries fail.

Perhaps more importantly, legislative decision theory helps a judge resist the problem of “picking and choosing” texts. In some cases, it is fairly clear that judges have focused on a single text when congressional members would have perceived a

¹⁴⁰ Corbin as quoted in Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implication for New Textualist Statutory Interpretation*, 87 GEO. L. J. 195, 197 (1998) (emphasis added).

¹⁴¹ 491 U.S. 440 (1989).

¹⁴² *Id.* at 452-53.

¹⁴³ *Id.* at 462-63.

¹⁴⁴ The statute covers a group of two or more people advising the President.

conflict. Consider *Green v. Bock Laundry Machine Co.*¹⁴⁵ The issue was whether an evidentiary rule applied to a plaintiff if the statute said “defendant”[.]. No one thought the statute made any sense, including Justice Scalia. But if you look at the procedural context, you find two relevant pieces of information: first, the term “defendant” was added in conference, second, there was another relevant term passed by both Houses—“witness.” The rule’s opening clauses covered all witnesses, but its balancing text covered only “defendants.”¹⁴⁶ No judge in the *Bock Laundry* case paid any attention to the term “witness,” which would have clearly covered the plaintiff nor did any judge attempt to reconcile the term “witness” with the term “defendant” (as would a member of Congress). The Justices focused on a single term, the one added in conference, the one with the least legitimacy from textualists’ own perspective (the one inserted by a committee and not passed twice by both Houses).¹⁴⁷

Lest this seem an oddball case, the same “tunnel vision” effect has occurred in the most famous case in textualism’s history, *Church of the Holy Trinity v. United States*.¹⁴⁸ Justice Scalia’s Tanner lectures made this case the poster child for textualism. The statute appeared to cover “labor or service of any kind,” its plain language thus including the rector of Holy Trinity Church. Hundreds of pages, quite literally, have been written about *Holy Trinity*¹⁴⁹ most of which have insisted that the statute is quite plain: labor means labor, and that is it. Few note, however, that there is more than one relevant text! The second text appears in the statutory exemption for “lecturers,” a text that appears to cut precisely in the opposite direction, for a plain meaning excluding the good rector. There is no immediate reason based on the semantic content of “lecturer” to believe that ministers do not count as “lecturers.” One who lectures (who orates at a lectern in front of groups of people) does not include a minister.¹⁵⁰ (Surely this follows the same semantic logic as the argument that anyone who labors is included in the statute).¹⁵¹ The point is to notice how so many people focused on one part of the statute to the exclusion

¹⁴⁵ 490 U.S. 504 (1989).

¹⁴⁶ *Id.* at 509-10.

¹⁴⁷ Textualists claim that committee reports should not be relied upon because they do not represent the membership as a whole, but only part of Congress.

¹⁴⁸ Rector, Holy Trinity v. United States, 143 U.S. 457 (1892).

¹⁴⁹ See the articles cited, *infra* text accompanying notes ___ to ___.

¹⁵⁰ And, in fact, there is evidence that this was the understanding of the author of the “lecturer” exclusion who specifically mentioned lecturers on religion in supporting the amendment. See *infra* text accompanying notes ___ to ___.

¹⁵¹ Note that in urging a broad interpretation for “labor,” textualists are using a semantically extensive meaning of the term, and presumably that same type of meaning should be applied to other terms in the statute. “Labor” could, by contrast, be interpreted to mean a prototypical laborer, or manual laborer. For the difference between prototypical and extensive meanings, see Nourse, BROOKLYN L. REV.

of another—declaring the statute clear beyond peradventure when the text suggests at the very least ambiguity.

Finally, legislative context may be crucial in interpreting text appearing semantically plain. The most famous example of this is the British case, *Pepper v. Hart*.¹⁵² The question was how to calculate taxes on fringe benefits: the taxpayer was a teacher who received an educational benefit for his children at his school. When the case was initially argued, the Lords agreed that the statute was plain, ruling for the government, that “expense incurred” was expense to the employer for non-employees as opposed to the marginal cost of adding another student. On reargument, after the Lords looked at Hansard (Parliament’s records), they reversed, finding the statute ambiguous, and ruling for the taxpayer. For our purposes, the important point is that the legislative process showed quite clearly that a legislative decision had been made: the government changed the text of the statute to reflect the government’s decision to embrace the status quo practice favoring the taxpayers receiving such fringe benefits.¹⁵³

Once we see that statutes that seem semantically plain can in fact be ambiguous, we can no longer be satisfied with semantic meaning alone. It follows that the exclusivity thesis must be wrong. We have seen that judges may pick and choose texts, that they may focus on one piece of text to the exclusion of other relevant texts, and find texts clear that turn out to be ambiguous. If that is so, we must ask how to constrain judges from such mistakes and we must consider legislative decision theory’s imperative to try to resolve ambiguity, first, by finding legislative context. If these kinds of cases exist, then a judge cannot be confident that he or she has interpreted the right text, seen a conflict, or correctly determined that the statute’s meaning is clear. The text alone cannot prevent the interpreter from imposing the “will of the judge” rather than the “will of the legislature.”

Textualists might argue that these examples are simply instances of bad textualism. The Lords in *Pepper v. Hart*¹⁵⁴ should have known that the statute was ambiguous, or the Supreme Court in *Bock Laundry*¹⁵⁵ or *Holy Trinity*¹⁵⁶ should have known that there were texts in need of reconciliation. But this would not provide much help in interpreting the text once it is seen as ambiguous. Once you find that there are

¹⁵² [1992] A.C. 593 (H.L.) 634 (U.K.).

¹⁵³ See *id.* at ___ (opinion of Lord Browne-Wilkinson) (quoting Finance minister saying “I have decided to withdraw Clause 54(4)”; *id.* (. . . “clause 54(4) sought to tax in-house benefits on a different basis from other benefits.”). By withdrawing 54(4) the Minister explained that the services provided would cost the employer “very little,” that this was the “position as it was before this Bill and as it will be if the whole of the Bill is passed . . . It does not produce anything new.” *Id.*

¹⁵⁴ Citation.

¹⁵⁵ Citation.

¹⁵⁶ Citation.

conflicting texts—“labor” and “lecturer” or “witness” and “defendant”—how are these to be reconciled or interpreted? If the semantic content does not yield a single answer, but points in two directions, then the statute is by definition ambiguous. One *must* look elsewhere to determine the statute’s meaning.

Legislative decision theory argues that the legislative context is the most restrained way of resolving these kinds of ambiguities; it does not look for the purpose of the statute, but the decisions the legislature made about the text or texts involved. As we have seen above, many cases involve a choice of text ignored when a judge, by fiat, announces “Claro!”¹⁵⁷ anointing the text as plain. By contrast, decision theory emphasizes “structure-induced ambiguity”¹⁵⁸—that textual ambiguity is not a function of foreseeability or word choice or congressional failure but is structurally entailed. Interpreters should start with an assumption that plain meaning is the exception, not the rule, reversing textualists’ preferred normative ordering of questions in statutory interpretation cases.

Textualists will insist that, rather than legislative context, canons can be useful in identifying semantic content and resolving conflicting texts. But it is clear that this is wishful thinking, even at the semantic level. Canons cannot resolve cases like *Public Citizen* (the ABA case) or *Pepper v. Hart*. Canons cannot always tell one *ex ante* if the text is plain or which text to pick. Even as a guide to ordinary usage, canons can operate in precisely the wrong direction. As Gricean analysis makes clear, semantic meanings depend upon background contexts that may have no real life parallel in legislative context¹⁵⁹: ordinary meaning canons, for example, depend upon a rather unrealistic notion that legislative combatants are always trying to “cooperate” in conversation.¹⁶⁰ Finally, textualist use of substantive policy canons is a poor substitute for trying to understand Congress’s meaning within legislative context. Substantive policy canons form a theory of statutory *construction*: *they fill statutory gaps when there is no*

¹⁵⁷ On Claro culture, see *supra* note ____.

¹⁵⁸ Nourse, *Misunderstanding*, *supra* note ____, at ____.

¹⁵⁹ I do not mean to contest recent findings by the excellent Gluck and Bressman study that statutory drafters do in fact use presumptions about speech that look like canons. No doubt this is true at some stages of the process and in some situations. I would probe this finding to determine, however, whether drafters used those same canons in cases of serious conflict.

¹⁶⁰ See Miller’s classic paper on canons and Grice; Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech* in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE, *supra* note ____, at ____ (explaining Grice’s work on implicatures: “[i]n normal conversational situations, when the main purpose of speech is the cooperative exchange of information, certain general maxims apply.”). It is certainly true that in some cases “ordinary meanings” will prevail in legislatures but not at the places most likely to need interpretation. At the points of central compromise—the points which are likely subject to litigation—precisely the opposite assumption should apply. When, for example, members are debating the meaning of a key compromise, they are likely to be extremely “uncooperative” in their approach toward that language, reversing many of Grice’s maxims of implicature. Rather than the “maxim of quantity” —which suggests that ordinary persons do not say too little or too much, there will be incentives to follow a maxim of “excess,” which is to say to read language more narrowly or broadly than would an ordinary speaker.

congressional meaning or the meaning is ambiguous. Perhaps these tools of construction are normatively wise, but they cannot supplant an attempt to find congressional meaning, for it is a judges' duty, as textualists and purposivists agree, to be a faithful agent of Congress. It is Congress's meaning, not judge's canonical meaning, that must take priority.

V. DECISION THEORY AND LEGISLATIVE HISTORY

If this is correct, textualists cannot claim that decision theory is impossible; in fact they must acknowledge that textualism is incomplete. If textualism is incomplete, then one must look elsewhere to interpret a statute. The first place one should look, in my opinion, is the legislative context, as courts must be faithful agents of Congress under the constitution.¹⁶¹ Looking for congressional context, however, must be distinguished from three different ideas of legislative history set forth by current theories: (1) some argue that legislative history can be used to determine semantic "usage"; (2) others claim that legislative history can be used to determine "purpose." Decision theory rejects these views because they can be misleading about Congress's actual decisions. Finally, and more radically, congressional decision theory rejects the view that judges should do *legislative history-as-history*.

A. *Legislative History and Purpose*

Purposivists argue that legislative history should be used to find purposes. There are two significant problems with this effort. First, just as one can pick and choose texts, it is easy to pick and choose purposes; indeed, it is obviously easier to pick and choose purposes since legislative history is almost by definition going to be more voluminous than the text of the statute. Second, and perhaps more importantly, purposivism assumes that one must move up a level of generality, that Congress has not made a decision about specific texts when, in fact, it may well have done just that or, at the very least, confined the inquiry far more substantially than would an inquiry into purpose alone.

Consider the *ABA* case again.¹⁶² Justice Brennan asked whether Congress could possibly have had the "purpose" to cover a vast range of private entities, such as the NAACP or the American Legion, when these organizations provided advice to the President.¹⁶³ Justice Brennan's invocation of purpose does not solve the multiple purpose problem. One cannot conclude, as the opinion suggests, that the only purpose of the statute was to exclude preexisting private entities. In fact, Congress might have wanted precisely the opposite result—albeit in *some* cases. Government contractors, for example, were excluded. But if oil and gas companies were on a committee advising the

¹⁶¹ Elsewhere, I have urged that, under textualists' own theories of constitutional interpretation, practices specifically authorized by the text should take priority over practices not authorized by the text. See Chapter 5, *The Constitutional Arguments, MISREADING LAW* (draft).

¹⁶² 491 U.S. 440 (1989).

¹⁶³ *Id.* at 453.

EPA on greenhouse gases, Congress wanted FACA to apply. Committee reports cited the quasi-private National Academy of Sciences and its private advisors as an example of a “covered” entity.¹⁶⁴ In short, the purposivist analysis here is subject to the multiple purpose critique.

Legislative decision theory may, in some cases, avoid the multiple purpose problem. Rather than looking for purpose in a voluminous record, one looks for a decision on the term utilized. And, as we have seen, utilize was added in conference committee. That decisional path gives important context to the meaning of the term.¹⁶⁵ Under the rules, the average member of Congress is entitled to assume that the conference committee has not significantly changed text passed by both Houses. Taking this approach, one can say that the Court should not interpret the term “utilize” to mean anything “significantly different” from “establish.” The important point for our purposes, however, is that using the decisional sequence, one can reach this result *without weighing multiple purposes*.¹⁶⁶

If decision theory has the capacity to avoid the multiple purpose problem,¹⁶⁷ it also has the capacity to avoid purposivists’ overly-pessimistic assumption that *Congress made no decision*. One of the great critiques of purposivism has been, as Chief Judge Easterbrook once wrote, that it tends to expand the domain of statutes, by moving up a level of generality.¹⁶⁸ The purported reason for this is the claim made by liberals and conservatives alike that, in most cases, statutory interpretation problems are ones of foreseeability.¹⁶⁹ Congress will not be able to foresee all of the situations in which a statute should apply (whether the term “vehicle” should include a plane or a wheelbarrow for example) and we can solve that problem by finding a more general purpose. However well worn this claim, it is based on a falsifiable empirical assumption, that Congress did not address the specific question. There is no reason to think that this is *always* the case.

¹⁶⁴ *Id.* at 460 n.11 (citing H. REP. NO. 91-1731 at 15).

¹⁶⁵ CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH AND LEGISLATIVE GUIDE 812-13 (1989) (“Conferees cannot remove language both chambers agree on, or insert new provisions not in either chamber’s version.”).

¹⁶⁶ *Public Citizen*, 491 U.S. at 477-78 (Kennedy, J., concurring in judgment).

¹⁶⁷ I have no empirical evidence (yet) that decision process theory avoids this problem in a significant number of cases, but have demonstrated that it is possible to do so in highly significant and contested ones. Nourse, *Decision Theory*, *supra* note ___, at 92-128 (applying decision process theory to several prominent cases taught in legislation courses).

¹⁶⁸ Easterbrook, *Statute’s Domains*.

¹⁶⁹ Radin, *supra* note ___, at 871 (“Interpretation is an act which requires an existing determinate event—the issue to be litigated—and obviously that determine event can not exist until after the statute has come into force.”).

Purposivism biases lawyers reading of legislative history. Looking for the general obscures the particular. The best example of this is *Holy Trinity*.¹⁷⁰ Professor Chomsky has written the classic law review article focused on the purpose of the Act to cover the mass importation of slave labor.¹⁷¹ Professor Vermeule has written the classic textualist response, noting that there is legislative history suggesting that members knew that the statutory terms vindicated “plain meaning”—“labor or service of any kind” covered “braintoilers.”¹⁷² Fifteen years and hundreds of pages after Justice Scalia made *Holy Trinity* famous, purposivists and their textualist opponents forgot to ask whether the legislative history had anything specific to say about the “lecturer” language in the statute. Looking for the general obscured arguments focused on the particular lecturer text.

In fact, as I discovered upon reading the legislative history in reverse, the “specific” issue of ministers was addressed in the legislative context. Senator Morgan, who offered the lecturer exclusion, explained that “[p]eople who can instruct us in morals and *religion* and in every species of elevation by lectures . . . are not prohibited.”¹⁷³ If one is focused on purpose, at a high level of generality, one may well miss this legislative history, which does not appear in Professor Chomsky’s fine work¹⁷⁴ or that of Professor Vermeule¹⁷⁵ or that of Justice Scalia.¹⁷⁶ The only academic to have noted the lecturer exemption at the outset of the debate was Professor Tribe who focused on the constitutionality of the statute and thus had no reason to peruse the legislative history.¹⁷⁷ Of course, if one never looks at legislative history, or if one is looking for something a good deal more general, then one may miss the lecturer text and its explication entirely.

To suggest that there are cases in which purpose may bias the legislative history inquiry is not to argue that purposivism as a theory of statutory *construction* is wrong. It is to say that roaming around legislative history looking for purposes should be reserved for cases when all other approaches are exhausted. As I have noted above, purposivism is not an effort to *find* meaning, but to *construct* a statutory meaning when we have no congressional decision. Legislative decision theory argues that one must look to actual congressional context before looking to purpose. So, for example, in *Holy Trinity*, after concluding that there were two conflicting terms in the statute, making it ambiguous, one would look to the most relevant and specific decision—Senator Morgan’s amendment—

¹⁷⁰ Rector, *Holy Trinity v. United States*, 143 U.S. 457 (1892).

¹⁷¹ Carol Chomsky, *Unlocking the Mysteries of Holy Trinity*, 100 COLUM. L. REV. 901–956 (2000).

¹⁷² Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

¹⁷³ 16 CONG. REC. 1633 (1885) (statement of Rep. Morgan). Morgan opposed the bill but supported the lecturer amendment. *Id.* For a lengthier discussion of this case, see Nourse, *Decision Theory*, *supra* note ____, at 118–28.

¹⁷⁴ Chomsky, *supra* note ____.

¹⁷⁵ Vermeule, *supra* note ____.

¹⁷⁶ SCALIA, *supra* note ____.

¹⁷⁷ Laurence H. Tribe, *Comment*, in SCALIA, *supra* note ____, at 92.

on “lecturers” to see whether, in context, Congress decided to exclude the good rector from the statute. Of course, Senator Morgan’s remark on “lecturers on religion” does not slam the door shut. One might argue that Morgan might have meant itinerant speakers on the Chataqua circuit, not men behind a pulpit, for example.¹⁷⁸ At that point, one might in theory look to “purpose” to determine whether the legal effect of the law.¹⁷⁹

B. *Legislative History and Usage*

Occasionally, textualists concede, and should concede, that legislative history may be used as evidence of semantic meaning by usage.¹⁸⁰ So, for example, one might look to the congressional record of the day to determine the conventional meaning of a term like “lecturer.” Computer research techniques now make this kind of usage inquiry rather easy (and they respond to claims that legislative history is too difficult or costly to find). Once one opens the door to legislative history as a form of usage, however, it is difficult to understand why it should not be opened to include Congress’s decisions on specific texts. Let us assume that there were 20 uses of the term “lecturer” in the 1885 congressional record and none of them included any reference to religion. Presumably, “usage” would offer no reason to include the minister; but what if we know, what we do know, which is that the author of the amendment excluding lecturers specifically referred to lecturers “on religion”?

Legislative decision theory argues that Congress’s actual decision should trump semantic usage in case of conflict. Usage inquiries suffer from three problems. First, as we have seen, they may amount to judicial fishing expeditions rivaling searches for legislative purpose. Let us assume, in *Pepper v. Hart*, that we can find 100 uses of the term “expense” and all of them suggest a broad definition supporting a ruling against the taxpayer. If we know, as we do know from the case, that the government withdrew and opposed that result, then semantic content becomes a way to reject Parliament’s actual decision for the results of a strange adventure in linguistics. Second, usage inquiries depend upon determining the appropriate term in the statute. If you think that the only relevant term in the *Holy Trinity* case is “labor,” for example, when the term might be “lecturer,” your usage inquiry will be skewed, and pointless if you choose the wrong text. Third, the usage inquiry can distort if it does not look to the *sequence* of Congress’s decision. Would it have helped, for example, to find how Congress used the term “utilized” in the *ABA* case? In fact, it would have distorted our best evidence of Congress’s decision. We know that the term “utilized” was added in conference committee. We know that the average member of Congress, in the absence of objection, will interpret that term as not significantly different from “establish.” If we ignore that

¹⁷⁸ Thanks to Matt Stephenson for suggesting this interpretation.

¹⁷⁹ Let me say that however insistent I am that one look for specific decisions over more general purposes, in this case it seems that the most conservative reading of the purpose—one based on prototypical meaning of “labor”—the Supreme Court’s decision to exclude the rector was correct.

¹⁸⁰ SCALIA & GARNER, *supra* note ____, at 33.

decisional sequence, we are likely to give far too much weight to the semantic content of “utilize.”

C. *Legislative History and Narrative*

Finally, it is worth addressing an assumption sometimes shared by textualists and purposivists alike that legislative history should aim to tell the historical narrative of a statute. This assumes that the making of a statute is a narrative process—that it is possible to tell a coherent tale, rather than one in which zigzagging and contradiction prevail. As students of narrative such as Peter Brooks¹⁸¹ know, the secret and perverse logic of narrative operates in reverse. Narrative is created by “a discoverer standing at the end of the process, then laid out as a plot leading from beginning to discovery. Earlier events or actions make sense only as their meaning becomes clear through subsequent events.”¹⁸² So, too, legislative history.

Traditional ways of doing legislative history can lead to fantasy narratives. This is equally true of histories written by liberals and conservatives. It is as if writers were trying to write histories of events for which there was no calendar, or a history of a trial with no rules. It is easy in such cases to confuse what happens later with what happens earlier, or a violation of a congressional rule with adherence to that rule. Perhaps more importantly, in making law, decisions are sometimes made that are inconsistent; indeed, this is often a part of the decisional process. X is adopted, then rejected, X is in part rejected, then accepted. There is a reason that the process is called “sausage”-making. It is not necessarily linear or coherent. Imposing a coherent narrative on an incoherent process, by looking for a central purpose or story, can prove an exercise in judicial imagination.

Consider first the lengthy legislative history written by Justice Stevens in *Bock Laundry*.¹⁸³ There, Justice Stevens provides an erudite lecture on the origins of the evidentiary doctrine governing the admission of a witness’s prior felony convictions. After a lengthy survey of non-legislative materials, including legal treatises and American Law Institute proposals,¹⁸⁴ he ultimately concludes that the Congress decided to apply the common law rule, allowing the admission of prior crimes evidence. A strong “pro-common law” purpose, however, is hard to square with the back and forth textual changes that actually occurred in Congress. The Senate passed the common law rule; the House passed a wildly different rule contrary to the common law; the Houses went to conference and *they changed the rule* to adopt *neither* the House or the Senate version. Given this back and forth, it is hard to see a coherent purpose to adopt the common law.

¹⁸¹ The “logic of narrative” is one of reverse engineering, “the determination of means by ends.” Peter Brooks, *What to Say About A Case* 37 (quoting the literary theorist Gerard Genette) (draft manuscript, presented at GULC).

¹⁸² *Id.*

¹⁸³ 490 U.S. 504 (1989).

¹⁸⁴ *Id.* at 511-16.

A similar error occurs in Justice Rehnquist's legislative history in *United Steelworkers v. Weber*.¹⁸⁵ The question was whether a private company and its union could use a voluntary affirmative action plan. Writing in dissent, Justice Rehnquist crafted an opinion that has been much admired precisely because it relied on a lengthy legislative history of the Civil Rights Act of 1964. Justice Brennan's opinion upholding the practice was derided by academics as devoid of "persuasive methodological power."¹⁸⁶ But the same should be said of Justice Rehnquist's legislative history. Like Justice Stevens, he writes a history devoid of any understanding of congressional process. The most important and specific statutory provision was section 703(j) which was added in the Senate prior to cloture—that provision specifically provided that no company would be "required" to impose affirmative action. That provision was added long after the bill was debated in various House committees, on the House floor, or in early Senate debates on sending the bill back to Committee, all of which Justice Rehnquist used to build his narrative.¹⁸⁷ How could those matters be relevant, when 703(j) had yet to be conceived or drafted? The best narrative here is not continuity but discontinuity: 703(j) modified and limited the statute's early and exceedingly vague anti-discrimination language. One would not know this, however, from Justice Rehnquist's narrative.

VI. CONCLUSION: ELEVATING CONGRESS TO DECISIONMAKER

Both purposivists and textualists may gain from legislative decision theory. First, they may gain constraint. Textualists could avoid the most egregious examples of "picking and choosing" texts, finding statutes with conflicting texts plain when in fact they are obviously ambiguous. Purposivists, too, would have a far more disciplined approach to legislative history, avoiding the worst abuses of "picking and choosing" legislative history, targeting their inquiries to particular texts rather than roaming around vast debates that are, by the end of the process, entirely irrelevant. Second, each may gain understanding. Members experience Congress in ways differing markedly from how judges experience Congress (whose only contact is likely to be the rather negative one of judicial confirmation). Republican and Democratic members of the House and Senate express shock at textualists' refusal to look at legislative history, arguing that such a view allows judges to "write their own law," and assaults the "integrity"¹⁸⁸ of Congress. Meanwhile, judges write of the nation's representatives as if they were illiterate and arrogant children, unschooled in the legal arts of precision and careful argument. Both would be better off with greater understanding of the other.

¹⁸⁵ 443 U.S. 193 (1979).

¹⁸⁶ Philip P. Frickey, *Wisdom on Weber*, 74 TUL L. REV. 1169, 1177 (2000)

¹⁸⁷ For discussions and citations to the relevant history, see Nourse, *Decision Theory*, *supra* note ____, at 106-108.

¹⁸⁸ Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 670-71 (2012) (quoting first Senator Arlen Specter and then Rep. Robert W. Kastenmeier.) See also *id.* at 671 (quoting Senator Grassley in Chief Justice Roberts' confirmation hearings stating that he does not agree with Justice Scalia's no legislative history position); *id.* (quoting Senator Hatch as stating that "text without context often invites confusion and judicial adventurism.").

One of legal education's dirty little secrets is its virtual abandonment of the teaching of lawmaking through anything but the "rear-view mirror" of appellate decisions. It has been a century since the greats invited law students to study legislation.¹⁸⁹ It remains the fact that very few students, and even professors, know much of anything about congressional procedure. I can still stand in a room of law professors and judges and ask them what the most important rule in American government is, and not a single one will mention Rule 22, the rule that governs the Senate filibuster and cloture,¹⁹⁰ even though this rule has singlehandedly distorted our democracy in the past two decades in ways that have now reached the newspapers and which (it is no exaggeration to say) may well imperil the nation.¹⁹¹

In a most eloquent way, Robin West has captured this failure in her description of a century-long "juriscentricity" of legal education.¹⁹² She writes of a "near-exclusive orientation of legal education, and legal scholarship, around a judicial—rather than a legislative—perspective."¹⁹³ In this world, we "teach and enculturate students to respect, admire, and emulate the thought, the knowledge, the wisdom and even the style of great judges, not great legislators."¹⁹⁴ The great statutes of the twentieth century, which liberated entire peoples (namely blacks and women and the disabled and the aged) become a kind of "faux law," or lower law, the work of usurpers too stupid to understand "higher, constitutional law," and motivated only by the self-interest of "uninformed and hate-filled constituents."¹⁹⁵

We live in an age of contempt for democracy, a contempt which is not new,¹⁹⁶ but has reached new heights. If no law school curriculum teaches much about congressional procedure, political science departments have taught for over two decades that only

¹⁸⁹ Ross F. Cranston, *Reform Through Legislation: The Dimension of Legislative Technique*, 73 Nw. U.L. Rev. 873, 907 (1978) (discussing "Roscoe Pound's challenge to lawyers—which has borne little fruit—to study the operation of legislation, the effects it produces, and the means of making it effective") (citing Roscoe Pound, 1 JURISPRUDENCE 350-55 (1959)).

¹⁹⁰ SENATE RULES, 112th Cong., *supra* note 97, R. XXII, at 20-21.

¹⁹¹ Filibuster from EGN manuscript.

¹⁹² Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L. J. 1343, 1348 (2011).

¹⁹³ *Id.* at 1344.

¹⁹⁴ *Id.* at 1347.

¹⁹⁵ *Id.* at 1349.

¹⁹⁶ Academic complaints about this are well known and go back to the mid-1990s, *see* RICHARD DAVIES PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); ROBIN WEST, "PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT" (1994); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

dictatorships or unanimous assemblies are “rational.”¹⁹⁷ Generations of students have been exposed to the radicalized version of the Arrowian thesis which empties democracy of meaning by arguing that “any notion of a popular will independent of the mechanism used to aggregate preferences” is “untenable.”¹⁹⁸ Although this is beginning to change, it is no exaggeration to say that entire swaths of elite graduates from Harvard and Yale and Stanford have been taught to have “contempt” for democracy. This would have been unthinkable in the era after World War II, when no one in America doubted in the least that they had fought a just war to sustain democracy against the onslaught of evil. But it is not only thinkable today, it is considered “smart” and “sophisticated.”

It is time to elevate Congress to the position of group agency, to talk of it as making decisions rather than having intent. This is not because intent does not exist or because it is linguistically or philosophically false to speak of Congress as having an intent, just as we speak of Apple or Yale or the Catholic Church as having an intent. The problem is that there are too many modalities of intent; the term is, as a pragmatic matter, entirely confusing and has entirely unfortunate connotations. A decision suggests commitment and authority, an intent something internal and idiosyncratic. Is there any real reason to think that the decisions of the Congress are any less decisions than the majority opinions of Supreme Court justices? We now know that the Civil Rights Act of 1964 and the Americans with Disabilities Act and the Violence Against Women Act helped to change a nation, and yet lawyers are quite comfortable treating these statutes as something lower in the most banal of discursive methods, by reducing them to bits of text or fleeting intents. My point is not to valorize Congress or its processes. I am perfectly willing to recognize that our present Congress may well be irretrievably broken. A group agent is only as good as the procedures it adopts.

It is often said that statutory interpretation assesses meaning. This is true but incomplete. Poems and novels mean. Statutes are more than meanings. People do not march or vote based on poems or novels. Some have suggested that statutes are particular kinds of communicated meanings—commands to judges and citizens. This is also true but incomplete. Such a view imagines law from “nowhere.” Statutes are decisions made in an electoral and procedural *context*. A statute’s legitimacy in our constitutional order depends upon meaning as the product of an elective, democratic process. Without that context, the meanings we give to statutes may simply reflect the mirror of judge’s souls.¹⁹⁹ More importantly, without that context, we have no democracy. However much Congress’s approval ratings sink, I seriously doubt that anyone, including those who extoll the holy grail of semantics, would seriously recommend Congress’s elimination, even if they argue as if it does not exist.

¹⁹⁷ DONALD P GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994). GERRY MACKIE, *DEMOCRACY DEFENDED* (2003).

¹⁹⁸ John A. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 10 B. J. POL. S. 1, 2 (2003) (discussing the work of William Riker as “radicalizing” Arrow’s work).

¹⁹⁹ George Bancroft (“Conscience is the mirror of our souls, which represents the errors of our lives in their full shape.”)