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Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers

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Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers

VICTORIA NOURSE*

Every lawyer's theory of statutory interpretation carries with it an idea of Congress, and every idea of Congress, in turn, carries with it an idea of the separation of powers. In this Article, I critique three dominant academic theories of statutory interpretation—textualism, purposivism, and game theory—for their assumptions about Congress and the separation of powers. I argue that each academic theory fails to account for Congress's dominant institutional features: "the electoral connection," the "supermajoritarian difficulty," and the "principle of structure-induced ambiguity." This critique yields surprising conclusions, rejecting both standard liberal and conservative views on statutory interpretation.

"Plain" meaning, it turns out, is not so plain: it is just as capable of expanding the domain of statutes as is its primary competitor, purposivism, because it waffles between ordinary and legalist versions of plain meaning. Conversely, standard views of purposivism, which textualists rightly criticize, might narrow the scope of statutes if focused on prototypical meaning. Game theory is far more sophisticated and more realistic about Congress than either textualism or purposivism and, yet, it too misunderstands Congress. Legislators bargain not only horizontally but also vertically (with a public audience in mind). Without considering the vertical audience, game theory may radically misconstrue a legislative bargain. More importantly, assuming that there is a deal, when there is none, may import the filibuster rule into the courtroom. Surely, a faithful agent is not supposed to defer to those who lost the congressional debate and tried to prevent a debate in the first place.

If academic theories assume much about Congress, they also assume much about the separation of powers, typically in the form of inchoate ideas of

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judicial or legislative power. This Article argues that, in its original Madisonian form, the separation of powers was idealized not as a set of functional domains, but as an allocation of electoral forces driven by public representation. If that is correct, statutory interpretation must hew to textualism’s original aim to embrace ordinary, public meaning and reject academic textualists’ automatic resort to elite, legalist meaning. At the same time, textualists should, as a constitutional matter, embrace rather than reject legislative history. For academics, this will seem oxymoronic: scholars define textualism as a rejection of legislative history. The oxymoron for academics is, however, the widespread practice of judges who do in fact resort to legislative history in cases of ambiguity. Implicitly, at least, the judiciary recognizes the constitutional argument for legislative history: that it checks judicial activism by forcing the judiciary to look to public, legislative meanings, rather than elite legalist meaning. Call this a “public meaning” theory of statutory interpretation based on a representational theory of the separation of powers.

TABLE OF CONTENTS

INTRODUCTION 1121

I. CONGRESS IS NOT A COURT 1125

 A. THE ELECTORAL CONNECTION 1125

 B. THE SUPERMAJORITY DIFFICULTY AND STRUCTURE-INDUCED
 AMBIGUITY 1128

 C. THE MERITS OF A MINIMALIST, EVIDENCE-BASED APPROACH 1134

II. STATUTORY INTERPRETATION THEORIES AND THEIR IDEAS OF
CONGRESS 1136

 A. TEXTUALISM 1136

 1. Textualism’s Janus-Faced Image of Congress 1138

 2. Two Kinds of Plain Meaning 1142

 3. Textualism, Restraint, and the Expansion of Statutes’
 Domains 1143

 B. PURPOSIVISM 1147

 1. Purposivism’s Rosy Image of Congress 1148

 2. Purposivism as a Theory of Deference 1149

 3. Purposivism-as-Prototypical-Meaning: Limiting
 Statutes’ Domains? 1152

 C. GAME THEORY 1153

1.	Game Theory as Orthogonal to Academic Textualism . .	1154
2.	Game Theory’s Bargain Bazaar Image of Congress	1155
3.	Game Theory and the Supermajoritarian Difficulty	1158
4.	When a Deal Is Not a Deal	1162
III.	THEORIES OF STATUTORY INTERPRETATION AND THEIR IDEAS OF THE SEPARATION OF POWERS	1164
A.	TEXTUALISM, PURPOSIVISM, AND GAME THEORY AS FORMALISM AND FUNCTIONALISM	1166
1.	Textualism as a Formalist Theory of the Separation of Powers	1166
2.	Purposivism as a Functionalist Theory of Separation of Powers	1169
3.	Game Theory as Combining Formalist and Functionalist Theories of the Separation of Powers	1169
B.	A REPRESENTATIONAL THEORY OF THE SEPARATION OF POWERS . .	1170
C.	APPLYING A REPRESENTATIONAL SEPARATION OF POWERS THEORY IN STATUTORY INTERPRETATION CASES	1171
D.	EVALUATING THEORIES OF STATUTORY INTERPRETATION IN LIGHT OF SEPARATION OF POWERS RISKS	1174
	CONCLUSION	1177

INTRODUCTION

“Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution.”

*—Justice Antonin Scalia*¹

When it comes to Congress, contemporary theories of statutory interpretation risk irony, if not contradiction. Consider textualism, the theory that judges should stop at plain meaning, blinding themselves to legislative history. One leading academic textualist describes Congress as “arbitrary” and “strategic,” its processes “tortuous” and “opaque.”² If Congress is all that, why should plain

1. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997).
2. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431–32 (2005). “Academic textualism” refers to some textualists’ preference for “expert” or “legalist” meaning. “Ordinary meaning textualism,” by contrast, prefers “ordinary” or “public” meaning. For a discussion of this distinction, see *infra* section I.B. As Judge Posner has explained in detail, see RICHARD A. POSNER, HOW JUDGES THINK 204–29 (2008), judges are not law professors and are rarely influenced by

meaning ever arise? Textualists' academic opponents, purposivists, reverse the irony. They idealize Congress. As Harvard Professors Hart and Sacks famously put it, members of the legislature are "reasonable persons pursuing reasonable purposes reasonably."³ But if Congress reasons so well, every statute should be plainly reasonable, not ambiguous enough to send the purposivist running to legislative history. Game theorists fare better, imagining Congress's process as a series of political deals, but this contract model still raises significant questions: if the bargaining is so efficient and refined, why is it so difficult to pass legislation, and why are the bargains so difficult to discover?

Taken to extremes, academic theories of statutory interpretation adopt ideas of Congress capable of contradicting the theories themselves. If we take the textualists' view of Congress-as-chaos to its extreme, textualism risks irrelevance—a truly chaotic Congress could not create plain meaning in statutory text. If we take the purposivists' view of Congress to its logical extreme, purposivism also risks irrelevance—a truly reasonable Congress will make statutory meaning plain. If we take the game theorists' view of Congress to its logical extreme, bargaining would be efficient and interpretation unnecessary. In my view, having spent a number of years as a legislative staffer, academic theorists have no coherent idea of Congress, nor one based on what experts know about how Congress works.⁴

This should be more than troubling given that every case of statutory interpretation is in fact an "interbranch encounter."⁵ Theories of statutory interpretation not only imply descriptive theories of Congress, but also normative theories about how Congress should relate to courts or agencies. In short, theories of statutory interpretation assume, often without any justification or articulation, theories of the separation of powers. For example, textualists, purposivists, and game theorists all agree that courts should not exercise legislative power.⁶ As students of the separation of powers know, the idea of legislative power is controversial, and alone is not a theory of the separation of

academic criticism. My audience here is other law professors. This is why the term academic textualism refers to those in the academy who have urged this position, even if they themselves have relied upon individual judges for their claims. For the definition of legalist, as equated with conceptual and logical, see *id.* at 41 (describing the ideal legalist decision as one grounded in syllogism). For my fuller distinction between legalist and prototypical meaning, see *infra* Part II.

3. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge Jr. & Philip P. Frickey eds., The Foundation Press 1994) (1958).

4. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14 (1994) ("Traditional legal writers have no theory of legislatures in general . . .").

5. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593 (1995).

6. Even those who have critiqued simplistic views of legislative supremacy recognize that it is a widely held principle, even "intellectual boilerplate." See, e.g., WILLIAM N. ESKRIDGE, JR., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 319 (1989) (interrogating the notion of legislative supremacy). In my view, legislative supremacy requires a normative theory of how the branches should relate to each other and that, in turn, requires a constitutional theory of the separation of powers. See *infra* Part III.

powers. Yet questions in statutory interpretation about the proper relationship of courts to Congress and agencies have never been theorized as questions of the separation of powers.⁷

It is time to take a serious look at statutory-interpretation theorists' views of Congress and how these ideas stack up against the separation of powers. This Article grounds statutory interpretation in a realistic idea of Congress and an articulate theory of constitutional structure. Part I begins with Congress, identifying three basic institutional features: the "electoral connection," the "supermajoritarian difficulty," and the principle of "structure-induced ambiguity." Part II describes and critiques assumptions about Congress implicit within three prominent academic theories of statutory interpretation: textualist, purposivist, and game theoretic approaches.⁸ It argues that each theory fails to account for the institutional features identified in Part I and is as critical of purposivism as it is of textualism, and even of game theory, on these scores. This analysis reverses conventional wisdom by suggesting that some forms of academic textualism have the power to expand statutes' domains and that a reconceived purposivism may narrow them. Game theory is in many ways an improvement over standard approaches, but like its cousins, if it does not fully understand Congress's vertical partners (the people), it may bring the filibuster rule into the courtroom, substituting superminority positions for majority ones.

Part III moves from Congress to the Constitution and the separation of powers. This Part argues that academic theories of statutory interpretation

7. To be sure, there is wide recognition that constitutional theory should play some role. In the mid-1990s, the Bicameralism and Presentment Clause was invoked to argue that legislative history was not "law" but has recently been reinvented as a reason to assume that statutes are finely wrought compromises reflecting bicameral structure. See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1306 (2010) [hereinafter Manning, *Second-Generation*] ("[E]mphasis on bicameralism and presentment, at a minimum, puts the theory of textualism on firmer [constitutional] ground."). At the turn of the new century, scholars debated the scope of "judicial power," with no apparent resolution of the tensions between originalist Blackstonian interpretation and modern versions of anti-originalist textualism. Compare William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16 & n.64 (2001) [hereinafter Manning, *Equity*]. No scholar of the separation of powers would recognize either claim—based on bicameralism or judicial power alone—as a full theory of the separation of powers, see *infra* note 232 (citing a variety of separation of powers theories), as fully consistent with Supreme Court precedent, see *infra* Part III, or, in my view, as seeking to implement the Madisonian ideal of the separation of powers, Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447 (1996).

8. Aficionados of statutory interpretation might argue that I ignore important and in some cases brilliantly devised academic theories, like Einer Elhauge's preference-eliciting default rules, EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008), Adrian Vermeule's welfarist approach, ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006), or Bill Eskridge's dynamic interpretation theory, ESKRIDGE, *supra* note 4. In my opinion, each of these approaches is a meta-theory of statutory interpretation rather than a theory of interpretation itself. Given the limits of space, and with no disrespect to any of these approaches, I focus most of this Article on academic approaches with judicial analogues: textualism, purposivism, and deal reconstruction (or at least the academic versions of these theories).

assume vague ideas about the meaning of judicial and legislative power. Textualism tends toward a “unitary” theory of the separation of powers, purposivism implements a “shared power” theory, and game theory adopts an eclectic mix of both. Rejecting these views, this Part argues that the separation of powers is not about unitary functions but about shifts in representation. Shifting lawmaking power from the legislature to courts creates three significant representational risks: risks of super-countermajoritarianism (that the court will embrace the meanings of a superminority rather than a majority), risks of federalism (that federal courts, which are far more nationally oriented than Congress, will apply their own views rather than those more likely to accord with those of states and localities), and risks of self-referential legalism (preferring judicial to ordinary meaning). From a constitutional perspective, the least risk to representation and the separation of powers comes from the unusual marriage of ordinary meaning textualism with legislative history. This will surprise academics because textualism in the academy defines itself in opposition to legislative history,⁹ but it is consistent with what most judges do on a regular basis. More importantly, this approach is likely to reduce judicial activism, checking the tendency of a judge to impose his or her preferred policy position rather than that of the people’s representatives.

If an interpreter is to be a faithful agent of his superior, and representatives are the people’s agents, then ordinary, popular meaning is to be preferred unless it is clear that specialized, legalist meaning should apply. A faithful agent considers every source of information about the legislature’s ordinary meaning, as game theorists rightly insist. This means that legislative history should be consulted not to find *the intent* of the legislature, but as a reference guide and a lexicon for prototypical legislative meaning. For example, instead of asking what rule the people’s representatives would imagine in the application of an employment statute to a particular case (which is typically impossible to find because the precise situation was never contemplated by the legislature), one would ask what a majority of representatives meant by the term at issue (for example, “labor”). In a system in which representation drives the separation of powers, it is the judges’ job to check their own preferred set of meanings against the text and the legislative record for evidence of popular, prototypical meaning before they resort to internal legalist resources (canons, common law, and precedent). Consulting sources outside the interpreters’ internal views is a “check”—a process of externalized self-discipline by which the interpreters’ ideological predispositions are measured against the best information about other people’s meanings. If courts have a duty to police the separation of

9. Academic textualists are not defined by their total rejection of purpose, *see* Manning, *Second-Generation*, *supra* note 7, at 1316–17 (quoting Justice Scalia), but by their rejection of legislative history—hence the term “academically oxymoronic.” *See, e.g.,* Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) (“[T]he principal implication of th[e] ordinary reader perspective is to banish virtually all consideration of legislative history from statutory interpretation.”).

powers, judges should continue the majority practice of looking at legislative history, not only because it is a better source of ordinary meaning, but also because it advances judges' constitutional duty of absolute impartiality—their central role in the separation of powers.¹⁰

I. CONGRESS IS NOT A COURT

"We think we know how legislators argue; but do we really?"

—Jeremy Waldron¹¹

Scholars of statutory interpretation have a tendency to project their own values onto Congress and, finding Congress sorely wanting, to treat it with a good deal of contempt. In part, this reflects general civic illiteracy coupled with a law-school curriculum that fails to teach lawyers even the most basic rules governing congressional behavior. Congress is not a court. It is time statutory interpretation theorists stopped treating Congress as a "junior varsity" judicial branch. To change this requires understanding three dominant institutional forces in congressional lawmaking: the "electoral connection,"¹² the supermajoritarian difficulty, and structure-induced ambiguity.

A. THE ELECTORAL CONNECTION

Let us begin with a basic fact about the legislature—the electoral connection. There is nary a political scientist who does not believe that the electoral connection—whether viewed as a rosy aim to further the public good or a craven attempt to extract interest-group rents—is Congress's most distinctive feature. The "legislature acts as the eyes, ears, and voice of the people."¹³ A representative "lives and dies," as the great constitutionalist Charles Black observed, based on "what [the voters] think of him [back home]."¹⁴ As the

10. I fully recognize that how one looks at legislative history is important, for the aim is not to pick and choose one's friends from the history, but to read the record: (1) as an external check on the tendency of judges to use internal meanings—legalist as opposed to prototypical, ordinary meaning, *see infra* Part III (discussing legislative history as a "check"); (2) as a lexicon of ordinary meaning in a particular legislative context—not for an intent unlikely to be there (on the particular interpretive issue), *cf.* *Muscarello v. United States*, 524 U.S. 125, 128–29, 142–43 (1998) (using dictionaries, surveys of press reports, and the Bible as lexical references to determine meaning); or (3) as setting the boundaries of permissible interpretation by revealing the parameters of a textual compromise, *see infra* section II.C. A fuller explanation of these uses of legislative history awaits a future article; such an explanation would detract from the present project but is necessary to complete the theory.

11. JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 25 (1999).

12. This term was made famous by DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

13. *See* GINA MISIROGLU, *THE HANDY POLITICS ANSWER BOOK* 331 (2003) (citing JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 104 (1861) ("[T]he proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all them which any one considers questionable; to censure them if found condemnable . . .")).

14. Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 *HASTINGS CONST. L.Q.* 13, 16–17 (1974).

political scientist Richard Hall puts it, “[t]he representative from South Dakota who concentrates legislative time on South Africa, and the senator from South Carolina who takes little interest in textile tariffs, whatever their positions and whatever we may think of their actions, are not being ideal [representatives].”¹⁵

That “members of Congress care intensely about reelection,”¹⁶ is a view shared by the greats of political science, from Douglas Arnold to David Mayhew, from Donald Matthews to Morris Fiorina, from Richard Fenno to John Kingdon, from Barry Weingast and Kenneth Shepsle to John Ferejohn and Matt McCubbins.¹⁷ Those who write within different political-science traditions—whether part of the behaviorist revolution of the 1960s and 1970s, the rational choice revolution of the 1980s and 1990s, or some entirely different variant—share this assumption. Even those political scientists who find no correlation between people’s views on particular issues and representatives’ voting records,¹⁸ or who insist that voters have the “haziest awareness” of specific policy issues,¹⁹ or who believe that party or ideology or public interest are significant, recognize that the electoral connection has an important role to play.²⁰ If nothing else, members of Congress say that it matters to them. As the renowned political scientist Douglas Arnold put it, members try to anticipate what their constituents want—or at least what their potential opponents at election time think that their constituents want.²¹

A brief intellectual experiment illustrates how the electoral connection makes judges and legislators act and speak in ways almost sure to produce regular misunderstandings. In what follows, I attempt to “light up” (to borrow Jeremy Waldron’s felicitous phrase) the differences between judges and legislators in

15. RICHARD L. HALL, PARTICIPATION IN CONGRESS 3 (1996) (emphasis omitted).

16. R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 5 (1990).

17. See, e.g., RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 31 (1978); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 6–7 (1977); LEWIS A. FROMAN, CONGRESSMEN AND THEIR CONSTITUENCIES 9 (1963); JOHN W. KINGDON, CONGRESSMEN’S VOTING DECISIONS (2d ed. 1981); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); DONALD MATTHEWS, U.S. SENATORS AND THEIR WORLD (1960); MAYHEW, *supra* note 12, at 17 (assuming that congressmen are “single-minded reelection seekers”); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249 (1979) (assuming, as rational choice principle, that congressmen act as self-interested maximizers).

18. Even those who emphasize the relative freedom of representatives from constituency influence acknowledge that constituencies have “some influence” over policy decisions. See, e.g., ROBERT A. BERNSTEIN, ELECTIONS, REPRESENTATION, AND CONGRESSIONAL VOTING BEHAVIOR: THE MYTH OF CONSTITUENCY CONTROL 104 (1989). On the failure of this kind of study to account for the intensity of preference or measure “activity” on issues of central importance to constituents, see HALL, *supra* note 15, at 58 (“[T]o the extent that a member believes that her district has an interest in an issue that comes before her, the more involved in the legislative action she is likely to become.”); *id.* at 4 (“Although there are variations . . . and although constituents’ interests are not the only (nor always the most important) determinant of legislative participation, the general finding that they matter holds true across policy domains . . . , decision-making forums . . . , and the several stages in a sequential legislative process . . .”).

19. MAYHEW, *supra* note 12, at 40.

20. HALL, *supra* note 15, at 60–65.

21. ARNOLD, *supra* note 16, at 5.

terms of audience—the better to understand the vertical dynamics of the legislature. As we will see, the process is complex; statutes are directed to multiple audiences, including courts and agencies. For parsimony’s sake, let us first see the point—that, relative to judges, legislators speak openly to a different, more public audience. Then we can begin to complicate the story.

Imagine a citizen encountering the Justices of the Supreme Court and asking them to please address important public problems: health-care costs, crime, and the budget deficit. Now imagine that in the weeks that follow we hear the following from the Supreme Court: “Our wives, our mothers, and our colleagues are afraid to walk in grocery store parking lots, to jog in public parks, or to ride home from work late at night in city buses. They are losing a fundamental human right—the right to be free from fear.”²² To anyone mildly conversant with the Supreme Court, there is something wrong with this picture. This does not sound like the statement of a Supreme Court Justice—for Supreme Court Justices are not supposed to respond to citizens’ needs for legislation. The statement I have provided is from a member of Congress: former Senator, now Vice President, Joe Biden.

Now shift your imaginative attention to the legislature. Imagine that a Senator, unprompted by citizen demand or public uprising, were to rise to make the following statement on the Senate floor:

Buckley did not consider [section] 610’s separate ban on corporate and union independent expenditures, the prohibition that had also been in the background in *CIO, Automobile Workers*, and *Pipefitters*. Had [section] 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. The expenditure ban invalidated in *Buckley*, [section] 608(e), applied to corporations and unions, and some of the prevailing plaintiffs in *Buckley* were corporations. The *Buckley* Court did not invoke the First Amendment’s overbreadth doctrine to suggest that [section] 608(e)’s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals. *Buckley* cited with approval the *Automobile Workers* dissent, which argued that [section] 610 was unconstitutional.

If you guessed that this was not a senatorial statement, but a Supreme Court opinion, you would be correct. It is taken from Justice Kennedy’s opinion in *Citizens United v. FEC*.²³ Notice how relatively coherent and precise the rhetoric is, and how unlikely it is that citizens or voters could make heads or tails of these statements. The Justices value precision, detail, and expert meanings. Whereas representatives speak to their constituents, the Justices speak to their peers in the elite legal community.

For those who remain unconvinced, some solace may be had by recognizing

22. 136 CONG. REC. 14,564 (1990) (statement of Sen. Biden).

23. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 902 (2010) (citations omitted).

that individual vice may yield collective virtue. As political scientist David Mayhew explains, relative to other forms of legislature, “the United States Congress is extraordinarily effective” at “voicing opinions held by significant numbers of voters back in the constituencies.”²⁴ As Jeremy Waldron has written, statutes are “*essentially*—not just accidentally—the product of large and polyphonous assemblies.”²⁵ Even the most minimal notions of democratic consent require that the minority has the opportunity to voice its opposition. Democracy’s legitimacy depends upon this idea.²⁶ To say that the electoral connection powerfully distinguishes legislatures from courts is *not* to say that representation works, is fair, or is undistorted.²⁷ Members may imagine an electorate that speaks in a distinctly upper- or lower-class accent. Representatives may be far more responsive to concentrated interest groups than to large latent majorities. They may follow party dictates or pass symbolic legislation. In the name of the public good, they may reject their constituents’ specific demands. The *relative* institutional point remains the same: a representative is subject to institutional constraints and incentives directly linking his actions to voters in ways unthinkable for an unelected judge.²⁸

B. THE SUPERMAJORITARIAN DIFFICULTY AND STRUCTURE-INDUCED AMBIGUITY

If I am correct about the electoral connection, then one of the most basic forces driving legislatures is different from—in fact, antithetical to—the forces overtly driving courts.²⁹ This helps to explain resilient institutional misunderstandings. Academics tend to assume that, because members of Congress are

24. MAYHEW, *supra* note 12, at 106.

25. JEREMY WALDRON, *LAW AND DISAGREEMENT* 10 (1999).

26. There is nothing particularly new about this idea. The cynic Machiavelli warned that the legislative “tumults that many inconsiderately damn” may yet yield good laws. See NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 16 (Harvey C. Mansfield & Nathan Tarcov trans., The Univ. of Chicago Press 1996) (1513); see also MILL, *supra* note 13, at 105 (“Representative assemblies are often taunted by their enemies with being places of mere talk and *bavardage*. There has seldom been more misplaced derision. . . . A place where every interest and shade of opinion in the country can have its cause even passionately pleaded . . . is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere, and one of the foremost benefits of free government.”); HALL, *supra* note 15, at 238 (quoting same).

27. Serious questions have been raised about whether Congress is in fact accountable to its citizens. See Jane S. Schacter, *Digitally Democratizing Congress?: Technology and Political Accountability*, 89 B.U. L. REV. 641, 643–46 (2009); *infra* Part III.

28. Some might argue that elected state judges are differently situated but, in fact, all judges, elected or not, are constrained by the structure of their institution in the sense that they are limited by the cases and controversies brought to them. All judges, elected or not, are passive entities who must await the problems that come to them on an individualized basis in case-by-case form and are bound by law to follow precedent. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 267–68 (1994).

29. I recognize that there is a wide political-science literature suggesting that courts are roughly responsive to democratic concerns. The attitudinal school of thought suggests that there is nothing to judging other than politics. This is far too simplistic a view, and one I have rejected elsewhere. See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009) (discussing the attitudinal studies at length).

lawyers, they do and should speak in the voices of lawyers or judges. To be sure, members of Congress do not leave their law degrees at the door when they enter the House or Senate chamber. But the structure of the institution plays an important role in how the individual speaks and acts. It is not simply that language alone invites semantic imprecision. The structure of legislative institutions increases the likelihood and value of semantic imprecision.

Take a Senator out of the Senate chamber and ask him to appear before a court, and he will speak in the language of the expert lawyer. Put him back in the Senate and ask him to pass a budget resolution or a tax cut, and he will speak in a different voice. The institution changes the Senator's audience and, with it, his incentives. For a legislator, legal ambiguity may be quite rational, not because he or she individually prefers it, but because the institution we know as Congress produces conditions demanding it—what I term structure-induced ambiguity.³⁰ If legal ambiguity is the necessary cost of passing a crucial budget resolution, rational legislators will choose legal ambiguity. From the stance of a court looking at the budget statute, this may not be virtuous, but from the position of the legislator or members of the public, who need a budget more than they need semantic precision, it may be both right and necessary.

The larger the drafting body, the greater the potential for structure-induced ambiguity: a court made up of 100 members would find it hard to agree upon a single opinion. But our legislative system exacerbates ambiguity by what I call the supermajoritarian difficulty. No one who studies Congress thinks it easy to pass legislation.³¹ It is far easier to stop than to enact legislation. There are too many steps in the process (what are frequently called vetogates): legislation must make it from assignment to a committee, from a subcommittee hearing to full committee, from the House to the Rules Committee, and from debate on the rule to debate on the House floor. It must then survive the gauntlet in the Senate, moving from subcommittee to committee to debate and potential filibuster. Finally, failure to obtain the capstone requirement—the President's signature—may necessitate a veto override.³²

The Constitution creates these legislative difficulties by requiring bicameral-

30. The obvious reference here is to "structure-induced equilibrium," a term made popular by the political scientists Kenneth Shepsle and Barry Weingast. See Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, in *POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS* 5, 8 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995); see also Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 27 (1979) (offering a model of legislative behavior that results in "equilibrium").

31. See, e.g., DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM JIMMY CARTER TO GEORGE W. BUSH* (2d ed. 2006) (study by legislative scholars); William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1447–48 (2008); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 11 (1994) ("[I]t is difficult and time-consuming to change most prior legislative bargains.") (study by positive political theorists). Note that "McNollgast" is a pseudonym collectively adopted by three authors: Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast.

32. See generally Eskridge, *supra* note 31.

ism,³³ entrenching equal state representation,³⁴ and allowing Congress to set its own procedures.³⁵ In such a system, legislation is difficult and gridlock a permanent state of affairs. This is not only a practical reality, but also a constitutional inevitability. State representation is constitutionally entrenched in the Senate. Because of bicameralism, minorities (small states) may always block legislation. As political scientists like Robert Dahl and Keith Krehbiel have argued, the structure of our government is far less majoritarian than most assume.³⁶ As the constitutionalist Sanford Levinson writes, “almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5 percent of the total U.S. population.”³⁷ The filibuster rule exponentially increases the power of small minorities to block congressional action. Positive political theorists now agree that since the 1980s the filibuster threat has meant that legislation on even remotely salient political issues requires a supermajority—one must garner sixty votes on nearly every bill.³⁸

The supermajoritarian difficulty, when combined with the electoral connection, creates enormous pressure for structure-induced statutory ambiguity. Although there are few electoral costs of ambiguity (no one ever lost an election because of imprecision), ambiguity may yield essential gains in achieving supermajority consensus. Failure to appreciate this structure creates enormous misunderstanding between courts and legislatures. Courts prize interpretive virtues—“precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts.”³⁹ Legislatures, on the other hand, prize collective and representational virtues—“action and agreement, reconciling political interests, and addressing the pragmatic needs of those affected by legislation.”⁴⁰

Consider the following example. During debates on the Violence Against Women Act, opponents claimed that the bill would cover every act of violence between a man and a woman, leading to massive numbers of cases brought to

33. U.S. CONST. art. I, § 7, cl. 2.

34. *Id.* art. I, § 3, cl. 1.

35. *Id.* art. I, § 5, cl. 2.

36. See generally ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001); KREHBIEL, *supra* note 17; see also BRADY & VOLDEN, *supra* note 31.

37. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 51 (2006).

38. On the increasing importance of the filibuster threat, see SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 6 (1997) (quoting former Senator Charles Mathias in 1994 that the filibuster had become “far less visible but far more frequent” and “an epidemic”); 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 . . .”). The practice of “holds” is what a modern filibuster looks like; a hold can be put on any legislation by a single Senator.

39. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 615 (2002).

40. *Id.*

federal court.⁴¹ To assuage opponents, the drafters accepted the argument—quite literally. They added bill language stating that the remedy did not cover “random acts of violence.”⁴² From the sponsors’ perspective, they gave away nothing because the bill was never intended to cover such acts. Instead, the amendment was an attempt to defuse a political argument. There is no guarantee, however, that this language would not, in some future case, become the subject of interpretive controversy (what is a “random” crime, after all?).

This is not an isolated example. Members draft language not only to achieve particular goals, but also to respond to other members’ political objections (objections often couched in public or ordinary meaning rather than legalist meaning). For example, one Senator might argue: “this bill creates a highway quota,” without defining the term “highway quota.” The other side might then respond in the *statutory language itself* by writing the public objection into the bill: “nothing in this bill should be construed to create highway quotas.” Meanwhile, no one has bothered to define the term “highway quotas.” Why? The answer lies in structure—the pressures of getting a bill done, the potential that any further definition will undermine a fragile coalition, and the need for the vast consensus (sixty votes) demanded by the supermajoritarian difficulty.

Structure-induced incentives yield what I have dubbed the constitutive legislative virtues. In a qualitative empirical study of legislative drafting, Stanford Law Professor Jane Schacter and I found that

[o]ver and over again, staffers explained their choices in terms of constitutive virtues—that deliberate ambiguity was necessary to “get the bill passed,” or that statutory language was drafted on the floor because a bill was “needed” by a particular senator, by the leadership, or by the public. Even staffers’ reliance on lobbyists was an attempt to understand how the bill would “affect” people in the world. It was not that the staffers did not know the rules or recognize the interpretive virtues; it was that those virtues frequently were trumped by competing virtues demanded by the institutional context of the legislature. In an ideal world, the staffers seemed to say, they would aspire to both clarity and agreement, but, if there were a choice to be made, the constitutive virtues would prevail.⁴³

It would be comforting if we could insulate statutory text from the electoral connection: congressmen could speak to voters in grand speeches and to courts in statutory text. By and large, I believe that members try to be as specific and lawyerly as possible. But there is no “acoustic separation,” as law professor

41. See FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 309–444 (2009) (discussing this battle).

42. Violence Against Women Act (VAWA), S. 11, 103d Cong. § 302(e)(1) (1993) (excluding “random acts of violence unrelated to gender”); see also Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 WIS. WOMEN’S L.J. 1, 14 n.74 (1996).

43. Nourse & Schacter, *supra* note 39, at 615.

Meir Dan-Cohen once put it, between the call of the voter, and the call of the court.⁴⁴ We cannot put legislators in a soundproof chamber when they speak to their constituents and then in another soundproof room when they mark up a bill. Speaking to the public either directly or through other members may involve arcane legalisms as easily as vernacular speech. A debate on securities reform will proceed in lawyerly terms. But it cannot be true that statutes are written only for courts (as opposed to the people). As Justice Scalia once wisely proclaimed, it would be horrifying if, like Nero, Congress posted statutes “high up on the pillars, so that they could not easily be read”—so that the ordinary man could not know the laws to which he had consented to be governed.⁴⁵

Statutes, like congressional debates, are exercises in communication between representatives and citizens (the vertical dimension) as much as between legislatures and other government branches (the horizontal dimension). There would be no purpose to a statute if it did not communicate rules to people⁴⁶: “do not defraud,” “do not file frivolous lawsuits,” “do not kill.” Of course, statutes are also, to varying degrees, directions to those who would apply the statutes and thus are communications to legal experts (lawyers,⁴⁷ agencies,⁴⁸ and courts). For these reasons, statutory language is often an amalgam of the prototypical and the conceptual—ordinary and legalist meanings. In part, this reflects how humans use language: most linguists agree that human beings use language in ways that are prototypical, by which they mean the “best example,” and conceptual, by which they mean “all examples.”⁴⁹ For my purposes, I define ordinary meaning in these terms, as searching for the best example, while legalist meaning seeks a conceptual or logical extension to all examples. Ordinary meaning is important in statutory interpretation because members talk to the public, their constituents, at least as much as they act as expert legal draftsmen. Public constituencies increase members’ incentives to use prototypical meanings (relative to a situation in which they were in an acoustic chamber talking only to courts). These incentives, whether we like it or not, apply *even in*

44. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984).

45. SCALIA, *supra* note 1, at 17.

46. See AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* 97 (Sari Bashi trans., 2005) (“[Statutory text] is communicative; it is designed to establish a legal norm to which people will conform their behavior.”).

47. Indeed, as Bill Eskridge has explained, “[m]ost interpretation is done in the lawyer’s office, on the police officer’s beat, and at the bureaucrat’s desk.” ESKRIDGE, *supra* note 4, at 71–72.

48. Ed Rubin is correct that even laws addressed to the citizenry are often implemented through agencies. See Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369 (1989). So too, “a large and increasing body of interpretations” is made by agencies. Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility To Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321 (1990). But this tells us little about the internal dynamics of Congress (much less agencies). No politician thinks he can maintain his seat by spending more time at the Nuclear Regulatory Commission or the Federal Trade Commission than in his home state.

49. See Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2039–44 (2005).

statutory text.

In part this is because of the electoral connection—when members say “no highway quotas,” they are speaking to their constituents, to other representatives, or those representatives’ constituents. In part, this is because of the extraordinary demands upon legislators’ time: Congress addresses every issue under the sun, not one case at a time, but health care and war and disaster relief and international relations and nuclear power simultaneously. This is exacerbated by the supermajoritarian difficulty: coalitions can be fragile, and the more fragile they are, the more likely members will embrace ambiguity to keep a bill moving because the electoral costs of imprecision are low versus the electoral gain in passing an important piece of legislation.⁵⁰ In such a world, ambiguity may become rational, even virtuous.

Structure-induced ambiguity should be distinguished from other prominent claims about legislative ambiguity. First, this ambiguity hails not from linguistic vagueness, the kind one sees in common law cases about contracts and wills, but from the structure of Congress as an institution. It does not emerge simply because of what H. L. A. Hart called legislatures’ “inability to anticipate.”⁵¹ Even if Congress were clairvoyant, it would still be subject to the electoral connection and the supermajoritarian difficulty. Second, this ambiguity is not simply a function of time.⁵² Dynamic theories of statutory interpretation claim that ambiguity is inevitable because of history: “[o]ver time, the gaps and ambiguities proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute.”⁵³ But structure-induced ambiguity exists on Day Number One, immediately upon statutory enactment.⁵⁴ Finally, this ambiguity differs from game theorists’ claims of “strategic ambiguity”: that members of Congress act to influence how courts will interpret a statute.⁵⁵ Representatives do anticipate the actions of other elite actors; they may try mightily to influence the way in which courts or agencies interpret statutes.⁵⁶ But it is also possible, as we will see in more detail later, to exaggerate the degree to which strategic action, as opposed to congressional structure, produces ambiguity. Bargaining in legislatures is done horizontally—anticipating the consequences of actors next in line, like a court or an agency—

50. For a more analytic distinction between prototypical and legalist meaning, see *infra* text accompanying notes 116–23.

51. H. L. A. HART, *THE CONCEPT OF LAW* 125 (1961).

52. See, e.g., ESKRIDGE, *supra* note 4, at 9–10.

53. *Id.*

54. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

55. See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 640–43 (2002).

56. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 715 (1992).

and vertically—anticipating how constituents will react.⁵⁷ Legislators are always talking to third parties (their constituents) and, unless those third parties are included in “the game,” it is just as likely, indeed in my view far *more* likely, that the electoral connection will produce far more ambiguity than legislators’ self-conscious attempts to manipulate courts.⁵⁸

C. THE MERITS OF A MINIMALIST, EVIDENCE-BASED APPROACH

Academic critics will complain that I have left out a vast range of political theory about median or pivotal voters, cycling, or agenda setting. This is intentional for two reasons. First, a good deal of political theory is just that, theory, and my aim is to rely upon the most basic, tested, and sound evidence (hence the term “evidence-based” approach) rather than choosing a more or less controversial theory from another discipline.⁵⁹ Second, my aim is orthogonal to that of political theory, which is to predict policy outcomes. My purpose is to describe the minimum *necessary* conditions for an evidence-based theory of legislative process and, through that, statutory interpretation.

As a minimalist theory, my approach builds on uncontroversial evidentiary premises. What is true of legislative history—it has a tendency to permit statutory interpreters to look out over the crowd, picking and choosing their favorite pieces of evidence—is also true of statutory interpretation theory. Textualists, as Judge Posner writes, have tended to rely upon theories that treat Congress with contempt—assuming that its decisions can never be rational, the process is highly chaotic, and majorities perpetually “cycle” according to Arrow’s Theorem.⁶⁰ Academic textualists who now seek to distance them-

57. See Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100, 101 (2001) (“Almost all models of bargaining ignore the possibility that the two primary negotiators want to send signals to a third party.”); see also James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994) (discussing vertical and horizontal considerations of democratic states conducting foreign policy).

58. Why does the congressman care more about the vertical market (the constituency) than the horizontal market (the court or agency)? In part the answer is timing. A representative’s electoral fate depends upon the claim that she has done something; a court may undo that, but the judicial intervention is most likely to be long after the election. For example, the Violence Against Women Act’s civil rights remedy was passed in 1994 but was not adjudicated unconstitutional until six years—three House electoral cycles—later. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 40302, 108 Stat. 1796, 1941, *invalidated by* United States v. Morrison, 529 U.S. 598, 619 (2000). In part the answer is the power of the vertical market to trump the horizontal market. Even if the court rules against the representative, that might not yield a bad electoral outcome: it might simply add to the salience and importance of the position-taking of the representative. More people might vote for her precisely because the court rejected her position.

59. See GERRY MACKIE, *DEMOCRACY DEFENDED* 156 (2003) (“The Arrow theorem is a great piece of work. . . . It is a logical exercise, it does not describe the real world.”). Elsewhere I have called this evidence-based approach a “new realism.” See generally Nourse & Shaffer, *supra* note 29.

60. See POSNER, *supra* note 2, at 195 (suggesting that there is a political valence to the view that “[s]tudents of public choice, and political conservatives generally, being skeptical about the good faith of legislators, fearing the excesses of democracy, [and] deeming statutes unprincipled compromises . . . deny that statutes ever have a ‘spirit’ or coherent purposes that might . . . limit judges’ discretion”).

selves from this view admit that “early textualism’s grounding in public choice theory seemed to reflect an antipathy to the legislative process or, at least, had a certain ‘eat your spinach’ quality to it.”⁶¹ Meanwhile, academic purposivists have tended to rely upon political theory suggesting a rosy pluralist view. Neither portrayal of Congress, as angel or devil, is well supported by the evidence.

Political theory aims for something different than a theory of statutory interpretation. It aims to predict policy outcomes and, for that reason, like a weather forecast, it yields few satisfying predictions. Interest-group theory yields highly indeterminate results.⁶² Neither a party-driven model nor a median-voter model⁶³ explains something as basic as why most bills pass by large bipartisan majorities⁶⁴—something supermajoritarianism does explain.⁶⁵ Indeed, twenty years of theorizing has been devoted to showing that Arrow’s cycling prediction is theory, not fact. As Kenneth Shepsle and Barry Weingast wrote a decade ago: “in no sense [is] there evidence that majority cycling [is] a constant companion of legislative life.”⁶⁶ The “structure and process of legislative decisionmaking, once established, leads to policy choices that are structurally stable.”⁶⁷

I fully agree that the facts I emphasize—the electoral connection, the supermajoritarian difficulty, and structure-induced ambiguity—will not predict political outcomes. My purpose is to critique legal academics’ views of Congress using a minimal set of uncontroversial facts we know about Congress.⁶⁸ Some political

61. Manning, *Second-Generation*, *supra* note 7, at 1289.

62. For a devastating critique of interest group theory, see JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 87–96 (1997). See also Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey’s Public Choice*, 67 NOTRE DAME L. REV. 183 (1991).

63. Party models are associated with the work of E.E. SCHATTSCNEIDER, *PARTY GOVERNMENT* (1942), and conditional party models with that of DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991). Median voter theory is associated with the classic work of DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

64. See KREHBIEL, *supra* note 17, at 6; see also *id.* at 9 (“While U.S. parties adopt platforms in national conventions, their platforms are usually amorphous, frequently identical on many provisions, and hardly ever serve effectively as constraints during the campaign or after the election.”); *id.* at 13 (median voter theory predicts that winning voting coalitions are “usually small . . . near minimum-majority size”).

65. As Krehbiel writes, “[c]onsider . . . all votes on final passage of laws enacted by the 102d and 103d Congresses (1991–94). The average size of the winning coalition on these 324 votes is 79 percent.” *Id.* at 6; see also DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 119–36 (2d ed. 2005) (reporting large coalitions for significant bills). Even among positive political theorists addressing legislative matters, there is dispute about the meaning or viability of Arrow’s Theorem. Compare McNollgast, *supra* note 31, at 20 & n.41 (arguing that Arrow’s Theorem is too pessimistic about legislatures’ ability to express reasonable preferences), with Kenneth A. Shepsle, Commentary, *Congress Is a “They,” Not an “It”: Legislative Intent as an Oxymoron*, 12 INT’L REV. L. & ECON. 239, 241–56 (1992) (defending Arrow’s Theorem).

66. Shepsle & Weingast, *supra* note 30, at 7; see also Shepsle, *supra* note 30, at 27 (offering a model of legislative behavior that results in “equilibrium”).

67. McNollgast, *supra* note 31, at 20.

68. See KREHBIEL, *supra* note 17, at 8–16 (arguing that median-voter theory, party-driven and conditional-party theories, Arrow’s Theorem, and stability-inducing theories do not explain either the sizes of majority coalitions or gridlock).

scientists might dispute my emphasis on supermajoritarianism as too Senate-focused,⁶⁹ but bicameralism demands such a focus, as the best students of the process and the Constitution, such as John Manning, understand.⁷⁰

II. STATUTORY INTERPRETATION THEORIES AND THEIR IDEAS OF CONGRESS

*"The legislative process is inertial, legislative capacity limited,
the legislative agenda crowded . . ."*

—Judge Richard Posner⁷¹

Measured by features identified in Part I, three of our most prominent academic theories of statutory interpretation—textualism, purposivism, and game theory⁷²—misunderstand Congress. Each fails to account for the electoral connection, the supermajoritarian difficulty, and structure-induced ambiguity.

A. TEXTUALISM

In 1987, Justice Scalia gave an extremely influential set of lectures in which he set forth a doctrine of statutory interpretation known as the "new textualism."⁷³ Since the country's founding, statutory text has always been the starting place for theories of statutory interpretation, but Justice Scalia's new textualism placed text at center stage. As Bill Eskridge explains: "Scalia's main point is that a statutory text's apparent plain meaning must be the alpha and the omega in a judge's interpretation of the statute."⁷⁴ Although traditional practice typically allowed judges to consider multiple factors, including legislative history and the statute's purposes, textualists narrowed the range of permissible evidence in statutory matters to the text. "Legislative history should not even be consulted to confirm the apparent meaning of a statutory text."⁷⁵ If a law is within the text, "end of case"; the judge should go no further.⁷⁶

Scalia's theory influenced a generation of legal scholars, including myself.

69. This same claim could be made in reverse about structure-induced equilibria theory—that it has falsely extrapolated from the study of the House and its committee structures, not to mention its Rules Committee, which is a powerful agenda-setter absent from the Senate, *see generally* GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005). No theory of legislation (as opposed to a theory of the House, Senate, or politics more generally) is complete without considering both the House and Senate.

70. Manning, *Second-Generation*, *supra* note 7, at 1306 (emphasizing bicameralism).

71. POSNER, *supra* note 2, at 201.

72. I have chosen for the sake of brevity to limit myself here to three of the most widely cited theories of statutory interpretation.

73. SCALIA, *supra* note 1, at 3–47 (reprinting an essay based on the lecture with commentary).

74. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) (book review).

75. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990); *see also* SCALIA, *supra* note 1, at 31 ("I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.").

76. SCALIA, *supra* note 1, at 20.

There are many grounds on which I stand firmly with him. Judges must be restrained; they must engage in strictly impartial interpretation. I tell my students: “read the text, read the text, read the text.”⁷⁷ And I firmly agree that “ordinary meaning” is theoretically important and even essential given Congress’s structure and incentives. As Jonathan Molot has explained, “we have all become textualists.”⁷⁸ This is true even though the theory has not had the kind of radical effect its academic proponents might have hoped: the Supreme Court majority and the courts of appeals have rejected a ban on legislative history.⁷⁹

My concern is not with Justice Scalia’s wonderful essay, but with the vast literature it has spawned. It has yielded literally thousands of pages and hundreds of erudite exchanges, many of which stand as the great intellectual battles of our day. Textualism has garnered sophisticated academic proponents, such as Harvard’s John Manning and Adrian Vermeule, who moved the theory in particular directions and gained support in other literatures. Because of its sophisticated academic proponents, academic textualism is increasingly taught as the gold standard to law students. Lawyers love rules, and here is a simple rule: “[W]hen construing statutes, consider the text, the whole text, and nothing but the text. Period.”⁸⁰ The academic theory of this seemingly simple rule, however, is not simple; it is complex and has suggested to some academics that judges should go so far as to embrace absurd results if the text so demands.⁸¹ And because its academic proponents decline to honor “congressional intent,” it has yielded some determined, yet conservative, judicial opponents: Judge Posner calls its more radical manifestations the “autistic” theory of statutory interpretation.⁸²

77. Judge Friendly once reported that when Justice Frankfurter was still teaching, he urged his students to follow a three-pronged rule for statutory interpretation: “(1) Read the statute; (2) read the statute; (3) read the statute!” HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 202 (1967).

78. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 36 (2006).

79. For a compilation of the empirical evidence, see Grundfest & Pritchard, *supra* note 55, at 684. For more recent studies, see James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 128–31 (2008) (surveying use of legislative history in tax and employment cases); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771–811 (2010) (surveying use of modified textualist interpretive methodologies among state courts of last resort); Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia’s Revolutionary Call To Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121, 123 (2000) (“As we survey decisions across the country, we observe little that has changed in the way that courts interpret statutes. In short, the Supreme Court, other federal courts, and state courts throughout the country continue to use legislative history to interpret statutes.”). *But see* Merrill, *supra* note 9, at 364 (finding a rise in textualism in the Supreme Court as compared to the 1980s, but concluding that only two Justices, Justice Scalia and Justice Thomas, are committed to the anti-legislative history program).

80. Eskridge, *supra* note 74, at 1514.

81. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (considering this position).

82. POSNER, *supra* note 2, at 194.

Let us turn to an example: *Church of the Holy Trinity*⁸³ figures prominently in academic textualist theory.⁸⁴ The question in *Holy Trinity* was whether a minister who contracted to serve a New York church fell within a statute aimed to prevent large scale importation of immigrant laborers. In fact, the case is an easy target because it makes the textualists' point at the outset. As the Supreme Court explained: "It must be conceded that the act of the [church] is within the letter of this section," the statute applying not only to "'labor' and 'service'" but labor and service "of any kind."⁸⁵ To top it off, the Court noted that the statute exempted singers, lecturers, and domestics and thus "strengthen[ed] the idea that every other kind of labor and service," came within the law.⁸⁶ Having noted these textual arguments for covering the good rector, the Court ignored them, reading the statute to exclude him, relying on the rule that any plain reading of the statute was so "broad" as to

reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.⁸⁷

Thus, a statute whose "intention" was to prevent mass importation of manual laborers, not brain-toilers,⁸⁸ excluded the rector. For textualists, *Holy Trinity* is Holy Tragedy—its reference to legislative "spirits" is dead wrong, and the case should have been decided based on "the letter of the statute."⁸⁹ Labor means all labor, and that is the end of the matter.

1. Textualism's Janus-Faced Image of Congress

Emerging from textualism's scholarly elaboration is what I will call a devil/angel view of Congress, with heavy emphasis on the devil. Academic textualists' most ardent supporters are resolutely pessimistic (if not contemptuous) about the legislative process. Here are some of the adjectives one scholar has used in describing the legislative process: "opaque," "awkward," "complex," "cumbersome," "highly intricate," "strategic," "arbitrary," "nonsubstantive,"

83. *Rector of Holy Trinity Church v. United States (Church of the Holy Trinity)*, 143 U.S. 457 (1892).

84. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1845–50 (1998); see also SCALIA, *supra* note 1, at 18–22; Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 905–08 (2000); Eskridge, *supra* note 74, at 1517–19.

85. *Church of the Holy Trinity*, 143 U.S. at 458 (emphasis added).

86. *Id.* at 459.

87. *Id.* at 472.

88. See *id.* at 463.

89. SCALIA, *supra* note 1, at 18–22; see also Eskridge, *supra* note 74, at 1517–19; Vermeule, *supra* note 84, at 1845–50.

and “tortuous”—and this in a single short article.⁹⁰ In fairness, “second-generation textualism” has been kinder to Congress.⁹¹ Whether first- or second-generation, however, academic textualists still hold out hope that their theory will discipline Congress to write better statutes.⁹² Overtly, or perhaps secretly, textualists dream of Congress as the expert wordsmith, the veritable green-eye-shaded scrivener, but see only a crass, unprincipled deal maker.

If the “devil” view were correct—if congressional action were truly chaotic—then it is doubtful that what came out of the legislative chamber (the words of the statute) would be any less “opaque,” “awkward,” “complex,” “cumbersome,” “highly intricate,” “strategic,” “arbitrary,” “nonsubstantive,” and “tortuous” than academic textualism describes.⁹³ The devil view simply goes too far, and should go too far even for honest textualists. Given their view of Congress, textualists must take one of two positions: they must either concede that Congress is plain on some occasions (in which case they will have to explain the variation between the “chaotic” Congress and the “plain meaning” Congress), or they have to take the position that the plain meaning is never plain meaning from Congress, but *plain meaning conferred upon the statute by judges who determine what is plain and what is not*. As a judicious member of the Federalist Society, Professor Thomas Merrill has written: “In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning.”⁹⁴

If Congress cannot provide plain meaning, then it follows that the only body capable of conferring plain meaning is the court (or perhaps an agency). Here, however, we have come full circle. Academic textualists fear that, by looking at legislative history, courts will exert their own will. Textualists’ views of Congress suggest the opposite: by asserting that ambiguous meaning is plain, judges are exerting their own will.⁹⁵ Honest textualists must answer the critic, like Professor Merrill, who says that the “judicial activism” may be in finding meaning plain when,⁹⁶ as textualists themselves argue, in “99.99 percent of the

90. Manning, *supra* note 2, at 431, 438 (“tortuous”); *id.* at 423, 430 n.34, 431, 444 n.84, 450 (“opaque”); *id.* at 424, 429 n.30, 430, 438 n.64, 448 n.96, 450 (“complex”); *id.* at 423, 426 n.23, 431 (“cumbersome”); *id.* at 432 & n.43 (“strategic”); *id.* at 431, 432 n.43 (“arbitrary”); *id.* at 420, 425, 445 (“awkward”); *id.* at 431, 432 (“nonsubstantive”); *id.* at 431 (“highly intricate”).

91. See Manning, *Second-Generation*, *supra* note 7, at 1315 (“Second-generation textualism seems to embrace the legislative process, with all its foibles.”).

92. Schacter, *supra* note 5, at 644–45. For a wisely skeptical view of this claim, see VERMEULE, *supra* note 8.

93. See *supra* note 90.

94. Merrill, *supra* note 9, at 372.

95. Mikva & Lane, *supra* note 79, at 137 (“[Justice Scalia] seems to frequently argue despite what seems to be evident ambiguity that a statute is clear.”).

96. Mikva and Lane argue that there is a political tilt to textualism—that it “is directed at limiting statutory scope rather than expanding it.” *Id.* at 123; see also FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 27–57, 163 (2009) (arguing that Judge Easterbrook’s *Statutes’ Domains* approach, 50 U. CHI. L. REV. 533 (1983), is openly antiregulation because it constricts statutes’ reach by interpreting them to only cover matters spoken to by the text). In fact, as I argue

issues of construction reaching the courts, there *is* no legislative intent.”⁹⁷

Some advocates of the devil view of Congress ground their theory in sophisticated, but controversial, and increasingly dated, political science. They argue that legislative intent is impossible because there can be no stable majoritarian set of preferences. “Many legal scholars have expressed skepticism on the grounds that majority rule decision-making is chaotic,” based on the Arrow Impossibility Theorem, a theory that makes democracy impossible in a seemingly vast range of cases.⁹⁸ As Professor Manning explains, “[i]nvoking the economic and game-theoretic insights of public choice theory, textualists thus emphasize that laws frequently reflect whatever bargain competing interest groups could strike rather than the fully principled policy judgment of a single-minded majority.”⁹⁹

For reasons we have already seen,¹⁰⁰ not only are second-generation textualists moving away from this view, but the underlying ideas are under much greater scrutiny by political scientists and lawyers today.¹⁰¹ The theory simply proves too much: if democracy were never possible, how could one explain the Civil Rights Acts or tax cuts or Social Security or the Clinton balanced budget? Without being able to prove variation—an impossibility if democracy *never* happens—such theories do not withstand the most basic standards of predictive, empirical social science. Even if these theories were correct, however, they would still pose a problem: Where does statutory plain meaning come from, if it must emerge from such a process? And if statutory plain meaning does not reflect democracy, then why does it deserve judicial deference?

The textualist will respond that the text is a better alternative than legislative history. Indeed, the most persuasive point made by textualists is that legislative history is simply too hard to find, to decipher, and to understand (a point with which I am sympathetic). Bracketing for the moment this practical claim, textualists go further. They argue that the text is the only constitutionally based source of meaning: individual legislators’ statements have not been approved by

below, there is nothing terribly libertarian about textualism as a matter of logical necessity; in *Holy Trinity*, for example, the textualist argument expands the regulatory scheme from the baseline prototypical meaning of manual labor.

97. SCALIA, *supra* note 1, at 32.

98. McNollgast, *supra* note 31, at 3. On the pervasive and unfortunate influence of cycling theory within political science, see MACKIE, *supra* note 59, at 72–157.

99. Manning, *supra* note 2, at 431 (footnote omitted).

100. See *supra* section I.C.

101. Even before the economic collapse and his recantation of some portions of law and economics, one of its founders, Judge Posner, wrote that he believed that the “economic approach to legislation” was “incomplete” and he disagreed with those who had “pushed it further than [he had].” Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 434 (1989). More recent work by positive political theorists has questioned some of the premises of strict application of economic assumptions to the political world. See, e.g., John Ferejohn, *Practical Institutionalism*, in RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 72, 73–74 (Shapiro et al. eds., 2006) (rejecting the basic economic assumption that preferences are exogenous to institutions). Even the work in political science on structure-induced equilibria shows the power of institutions to “correct” the more extreme predictions of Arrovian Theory. See Shepsle & Weingast, *supra* note 66, at 22.

two houses and the President.¹⁰² Put bluntly, both text and legislative history may be chaotic, but text has greater constitutional legitimacy.¹⁰³ Again, this argument goes too far: legitimate chaos may be legitimate, but it still is chaos. There is nothing about bicameralism that selects out *text* as opposed to *votes*. Taken to its extreme, the bicameralism argument would give legitimacy to a list of random zeros and ones, as long as the list was passed by the Senate and the House and signed by the President. Put in other words, it would confer legitimacy on absurdity.¹⁰⁴

Now let us turn to the angel ideal: academic textualists criticize Congress hoping to induce legislators to write clearer statutes.¹⁰⁵ Visions of an expert scrivener dance in textualists' heads. But remember the electoral connection. Can one really imagine citizens protesting on the steps of the Capitol with signs reading, "Vote 'No' on lack of precision!" or "He forgot the dictionary!"? We can with little worry of exaggerating assert that no congressman ever lost a single vote because of a failure of semantic precision. Academic textualists admire exactitude, consult dictionaries, and embrace the common law. Professor Merrill has aptly described the attitude:

The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute. This exercise places a great premium on cleverness. In one case the outcome turns on the placement of a comma, in another on the inconsistency between a comma and rules of grammar, in a third on the conflict between quotation marks and the language of the text. One day arguments must be advanced in support of broad dictionary definitions; the next day in support of narrow dictionary definitions.¹⁰⁶

But this is not what one sees when one watches committee hearings or floor speeches on C-SPAN or reads debates in the congressional record. Senators do not sit quietly at their desks with dictionaries in hand. House members do not have the latest Supreme Court case on their desks, much less Blackstone or the *Federalist Papers*. If there are reasons to suspect that the image of Congress as Scrivener-in-Chief does not accord well with congressional reality, there are also reasons to worry that it is suspiciously self-referential. Although the

102. U.S. CONST. art. I, § 7, cl. 2.

103. As will become clear later in the Article, there are countervailing constitutional arguments. For one thing, the Constitution itself delegates to Congress the power to create its own procedures, which allows it to delegate to committees (for example, the power to explain text with evidence of legislative meaning). More importantly, from my point of view, the constitutional question is not, as textualists' claim, "What is law?" (No one thinks legislative history is law.) The question is one of institutional choice: Which institution, the courts with their arcane common law, or the Congress with its cacophonous chorus, is a better source of ordinary meaning?

104. See generally Manning, *supra* note 81 (considering this question).

105. See Schacter, *supra* note 5, at 644–45.

106. Merrill, *supra* note 9, at 372 (footnotes omitted).

scrivener model is almost completely foreign to political scientists and policy analysts (not to mention those who work in Congress),¹⁰⁷ it haunts lawyerly discourse about statutory interpretation. As Professors Sunstein and Vermeule have written, statutory interpretation theorists, as a general rule, “work with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters, such as agencies and legislatures.”¹⁰⁸ In part, this is to be expected: legal education privileges courts mightily. Recent emphasis on administrative law is a partial antidote to judiciocentrism; legislation courses remain heavily outnumbered. Worse, few experts in statutory interpretation have any experience in congressional lawmaking.¹⁰⁹ Whether intentionally or not, the textualists’ dreamed scrivener image looks more like the *judiciary*—a kind of junior varsity court—than Congress.

2. Two Kinds of Plain Meaning

Textualism ignores Congress’s most distinctive institutional feature: the electoral connection. As I have explained earlier,¹¹⁰ in both text and history, the Congress is speaking to multiple audiences—to the people as well as the courts. The multiple-audience problem invites us to apply “prototypical” or public meaning. Consider, for example, *Holy Trinity*.¹¹¹ To the average person on the street when the act was passed in the late nineteenth century, the prototypical meaning of “labor,” even “labor of any kind” was manual labor. As the linguist and law professor Larry Solan has argued, ordinary meaning is prototypical meaning, meaning that picks the “best example” rather than “all examples,” or the conceptual or logical extension of the term.¹¹² Such meaning identifies the best example, not the peripheral one. In 1884 and 1885, when the bill was debated, the prototypical case of a laborer was a miner or a railroad worker, not a minister. Contemporary dictionaries support this view: “[t]he first definition of the term ‘labor’ listed in the 1879 and 1886 editions of Webster’s Dictionary was ‘Physical toil or bodily exertion’”¹¹³ As the *Holy Trinity* Court ex-

107. Nourse & Schacter, *supra* note 39, at 614–15.

108. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing that, in general, statutory interpretation theory has avoided the role of institutions).

109. For an empirical study showing this, see Dakota S. Rudesill, Comment, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 702 (2010) (“On the most prestigious law faculties, only 5 percent of professors have worked for a legislative institution—local, state, federal, or international.”).

110. See *supra* section I.A.

111. *Church of the Holy Trinity*, 143 U.S. 457 (1892); see *supra* notes 83–89 and accompanying text.

112. See Solan, *supra* note 49, at 2041–42.

113. Eskridge, *supra* note 74, at 1518. That there may have been other secondary definitions does not detract from the fact that the vast majority of the debate about the statute in *Holy Trinity* concerned the question of forced, slave-labor-type arrangements (not to mention nativist rants about low-quality immigration) in the coal, railroad, and glass-blowing industries, all of which assume “manual labor” as the law’s prototypical object (the best example). If we were to view legislative history as a trial record, it would be clear error to believe that most representatives were using the term labor in the sense

plained in defense of its prototypical approach, “the whole history and life of the country”¹¹⁴ rebelled at the notion that this law, aimed at “importing laborers as we import horses and cattle,”¹¹⁵ could cover the voluntary passage of a minister. Textualists like Professor Vermeule, however, find a different, and obvious, plain meaning: what I will call “legalist” meaning (borrowing from Professor Vermeule, among others).¹¹⁶ He abstracts from the core and considers all logical possibilities within the concept of a laborer. Where prototypical meaning looks for the best example, legalist meaning looks for all examples, examples that by definition push the law toward fringe or peripheral meanings.¹¹⁷ Labor means labor, according to the academic textualist, and that includes the minister.

3. Textualism, Restraint, and the Expansion of Statutes’ Domains

One can conceive of the way in which legalist meaning may expand the range of the statute in the following diagram¹¹⁸:

that would cover the good rector. *See* 15 CONG. REC. 5349–71 (1884) (House debate and passage); 15 CONG. REC. 6057–67 (1884) (Senate postponement of bill to next session). It is true, as Vermeule has shown, that there was some debate on the scope of the legalist term “labor,” by both supporters and opponents. Vermeule, *supra* note 84, at 1845–50. One of the reactions to such objections, however, suggests the tension between popular and legalist meaning (which was apparent in the debate itself): when questioned whether the bill would cover Lord & Taylor bringing a clerk back from abroad, Rep. O’Neill replied,

[I]f you mean to protect American labor here is where you can show your sympathy in the best way.

Never mind about these hair-splitting technicalities with reference to the bill; . . . remedy any defects that you believe to exist in it. If we all had to run as constitutional lawyers, few of us would get elected [laughter], and remember that what the workingmen ask you to do for them is simply that this Congress shall give, so far as it can, protection to them against this infamous contract system.

15 CONG. REC. 5358 (1884) (emphases added). The point, of course, is that linguistic clarity is not the measure of electoral success or real-life results for labor. *See* 16 CONG. REC. 1781 (1885) (statement of Sen. Platt) (“I think it illustrates the folly of a class of men who suppose that bills can be better prepared for the consideration of Congress and passage by Congress by those who are not familiar with legal phraseology and with the legal profession.”).

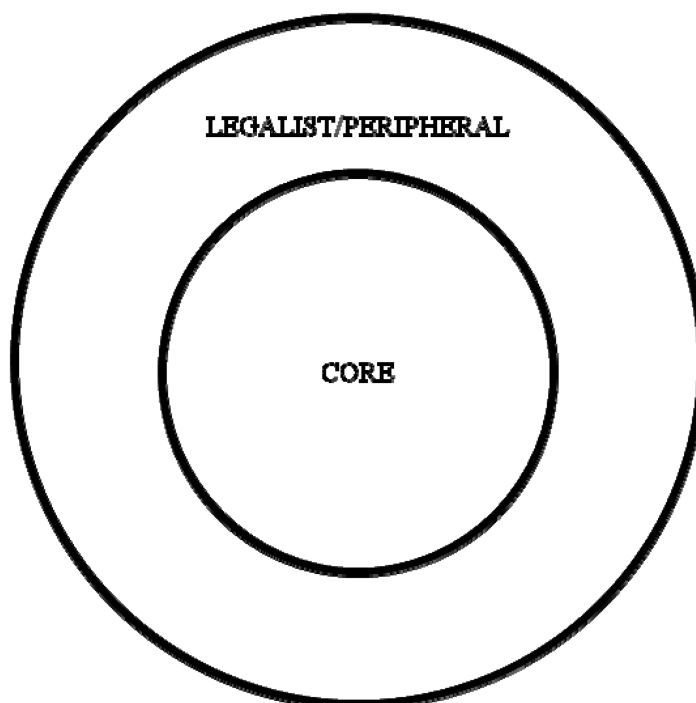
114. *Church of the Holy Trinity*, 143 U.S. at 472. *Holy Trinity* is typically known as an “absurdity” case. I make no claim here about whether its reference to the Blackstonian term “spirit” is worthy of revival, nor do I make any claim about judicial use of the absurdity canon. I do note that one way of thinking about absurdity is to view it as arising when there is a strong conflict between legalist meaning (all workers) and prototypical meaning (manual labor or service). Compare, for example, standard examples of absurdity: “bloodletting” (prototypical meaning: fight; legalist meaning: any bloodletting including by a surgeon); “prison escape” (prototypical meaning: escape to flout law; legalist meaning: any escape even if to escape fire).

115. 16 CONG. REC. 1782 (1885) (statement of Sen. Platt).

116. *See* ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 2–3 (2009); *see also* POSNER, *supra* note 2, at 41.

117. There is an analogy here, as well, to H. L. A. Hart’s famous distinction between core and penumbral meaning. *See* DAVID LYONS, *MORAL ASPECTS OF LEGAL THEORY: ESSAYS ON LAW, JUSTICE, AND POLITICAL RESPONSIBILITY* 84–85 (1993).

118. The emphasis here should be on “may.” In some contexts, the exact opposite proposition may occur. My only claim is that textualism is not always a recipe for relative restraint or even the narrowing of a statute’s boundaries.

Figure 1. Legalist Meaning

There is nothing terribly modern about this idea. It has existed in statutory interpretation since the sixteenth century, expressed in the shell-and-kernel metaphor:

And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter.¹¹⁹

Here, the kernel represents prototypical “sense” while the shell represents the legalist “letter of the law.” Early American courts expressed a similar idea, quoting the Latin phrase, “*qui haeret in litera, haeret in cortice*”: “he who sticks to the letter of the law will only stick to its bark.”¹²⁰

119. ESKRIDGE, *supra* note 4, at 4 (quoting the reporter’s commentary on *Eyston v. Studd*, (1574) 75 Eng. Rep. 688 (K.B.) 695–96).

120. *Church v. Thomson*, 1 Kirby 98, 99 (Conn. Super. Ct. 1786); *Sumner v. Williams*, 8 Mass. (1 Tyng) 162, 183 (1811); *Commonwealth v. Andrews*, 2 Mass. (1 Tyng) 14, 30 (1806); *Miller’s Lessee v. Holt*, 1 Tenn. 111, 116 (Tenn. Super. L. & Eq. 1799); *Olin v. Chipman*, 2 Tyl. 148, 150 (Vt. 1802); see also JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 131 (Alexander Campbell Fraser ed., Clarendon Press 1894) (1690) (“[D]oth it not often happen, that a man of an ordinary capacity, very well understands a text, or a law, that he reads, till he consults an [expert] expositor . . . [who] makes

Academic textualists embrace expert, and thus peripheral, legalist meaning. Professor Manning writes that “textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers.”¹²¹ Enforcing this focus on expert (as opposed to prototypical) meaning is the tendency to equate text with semantics. As Professor Jonathan Molot explains, textualists tend to see “words written on a piece of paper, rather than . . . a collective effort by elected representatives to govern on behalf of their constituents.”¹²² This tendency to detach text from any larger conversation between the public and its representatives reflects the lawyerly love of logical puzzles.¹²³

Indeed, the preference for legalist, peripheral meaning reveals two important aspects of textual theory. Generally, academic textualism advertises itself as a “restrained” view relative to “intentionalism” or “purposivism.” Although textualists claim that they, unlike purposivists, do not “add” meaning to text, in fact, they do. They reject legislative history but add lawyerly meanings taken from past precedents, canons of construction, and the common law. Preference for specialized meanings speaks loudest in textualists’ affection for the “common law” baseline. As Professor Manning explains: “Textualists assign common-law terms their full array of common-law connotations; they supplement otherwise unqualified texts with settled common law practices.”¹²⁴ The common law is a judicial, not a public or legislative, province. Even a committed textualist, if asked, would not claim that legislators were common law experts. To be sure, many legislators are lawyers, but the common law tends to be the province of academics and judges, not the average practicing lawyer who has neither the time nor the inclination to study Blackstone.

Critics will reply that it is not fair to tar textualism with affection for arcane lawyerly meanings; textualists seek *ordinary* meanings. Justice Scalia maintains that the appropriate procedure for determining meaning is as follows:

[F]irst, find the *ordinary meaning* of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the *ordinary* one applies. If not—and especially if a good reason for the *ordinary meaning* appears plain—we apply that ordinary meaning.¹²⁵

the words signify either nothing at all, or what he pleases.”). Special thanks to Asher Steinberg, Georgetown University Law Center Class of 2011, for discovering this kernel of wisdom in a number of nineteenth-century cases.

121. Manning, *supra* note 2, at 434–35.

122. Molot, *supra* note 78, at 48.

123. Merrill, *supra* note 9, at 372.

124. Manning, *supra* note 2, at 435 (footnote omitted).

125. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphases added). In the constitutional context, he is even more insistent. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (“In interpreting this text, we are guided by the principle that ‘[t]he Constitution was written to

I could not agree more. There is reason to wonder, however, whether “ordinary” meaning is too often equated with expert or specialized meaning. Law professor and linguist Larry Solan has suggested, for example, that judges are not consistent on this score, sometimes applying prototypical meaning and other times applying legalist or peripheral meaning.¹²⁶ In one recent study, the author found that “when Justice Scalia says plain meaning, he refers to something different than ‘ordinary meaning.’ ‘Plain meaning’ usually refers to a *specialized* but accepted meaning of a term”¹²⁷ Political scientist Frank Cross found that “[o]verall, the plain meaning standard seems ideologically manipulable and incapable of constraining preferences to provide greater consensus.”¹²⁸ A more recent empirical study, conducted by Ward Farnsworth, Dustin Guzor, and Anup Mulani, concluded that “ordinary meaning” has a tendency to reduce ideological bias relative to plain meaning because the interpreter is required to imagine a meaning other than what is already plain to him or her.¹²⁹

Herein lies a deep and important ambiguity, even inconsistency, within textualist theory. Textualism, for all its affection for plainness, is in fact ambiguous on the type of meanings it will apply.¹³⁰ Although some textualists emphasize expert meaning and semantic content, others rightly emphasize ordinary meaning. Even within a single article, some textualists equate ordinary and specialized meaning.¹³¹ Perhaps academic textualists assume that the average citizen is a lawyer—something the voting public would find odd, if not offensive. But perhaps that helps to explain empirical work showing that Congress has a greater tendency to override plain meaning decisions than to override decisions deferential to legislative history.¹³²

Academic textualism has no theory of when to apply expert meaning and

be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning.”) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

126. See Solan, *supra* note 49, at 2046–47.

127. Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 *MISS. L.J.* 129, 149 (2008) (emphasis added).

128. CROSS, *supra* note 96, at 166.

129. Respondents were more likely to agree that “ordinary readers would disagree about the correct reading” of a statute than that “the statute, as applied to [the] facts, is ambiguous”; furthermore, ideological bias more greatly influenced responses to the “ambiguous” question than the “ordinary readers” question. See Ward Farnsworth, Dustin F. Guzor & Anup Mulani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation* 6, 8–12 (Univ. of Chicago Public Law and Legal Theory Working Paper No. 280, 2009), available at <http://www.law.uchicago.edu/files/file/280-am-ambiguity.pdf>. Farnsworth, Guzor and Mulani usefully distinguish between plain meaning (an “internal view”) and ordinary meaning (“external”).

130. See Molot, *supra* note 78, at 36 (“[S]o long as textualism is on the attack . . . little attention is devoted to the interpretive methodology textualism offers to replace strong purposivism and on variations within the textualist movement.”).

131. See, e.g., Vermeule, *supra* note 84, at 1852–53.

132. See CROSS, *supra* note 96, at 82–83 (summarizing this evidence and relying on Daniel J. Bussel, *Textualism’s Failures: A Study of Overruled Bankruptcy Decisions*, 53 *VAND. L. REV.* 887, 909–10 (2000), William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 350 *tbl.8* (1991), and Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 *TEMP. L. REV.* 425, 446 (1992)).

when to apply public, or prototypical, meaning.¹³³ It either assumes that prototypical and legalist meanings are the same, or prefers expert meaning without defending that choice. Sophisticated textualists like Professor Manning sometimes bow to the relevant “interpretive community” but define that community not as the people, but as expert lawyers.¹³⁴ Shifting the inquiry to a “relevant community” has the important virtue of noticing that there is an audience for statutes, but it raises its own ambiguities: how are we to determine the relevant audience?

Finally, and perhaps most importantly, academic textualism ignores structure-induced ambiguity. Textualists tend to characterize ambiguity as a deliberate legislative failure: Congress could have been clear, but chose not to be. Textualists criticize legislatures for manipulating courts into particular interpretations—a position I find exaggerated, if one accepts the overriding power of the electoral connection.¹³⁵ Just imagine our putative Representative going home to claim, “I manipulated more courts than any other representative in Congress,” rather than “I voted for war” or “I voted for deficit reduction.” Would such a position gain him many votes and, if it would not, why are we assuming that it is a common, as opposed to an unusual, phenomenon? The bottom line: academic textualism waxes ambivalent on the issue of ambiguity. A theory that assumes Congress’s chaotic nature should make ambiguity the norm: how, then, can it insist that there are plain meanings?

B. PURPOSIVISM

If the new textualism has captured the imagination of a scholarly generation, this was not always the case. For much of the twentieth century, courts agreed that they should interpret statutes by looking for congressional *intent*. In the postwar era, a new consensus called purposivism developed. Rather than focus on intent, Harvard’s legal process school urged lawyers to look for the *purposes* of a statute: “Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose

133. Note that there is no logical connection between public or prototypical meaning and Congress; Congress may use terms in legalist or prototypical fashion. Congress, for example, may mean for the term “utilize” to cover all cases of use (the legalist and conceptual meaning), or it may mean for the term “utilize” to cover only particular cases involving presidential transitions. *See* *Public Citizen v. U.S. Dep’t. of Justice*, 491 U.S. 440, 452–54 (1989).

134. *See* Manning, *Equity*, *supra* note 7, at 16 & n.64 (“Textualists believe that legislation supposes that legislators and judges are part of a common social and linguistic community, with shared conventions for communication. Accordingly, they argue that a faithful agent’s job is to decode legislative instructions according to the common social and linguistic conventions shared by the relevant community.”). *See generally* STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 338–54 (1980).

135. Textualists are not alone in this claim, which arises frequently in game-theory analyses of statutory interpretation. *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, 1442–43 (2003).

as best it can”¹³⁶ Legal process advocates used legislative history to resolve ambiguities or find statutory purpose.

Return to *Holy Trinity*.¹³⁷ The purposivist looks at the text and finds it ambiguous. There are two possible meanings of laborer: laborer might mean “all workers,” or laborer might mean “manual laborer.” Given that ambiguity, the purposivist then looks to legislative history to discover the statute’s purpose. According to the Court, the legislative history showed that Congress’s core purpose was to cover large-scale operations in which corporations imported cheap immigrant labor for mining or other industrial operations—not ministers.¹³⁸ Thus, the purposivist is likely to proclaim *Holy Trinity* correctly decided.

Prominent academics have rightly criticized this view. As law professors Adrian Vermeule, Bill Eskridge, and Carol Chomsky all show, the Court barely scratched the surface of the legislative history.¹³⁹ Professor Vermeule cites legislative history suggesting that bill proponents and opponents alike thought the bill was drafted too broadly; some representatives and Senators noted that the bill might cover high- as well as low-class laborers.¹⁴⁰ Professor Chomsky rejects that view based on a review of all the legislative history, arguing that such comments were relatively rare, compared to the vast amount of discussion concerning manual labor and the proponents’ avowed aim to ban large-scale slave-labor operations.¹⁴¹ These scholars’ disagreement tends to highlight the textualists’ concern (a real one) that it is simply too difficult to try to read legislators’ minds by scouring legislative history.

1. Purposivism’s Rosy Image of Congress

Now, let us consider purposivists’ view of Congress. Purposivists embrace a rosy view of Congress. Harvard professors Hart and Sacks wrote that courts should “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”¹⁴² Few students of Congress, and certainly no political scientists, hold such a view. Like the purposivists’ critics, I believe this view is far too rosy—even if taken as a normative ideal rather than a descriptive one (what Congress *should* be as opposed to what it *is*). Congress can only *be* that which its institutional incentives—principally its electoral connections—allow it to be; to idealize Congress simply brands purposivism as romance, not law.

Purposivists’ rosy view of Congress is just as self-referential as the textual-

136. HART & SACKS, *supra* note 3, at 1374.

137. *Church of the Holy Trinity*, 143 U.S. 457 (1892).

138. *Id.* at 463–64.

139. See Chomsky, *supra* note 84, at 905–08; Eskridge, *supra* note 74, at 1517–19. See generally Vermeule, *supra* note 84.

140. See Vermeule, *supra* note 84, at 1850–51.

141. See Chomsky, *supra* note 84, at 923.

142. HART & SACKS, *supra* note 3, at 1378.

ists' junior varsity court image. "Reasonable persons acting reasonably" describes judicial, not legislative, virtue: "precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts."¹⁴³ Courts prize reasonableness; they seek rational policy (as opposed to "position taking" or symbolic action, as a political scientist might emphasize). This should not surprise: institutions tend to project their own values onto other institutions.¹⁴⁴ Purposivists and textualists in the academy project the virtues of the academy with its judiciocentric focus onto Congress, imagining legislative institutions as courts. A sophisticated purposivist does not need this view: to the extent that purposivists recognize ambiguity, they should be willing to adopt a realistic view of Congress. After all, if Congress were so reasonable, wouldn't purposivism be unnecessary? All statutes would be plain and consistent with their purposes.

2. Purposivism as a Theory of Deference

If purposivists acknowledge ambiguity, then jettisoning the "rosy" Hart and Sacks theory may make good sense. In fact, purposivists' attachment to the rosy view may be something other than it appears. Purposivists honor the legislature's lawmaking capacities, urging that deference to Congress's meaning constrains judges. Under this view, the "rosy legislature" becomes less a description of Congress and more a normative principle of *deference to Congress*—a principle that few, even textualists, reject. To the extent purposivists' view of Congress is really a theory of deference to Congress, it declares a principle with which no theory of statutory interpretation openly quarrels. In fact, it accords with constitutional law's one truism: deference to the political branches is not just wise but constitutionally commanded.¹⁴⁵

Another, related, way to look at the rosy view is that it is not so much a theory of Congress as it is a theory of courts as Congress's "faithful agent." As law professor Bill Eskridge puts it, good agents serve their principals' ends by filling in gaps and responding to real and sometimes changing circumstances. If told to collect all the ashtrays in the building, the faithful agent does not pull the ashtray off the wall.¹⁴⁶ In fact, in any reasonable agency relationship, we affirmatively do not want the agent to pull the ashtray off the wall. It is quite possible, however, to adhere to this idea of a faithful agent—a quite sensible one—without adopting a rosy view of Congress.

143. Nourse & Schacter, *supra* note 39.

144. See generally Victoria F. Nourse, *A Tale of Two Lochners*, 97 CALIF. L. REV. 751, 757 (2009) (arguing that the revisionist incorrectly read the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), as a political decision because of the political nature of the Executive Branch understanding of—and response to—the case); Nourse & Shaffer, *supra* note 29, at 85 (discussing claims that new legal realism should focus on institutional forces).

145. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142 (1893).

146. See Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 771–72 (1966).

Let us return to *Holy Trinity*.¹⁴⁷ What if purposivists were to proceed on a less than rosy account of the legislative history? The vast majority of the legislative history (pages upon pages) assumes manual labor as the object of the bill, but there are moments when this is questioned, both in the House and in the Senate. Let us assume that members were not acting as reasonable persons acting reasonably (as judicial actors would), but as legislators trying to accommodate their constituents under pressure to reach widespread agreement. How might this have occurred? We know that the bill's supporters were happy with an amendment limiting the bill to "manual" laborers (this is consistent with their general purpose of limiting massive slave-labor immigration and with the committee report cited by the Supreme Court).¹⁴⁸ We also know that, at the least, post hoc, Congress passed a bill to exclude ministers (so there were eventually enough votes for a minister exclusion).¹⁴⁹ Assume, however, that when the bill was first introduced, those who opposed the bill were afraid to oppose it openly: who could condone slave labor contracts when many legislators still remembered the call of "free labor"?¹⁵⁰ Instead, some manufacturing interests chose to oppose the bill by claiming it was poorly drafted and overbroad, even unconstitutional.¹⁵¹ Assume further that ambiguity was the price of passage because, in fact, manufacturing interests wanted to make labor appear silly and uneducated, and labor supporters did not care much about the precise language because their constituents cared more about their wages than semantic precision. We will never know whether this story is true or not; we can only speculate that ambiguity may have been the price the bill's opponents demanded for the Act's passage.¹⁵² Given the difficulty in passing the Act,

147. *Church of the Holy Trinity*, 143 U.S. 457 (1892).

148. *Id.* at 464–65 (quoting H.R. REP. NO. 48-444 (1884), reprinted in 15 CONG. REC. 6059 (H. Comm. on Labor Rep. on H.R. 2550 and H.R. 3313)); see also Vermeule, *supra* note 84, at 1843–44.

149. See Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. 1085; see also Vermeule, *supra* note 84, at 1841–42 & n.38.

150. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 768 (outlining movements by state and federal judges to defend free labor by striking down state economic regulations, maximum hour laws and other labor legislation).

151. See Vermeule, *supra* note 84, at 1846–47. The claim of constitutionality is almost impossible for moderns to see unless they are aware of the history of equal protection, which was much more vibrant in the late nineteenth century and went by the name of "class legislation." Class legislation was an argument that the legislature had exercised improper selectivity, singling out a particular group for harsher treatment than others; its most famous nineteenth-century example is *Barbier v. Connelly*, 113 U.S. 27 (1885), which preceded *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in addressing discrimination against the Chinese. The trigger for class legislation arguments was not substantive due process, as some have argued, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993), but statutory exemptions. This is why adding exemptions to the bill might have appeared to pose a constitutional problem. V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 972, 987 (2009).

152. Bargaining theorists would tend to say that, in such a situation, the deal should be honored and the language interpreted broadly because that was the price of bill passage. Even if we knew this to be true (which we do not), it should not result in a legalist or peripheral interpretation of the statutory term "labor." As game theory posits, the price of the deal cannot be measured by those who were inveterate opponents. And there is significant evidence that the legalist interpretation was adopted by the

despite a broad coalition of nativists, labor, and small manufacturers, precision in drafting may have appeared, to some, a small price to pay.¹⁵³ As one supporter claimed:

*Never mind about these hair-splitting technicalities with reference to the bill; . . . remedy any defects that you believe to exist in it. If we all had to run as constitutional lawyers, few of us would get elected [laughter], and remember that what the workingmen ask you to do for them is simply that this Congress shall give, so far as it can, protection to them against this infamous contract system.*¹⁵⁴

Purposivists need not reject this account. A purposivist may readily accept it without claiming that legislators do, or should, act as reasonable persons acting reasonably all of the time. In fact, purposivists who cling to the rosy vision take the more radical position of Professor Cass Sunstein, who argues for a small-r republican theory of statutory interpretation.¹⁵⁵ Sunstein claims that courts should treat Congress as grand deliberator.¹⁵⁶ Again, evidence calls the rosy republican ideal into question.¹⁵⁷ For example, is the “no-compromise compromise” we saw earlier,¹⁵⁸ in which one side concedes a point that it is not trying to make (no “random” violence, no “highway quotas”), really a form of deliberation? It seems rather like *no* deliberation. To be sure, Congress’s critics grossly exaggerate the idea that the body never deliberates. I can think of many cases in which Congress truly did debate questions, when members were on the floor, on the exclusionary rule, or habeas corpus reform; indeed, as legislative scholars know, there are inspiring examples such as the debate over congressional authorization for the first Gulf War.¹⁵⁹ But the question of debate evades the dominant structural incentive at play: the electoral connection. In some cases, the electoral connection will drive serious debate, but sometimes it will drive the opposite: no debate at all.

opponents of the bill because they could not openly oppose the bill on the merits. Indeed, applying bargaining theory in this way can easily elevate a loser’s claim into winner’s status. *See infra* section II.C.

153. The suit was ultimately instigated by a railroad financier. *See* Chomsky, *supra* note 84, at 910 (“John Stewart Kennedy, a prominent banker, financier, and railroad director”).

154. *Id.* at 927 (emphases added) (quoting 15 CONG. REC. 5358 (1884) (statement of Rep. O’Neill)).

155. Compare Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988), with Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685 (1988).

156. Sunstein, *supra* note 155 (claiming that the first principle of liberal republicanism is “deliberation in government”).

157. *See* Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1674 (1988).

158. *See supra* section I.B (discussing the Violence Against Women Act).

159. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 62 (3d ed. 2007).

3. Purposivism-as-Prototypical-Meaning: Limiting Statutes' Domains?

In my view, purposivism fares poorly as a congressional theory, but it may make sense as something entirely different. Like other theories of interpretation, purposivism has little regard for the electoral connection. This tells us that sometimes statutory language is directed at the people; it is used in a prototypical vernacular as opposed to a legalist sense. One way of rehabilitating purposivism would be to reform it in light of the electoral connection. One would not ask about the purpose of the statute *simpliciter*, but the purpose to the ordinary person on the street. The first stop in that process would be to look for the text's prototypical meaning. As prominent textualists have argued, the text is often the best indication of purpose.¹⁶⁰ Just as there may be two kinds of plain meaning, there may be two kinds of purpose—prototypical purpose (the best core purpose to the people) and peripheral or legalist notions of purpose (all possible purposes).

One of the most powerful critiques of purposivism argues that it extends the domain of statutes: as Judge Easterbrook once wrote, because purpose will be more general, it will tend to expand a law's domain.¹⁶¹ But as this analysis of *Holy Trinity* shows, if purpose is redefined as prototypical meaning, then the opposite may be true. According to academic textualists, like Professor Vermeule, the text is clear and includes the rector. But, if this is right, his textualism (the legalist, extensive kind) *expands* the reach of the prototypical meaning of the statute. Prototypical purpose would *narrow* the reach of the statute to "manual" laborers, relative to legalist meaning (all laborers). Purposivism, then, is not the only form of statutory interpretation having the potential to expand statutory scope; textualism does not necessarily narrow statutory scope. As Judge Posner has explained: "Literal interpretations can be astonishingly broad."¹⁶² He provides a characteristically pointed example: "Suppose you asked a druggist for something to help you sleep and he gave you a sledgehammer."¹⁶³

Prototypical meaning carries no necessary political valence, even if it has

160. Manning, *Second-Generation*, *supra* note 7, at 1316–17 (quoting Justice Scalia).

161. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 537 (1983) ("If the question of a statute's domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design. To impute a design to Congress is to engage in an act of construction.").

162. POSNER, *supra* note 2, at 200.

163. *Id.* I make no claim that legalist meaning always expands meaning, only that it *may* expand meaning. As a general rule, if we define prototypical meaning as the best example and legalist meaning as all examples, the tendency will be for legalist meaning to be more expansive than prototypical meaning. I do not foreclose the possibility, and my argument does not depend upon the claim, that there may be cases in which the opposite might occur, in which prototypical meaning might expand legalist meaning. Moreover, in some cases, expansion or contraction may depend upon which piece of a text is pulled out of the statute to consider. For example, consider *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In that case, the term "utilize" might seem to cover the American Bar Association if "utilize" is considered in both its prototypical (best example) and legalist (all examples) senses. But the case looks quite different, in my view, if we consider the question as one of the prototypical "advisory

been criticized as a conservative approach. The average exemplary meaning is likely, in fact, to change more rapidly than would legalist meaning, because it is subject to changes in ordinary usage and social context.¹⁶⁴ Of course, prototypical meaning is no panacea. In many cases, Congress embraces technical meaning. When Congress legislates about the proper pleading standard in securities actions, it cares little for what the average man on the street thinks of *scienter*; it debates the difference between the expert legal standards available in the Ninth and Second Circuits.¹⁶⁵ Indeed, one great problem in statutory interpretation can be in determining whether Congress used a term in a prototypical or legalist sense. In the famous *Bock Laundry* case, when Congress used the term “defendant” in a federal evidentiary rule, it appeared to use the prototypical meaning of the word—criminal defendant—because use of the term yielded absurdity or potential unconstitutionality when the expert meaning was applied—criminal *or* civil defendant.¹⁶⁶ Finally, and perhaps most importantly, as we will see in Part III, prototypical meaning, as a method of statutory interpretation alone, may entrench bias. (Had the statute in *Holy Trinity* applied to a particular “race,” it would have relied upon the extensive prototypical meaning of that term in the late-nineteenth century.)

If purposivism can be reconstructed to reduce the risks of statutory extension (applicable as well to legalist textualism), it is also true that purposivism’s theory of Congress can be revisited. There is nothing preventing purposivists from jettisoning the Hart and Sacks rosy view of Congress; indeed, it would only serve to strengthen the theory. Purposivists, unlike textualists, urge that ambiguities should be resolved by looking at evidence produced by a popular body (legislative history). That aspect of purposivism would only be strengthened by a minimalist, evidence-based view of Congress.

C. GAME THEORY

In recent years, scholars have brought game theory to legislative studies. Bill Eskridge and John Ferejohn led the theoretical charge, masterfully analyzing the Court–Congress–President game.¹⁶⁷ More recently, law professor Daniel Rodriguez teamed up with eminent Harvard political scientist Barry Weingast to apply the insights of game theory to interpret specific statutes,¹⁶⁸ following seminal articles by McNollgast and others on the positive political theory of

committee.” This question of which piece of text one chooses to focus upon may be central to the interpretation.

164. See VERMEULE, *supra* note 8, at 46–49.

165. See Grundfest & Pritchett, *supra* note 55, at 652–53.

166. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989).

167. See Eskridge & Ferejohn, *supra* note 54.

168. See Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207 (2007) [hereinafter Rodriguez & Weingast, *Paradox*]; Rodriguez & Weingast, *supra* note 135.

statutory interpretation.¹⁶⁹ Game theory uses bargaining theory to understand the deal struck by Congress.¹⁷⁰ Judges and statutory theorists have suggested “imaginative [deal] reconstruction” for years.¹⁷¹ Judge Learned Hand and Judge Posner have advocated such an approach.¹⁷² Game theory provides a seemingly more sophisticated analytic veneer, adding a new vocabulary of “cheap talk,” “costly concessions,” and “signaling.”

1. Game Theory as Orthogonal to Academic Textualism

Although textualists often cite game theorists as allies,¹⁷³ the theories are quite distinct, even orthogonal. Textualists reject intentionalism and legislative history. Game theorists eagerly dive into the legislative history; their aim is to create a more “scientific” intentionalism.¹⁷⁴ Rather than picking out one’s friends at a schmoozy cocktail party (to paraphrase the famous Leventhal quip), game theorists aim to create a scientific theory of legislative rhetoric that weeds out unreliable from reliable legislative history.

As McNollgast put it over a decade ago, “ascertaining legislative intent requires separating the meaningless actions (or signals) of participants in the legislative process from the consequential signals that are likely to reveal information about the coalition’s intentions.”¹⁷⁵ “[C]heap talk” is “communication that is costless for the speaker to make and that is unverifiable and therefore untrustworthy,” and “costly signaling” is defined as “communication where the speaker pays a price for inaccuracies.”¹⁷⁶ Costly signals can be trusted; cheap talk cannot. For example, in *Holy Trinity*, the original committee report supporting a “manual labor” interpretation would be cheap talk¹⁷⁷ because the authors anticipated that the bill would not pass—there was no actual legislative cost to making such a statement.

Curiously, game theory relies in significant part on a *legal*, as opposed to a *political*, theory of legislation. Statutes are contracts: “Both formalize bargains

169. See John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); McNollgast, *supra* note 31, at 3; McNollgast, *supra* note 56; McNollgast, *The Theory of Interpretive Canon and Legislative Behavior*, 12 INT’L REV. L. & ECON. 235 (1992).

170. In this section, I consider only game theory models. Positive political theory (PPT) can also be used much more loosely. See Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 457–63 (1991) (discussing various meanings of PPT).

171. See, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

172. See, e.g., POSNER, *supra* note 2, at 194 (quoting Judge Learned Hand, who sought to “reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision”).

173. When textualists cite positive political theorists as allies, they are typically citing to that strain of positive political theory that Gerry Mackie calls the “irrationalist” thesis, following William Riker’s work on Arrow’s Theorem. See MACKIE, *supra* note 59, at 23, 156.

174. There is some difference on this issue among positive political theorists. See, e.g., Shepsle, *supra* note 65.

175. McNollgast, *supra* note 31, at 7.

176. Rodriguez & Weingast, *Paradox*, *supra* note 168, at 1220.

177. See *supra* note 148 and accompanying text.

among actors with diverse and partially conflicting interests.”¹⁷⁸ As in contract law, “the role of the courts is to fill in the gaps in legislation by interpreting the intentions of the law’s enacting coalition.”¹⁷⁹ Just as a court finds the “actual agreement” of contractual parties, game theory aspires to find the “original intent” of legislation.¹⁸⁰ The contractual analogy explains why McNollgast rejects academic textualists’ distaste for legislative history: “One cannot argue that a contract between two parties does not embody their mutual agreement because both parties delegated the negotiation to their lawyers and then signed it after only superficial perusal of its contents.”¹⁸¹ McNollgast rejects textualism’s willingness to blind itself to relevant information: “Theoretically well-grounded interpretations of legislative signals will produce better information than poorly grounded readings of the history or than a decision to ignore all of the history because some of it is uninformative.”¹⁸²

2. Game Theory’s Bargain Bazaar Image of Congress

Given its emphasis on contract, it is not surprising that game theorists’ idea of Congress is neither devil nor angel, but something akin to the marketplace. In an early paper, McNollgast made clear that the analogy to contract was based on the “economic approach to the law of contracts,” which “evaluates legal regimes according to their efficiency.”¹⁸³ Legal rules increasing the cost of negotiation were disfavored; common law rules were viewed as efficient to the extent that they furthered the purposes of the contracting parties.¹⁸⁴ Similarly, rules of statutory construction should be created to increase efficiency: “Viewed in the light of contract law, the purpose of canons of statutory interpretation is to facilitate legislative agreements and thereby advance the efficiency of the legislative process.”¹⁸⁵ This, they contended, could be accomplished by scouring the legislative history to find the moderate coalition necessary for bill passage: “Consequently, if statutory interpretation is guided by the principle of honoring the spirit of the legislative bargain, it must not focus only on the preferences of the ardent supporters, but also *on the accommodations that were necessary to gain the support of the moderates.*”¹⁸⁶

As we have seen for textualism and purposivism, a contract theory of Congress fails to accord with our two minimalist principles: the electoral connection and the supermajoritarian difficulty. Unlike businessmen who are contracting, legislators are speaking to their constituents as much as to each

178. McNollgast, *supra* note 31, at 9.

179. *See id.*

180. *Id.* at 5.

181. *Id.* at 11 n.23.

182. *Id.* at 25.

183. McNollgast, *supra* note 56, at 708.

184. *See id.*

185. *Id.* at 710.

186. *Id.* at 711–12.

other. The contract analogy fails to take into account what evidence-based theory predicts: that there may be *no contract*. Sophisticated game theorists know that signals to third parties may be crucial to the game, but game theoretic analyses of legislative history have ignored this vertical dimension. Like textualism and purposivism, first generation game theoretic statutory interpretation focuses on the horizontal relationship between courts and Congress, not Congress and its electoral audience. Moreover, as we will see, however sophisticated game theory appears, it may fail—at least in particular applications—to consider basics such as the supermajoritarian difficulty.

Consider Rodriguez and Weingast's analysis of the Tower Amendment to the 1964 Civil Rights Act. Their argument proceeds as follows: The 1964 Civil Rights Act was the product of congressional compromise between the Humphrey majority and the Dirksen moderates.¹⁸⁷ Relying only on Senator Humphrey's "winner's history," they argue, "devalues the pivotal role of moderate legislators whose assent is essential to reaching a bargain that can achieve majority (and, because of the filibuster, super-majority) support."¹⁸⁸ Rodriguez and Weingast explain:

For example, speeches made at the introduction of legislation are ordinarily cheap talk. This stage occurs before any of the legislative compromises necessary to pass the act and, therefore, cannot reflect the critical compromise provisions in the final act. . . .

In contrast, discussions on the floor of the legislative chamber that focus on the meaning of critical compromises offered in amendments are costly signals. Because they risk losing the votes of the moderates, ardent supporters pay a large price for attempts to downplay or inaccurately describe the compromise during floor debates preceding acceptance of the compromise.¹⁸⁹

There is much to commend in this passage. Bill supporters do wax lofty: We will "end child poverty in America," "rid the airwaves of poisonous political advertisements," or "end violence in our time." This is cheap talk. So, too, game theory recognizes what courts often do not: the dangers of "loser's" history. Just as ardent supporters are likely to engage in lofty rhetoric in support of a bill, ardent opponents are likely to engage in lofty rhetoric: "Members who voted against the legislation in key votes, who filed minority reports against the legislation in committee, and who offered rejected amendments to kill or gut the legislation should be regarded as outside the enacting coalition, even if they voted in favor of the bill on final passage."¹⁹⁰ There is much to admire in this, relative to the tendency of lawyers to slice and dice the congressional record without any thought to whether those cited opposed or supported the bill. The

187. Rodriguez & Weingast, *supra* note 135, at 1427.

188. Rodriguez & Weingast, *Paradox*, *supra* note 168, at 1215, 1218.

189. *Id.* at 1220–21.

190. McNollgast, *supra* note 31, at 21.

question, however, remains whether game theory ignores the very institutional processes it aims to honor.

Putting aside any larger claims about game theory for the moment, let us take one of Rodriguez and Weingast's specific examples, the statute underlying the *Griggs* case involving employee testing.¹⁹¹ Senator Tower offered an amendment to the 1964 Civil Rights Act, making explicit the power of companies to test employees. The conventional story is that Senator Tower was particularly concerned about overruling an Illinois employment decision, *Motorola*, which struck down testing because of the "disadvantaged" background of those taking the test—an extreme form of disparate impact theory, which would have virtually eliminated testing and which no Senator supported.¹⁹² Tower's first amendment encountered resistance because it applied to all "professionally developed ability test[s]" that determine whether employees are "suitable."¹⁹³ In theory, as opponents suggested, this could mean "any test." (One imagines giving the MCAT to janitors.) The amendment failed to pass.¹⁹⁴ Later on, Senator Tower offered another version of the amendment and Senator Humphrey, manager of the bill, conceded to the new version.¹⁹⁵ This, Rodriguez and Weingast call a "costly signal."¹⁹⁶ Based on this, Rodriguez and Weingast argue that the Tower Amendment should be given a broad interpretation and that *Griggs* was incorrectly decided.¹⁹⁷ Tower said "any professionally developed ability test,"¹⁹⁸ and the *Griggs* majority deferred to the EEOC's rule that testing had to be "job-related."¹⁹⁹ According to Rodriguez and Weingast, the Dirksen amendments were "pivotal" to the success of the bill; these included the Tower Amendment, and it should be given its full meaning, which the *Griggs* Court did not do.²⁰⁰ My argument is not with their conclusion but with this particular

191. Rodriguez & Weingast, *supra* note 135, at 1501–10 (discussing *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971)). Note that this analysis does not necessarily apply to any of the other examples used by Rodriguez and Weingast.

192. See 110 CONG. REC. 13,492–94 (1964) (statement of Sen. Tower) (discussing *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. Fair Emp't Practices Comm'n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662-64 (1964)); see also Rodriguez & Weingast, *supra* note 135, at 1505–06.

193. The first Tower Amendment was offered post-cloture on June 11, 1964. 110 CONG. REC. 13,492 (1964) (amend. no. 606). Its language is quoted in full *infra* note 209.

194. Rodriguez & Weingast, *supra* note 135, at 1506 ("Tower's first amendment was defeated on a roll call vote, 38 to 49.").

195. 110 CONG. REC. 13,724 (1964) (amend. no. 952); see also Rodriguez & Weingast, *supra* note 135, at 1506.

196. Rodriguez & Weingast, *supra* note 135, at 1506.

197. *Id.* at 1507 (arguing that the *Griggs* Court decided that "the expressed understanding of the ardent supporters (Humphrey's view about what the Tower Amendment meant) should determine the meaning of an ambiguous statute" but pointing out that "by accepting the second Tower amendment, the ardent supporters receded from this view").

198. 110 CONG. REC. 13,492 (1964). For the text of the amendment, see *infra* note 209.

199. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239–40 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

200. Rodriguez & Weingast, *supra* note 135, at 1508 ("The fact that a majority of the Senate voted in favor of the amendment makes the supporters' position—essentially the position that . . . would prevail later in *Griggs*—precarious."). Rodriguez and Weingast also emphasize that even though there

analysis of the Tower Amendment.

3. Game Theory and the Supermajoritarian Difficulty

As I have indicated, game theory is more finely attuned to congressional action than is purposivism or textualism. And yet game theory may yield flawed results if it does not pay sufficient attention to the particular institutional realities shaping the legislative deal. As we have seen in Part I, structure induces ambiguity, a product of the electoral connection plus the supermajoritarian difficulty. As the political scientist Keith Krehbiel has made clear, and firsthand accounts of the Congress corroborate, getting to sixty votes is central to any bargain in the Senate.²⁰¹ Game theorists are correct that the majority seeks moderate votes clustered around a pivot; the crucial pivot, however, is cloture. Senators willing to resist cloture may demand changes to the bill as a price for their vote to close debate.²⁰² So in the Civil Rights Act, H.R. 7152, the original bill before the Senate *was not the bill* considered after cloture. Instead, there was a “substitute” bill (styled as an amendment but which struck out the entire original bill). A substitute representing the basic negotiations—the Mansfield–Dirksen substitute—was Dirksen’s price for cloture (which then required sixty-seven votes).²⁰³ There is nothing unusual about this procedure; it happens to any bill with salient or controversial provisions.

Given this process, one has to be concerned about Rodriguez and Weingast’s analysis of the Tower Amendment. They claim, for example, that the Tower

was no recorded vote on the second Tower Amendment, it would have included “the thirty-eight who made up the group supporting the first Tower amendment,” and that this number was sufficient to prevent cloture. *See id.* at 1507. Note in regard to the last claim that, once cloture has been invoked, which it had been by June 11, moderates had no power to filibuster again.

201. *See* KREHBIEL, *supra* note 17, at 13, 101; *see also* BRADY & VOLDEN, *supra* note 31, at 1, 15, 156.

202. This is too simplistic a calculus, as the concessions extorted may be completely unrelated to the bill in question or even the text. As we will see below, one of the problems with contract-based models is that there is no guarantee that bargaining occurs on questions of text at all, or whether the bargaining occurs across bills, nominations, or any other legislative matter. *See infra* text accompanying notes 216–23.

203. *See* HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA* 142 (1990) (“But hard bargaining for Senate cloture dominated the next three months, and necessarily involved some trade-offs in response to Dirksen’s artful probes.”); John G. Stewart, *Thoughts on the Civil Rights Bill*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION*, at 93, 113 (Robert D. Loevy ed., 1997) (notes of John G. Stewart, an important congressional staff member, stating that “[n]o agreements will be made until the quid pro quo has been established; namely, that we get cloture activity from Dirksen”); *id.* at 117 (“In short, we want cloture on the whole bill . . . and if Dirksen is not willing to go this route then there is really no business to talk to him about his amendments.”); *see also id.* at 141 (“Those few amendments which were adopted after cloture resulted from the persistent efforts of their sponsors and from Humphrey’s willingness to be accommodating and helpful wherever he could.”). The Mansfield–Dirksen substitute was introduced on May 26; the cloture vote occurred on June 10. *Id.* at 129; John G. Stewart, *The Civil Rights Act of 1964: Tactics II*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION*, *supra*, at 275, 282. The first Tower Amendment was offered on June 11. 110 CONG. REC. 13,492 (1964). The second Tower Amendment was agreed to by voice vote on June 13. 110 CONG. REC. 13,724 (1964).

Amendment should be respected as essential to moderate pivotal legislators.²⁰⁴ Senator Tower was not a moderate legislator but a serious opponent who fought and voted against the bill, which even Rodriguez and Weingast acknowledge.²⁰⁵ If McNollgast is right, then Tower's statements about the scope of the bill amount to cheap talk. In particular, his discussion of *Motorola* in connection with the first Tower Amendment (which never passed) should be viewed with skepticism, rather than embraced with enthusiasm.²⁰⁶

Much more importantly, this particular analysis violates the supermajoritarian principle. The Tower Amendment could not have been the price of cloture, even if it had been offered by Senator Dirksen, a moderate. In the Senate's supermajoritarian world, whether or not the opposition will filibuster is the essence of the deal. Given such rules, whether any particular post-cloture amendment fails is irrelevant because the pivot has been obtained: the minority has conceded that debate be closed. Once cloture is invoked, everything that happens after cloture is subject to stand-alone majoritarian votes.²⁰⁷ Tower's amendment was a post-cloture amendment and therefore was outside the price Dirksen's moderate coalition was capable of forcing Humphrey and the majority to pay. By definition, post-cloture amendments cannot be the price of a bill *in toto*.²⁰⁸

204. Rodriguez & Weingast, *supra* note 135, at 1504 (“[M]oderate legislators worried that section 703(h) would nonetheless be read by the courts to outlaw employment tests. Senator Tower’s introduction of an amendment after the presentation of the Clark–Case memorandum provides the best evidence of this concern among the moderates.”). If “pivotal legislators” were not convinced by the Clark–Case memorandum and required a testing amendment to approve of the bill, it would have been included in the Mansfield–Dirksen substitute.

205. *Id.* (linking Senator Tower to pivotal moderate legislators); *cf. id.* at 1507 (recognizing that Tower was an “ardent opponent of the Act”); *id.* at 1508 (recognizing that “Tower and his ardent-opponent colleagues would vote against the Civil Rights Act”). Because of this, Rodriguez and Weingast claim that Humphrey’s costly concession to the Tower Amendment had to be directed to moderates. No doubt Humphrey’s staff had been negotiating with moderates, but it is also true that the moderates were not empowered to filibuster the entire bill after cloture had been invoked.

206. Rodriguez and Weingast take the conventional view that the *Motorola* decision was a proxy for “disparate impact” analysis rejected by Tower, conceded by Humphrey, and then wrongly accepted by the *Griggs* Court. *See id.* at 1501–09. In fact, as Bill Eskridge has argued, the idea that disparate impact was in the minds of the legislators in 1964 is highly anachronistic. The concept simply did not exist. *See* ESKRIDGE, *supra* note 4, at 74 (“[T]he legal world was stunned by the Supreme Court’s unanimous adoption of a disparate impact approach in *Griggs* . . .”). There is also no indication from the record itself, other than the discussion about *Motorola*, with which all Senators disagreed, that the parties were actually arguing about the concept in the ways that we understand it today. Lawyers tend to read into the discussion the present of the bill, rather than its inchoate past. Both sides agreed that *Motorola* went too far before the second Tower Amendment was accepted. But *Motorola* cannot be equated with disparate impact because disparate impact is rebuttable evidence of discrimination whereas *Motorola* created a *per se* rule. Nor can *Motorola* be equated with *Griggs*: the EEOC’s “job-related” rule attempted to eliminate the most egregious forms of abuse. *See id.*

207. Senate rules require that all post-cloture amendments must be filed before the cloture vote. *See* Stewart, *Thoughts on the Civil Rights Bill*, *supra* note 203, at 143 (“Once cloture has been invoked, only those amendments which have been ‘presented and read’ [prior to the cloture vote] qualify for consideration . . .”).

208. To be sure, when the Civil Rights Act of 1964 was passed, it was still possible to filibuster by amendment, but there is no indication, nor argument by Rodriguez and Weingast, that this is their

The first Tower Amendment²⁰⁹ included language that would have allowed businesses to test for “suitability.”²¹⁰ That term, of course, might invite discrimination if it included tests based on “customer appeal.” Opponents of the first Tower Amendment claimed just that: the amendment would permit intentional discrimination.²¹¹ The second Tower Amendment, to which the majority agreed, did not include the suitability language; Tower had to make a costly concession,

claim. In fact, any thought there would be such a filibuster was soon put to rest in the actual bill. Stewart, *Thoughts on the Civil Rights Bill*, *supra* note 203, at 141.

209. Rodriguez & Weingast, *supra* note 135, at 1506. The first amendment provided as follows:

On page 35, after line 20, insert the following new subsection:

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give *any professionally developed* ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—

(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or

(2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.

110 CONG. REC. 13,492 (1964) (emphases added). The second Tower Amendment was modified as follows before passage:

On page 44, line 15, insert the following after the word “origin”; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

110 CONG. REC. 13,724 (1964). The resulting statute reads:

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide seniority or merit system*, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are *not the result of an intention to discriminate* because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results *is not designed, intended or used to discriminate* because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (2006) (emphases added).

210. In *Motorola*, a hearing examiner in Illinois ruled that a general ability test in considering applicants for assembly line jobs was discriminatory on the theory that the test was unfair to “culturally deprived and disadvantaged groups.” See *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. Fair Emp’t Practices Comm’n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662–64 (1964).

211. See, e.g., 110 CONG. REC. 13,503–04 (1964) (statement of Sen. Case) (“Discrimination could actually exist under the guise of compliance with the statute.”).

narrowing his provision. The amendment also added language barring the use of tests “designed, intended or used” to discriminate. Again, these were concessions Senator Tower made to those who argued that his amendment would permit intentional discrimination.

Humphrey and the majority also had to make a concession, albeit one prompting legal ambiguity. First, there is the obvious ambiguity of the term “used” to discriminate, which presumably included something more than “intentional” discrimination. Second, and more importantly, the majority accepted a special sentence on testing that the bill managers *thought redundant*. Bill supporters believed that the first sentence in subsection (h) covered the testing issue by allowing “bona fide” merit systems. Senator Humphrey insisted that the first Tower Amendment was unnecessary.²¹² When asked why, Senator Miller responded that the bona fide merit provisions already in section (h) covered bona fide testing so that the only thing the amendment might do was to encourage illegitimate testing.²¹³ If the majority believed that the testing amendment was redundant, there is no reason why it should not have agreed to it on the theory that it was giving nothing away. As we have seen in Part I, to keep a bill moving, there is always an incentive to logroll language—to add language that satisfies a particular senator’s electoral needs. Any lawyer worth his salt might have looked at the actual language and told the majority that the amendment created legal ambiguity (now there were two provisions on testing), but it was the end of “the longest debate”²¹⁴ on an excruciatingly important bill.²¹⁵ As a general rule, post-cloture amendments are likely to be sloppier than

212. *Id.* at 13,504 (statement of Sen. Humphrey) (“These tests are legal. They do not need to be legalized a second time. . . . That is why I said I did not think the proposed new language was necessary.”); *see also id.* at 13,503–04 (statement of Sen. Case) (“I object to the amendment suggested by the Senator from Texas because, first, it is unnecessary The amendment is unnecessary”). Senator Miller asked the managers whether the right to give tests was already authorized under subparagraph (h) of the then extant bill: “I believe that during the development of the [substitute] amendment, the question of its not being an unfair labor practice for an employer to provide for the furnishing of employment [testing] pursuant to a bona fide . . . merit system . . . was discussed.” *Id.* at 13,504. Senator Humphrey replied that this was indeed covered by subparagraph (h). *See id.*

213. *See id.* at 13,503–04.

214. *See* CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); *see also* *THE CIVIL RIGHTS ACT OF 1964*, at vii (Robert D. Loevy ed., 1997) (“This titanic legislative struggle produced the longest continuous debate ever held in the U.S. Senate.”).

215. The first sentence in section (h) addresses bona fide merit systems. *See* 42 U.S.C. § 2000e-2(h) (2006). The second sentence is the testing provision. *See id.* Because the second sentence does not contain the term “bona fide,” one standard lawyerly inference is that this qualification was not intended; even if supporters like Senator Miller, *see supra* note 212, seemed to believe testing was already covered under the bona fide provisions. On another reading, however, the sentences should be read in harmony: why should one want to permit non-bona-fide testing if one wanted to bar non-bona-fide merit systems? Even Senator Tower admitted during the debate on the first Tower Amendment that his amendment would not sanction discriminatory tests. *See* 110 CONG. REC. 13,492 (1964). Moreover, unlike the first sentence, which explicitly bars bona fide systems intended to discriminate, the second sentence provides that testing may not be *used* to discriminate. *See* 42 U.S.C. § 2000e-2(h). Special thanks to President Reagan’s former General Counsel to the Equal Employment Opportunity Commis-

the language of the substitute (which tends to be more carefully crafted).

Now, this particular critique does not indict all game theory analyses, but it does raise the problem of reading legislative bargains without regard to the rules. First, this particular analysis raises questions of internal consistency to game theory's own principles because Senator Tower opposed the bill. Second, it ignores the supermajoritarian difficulty: a post-cloture amendment is by definition not the price of cloture. Third, and most importantly, it provokes the question whether game theory assumes what it must prove. Remember our first principle of a minimalist, evidence-based theory: the electoral connection. If the electoral connection induces ambiguity, then one must begin to question one of the principal assumptions of game theory—that statutes are contracts and legislatures are markets. Game theory assumes that there was a deal when a minimalist, evidence-based theory suggests there are often no deals but, instead, false compromises, structure-induced ambiguities, and logrolling redundancies.

4. When a Deal Is Not a Deal

Like purposivism and textualism, deal reconstruction pays little attention to constituency talk or what some game theorists call “audience costs.” As game theorists and political scientists Nolan McCarty and Tim Groseclose explained in a sophisticated model of presidential–congressional relations, “[a]lmost all models of bargaining ignore the possibility that the two primary negotiators want to send signals to a third party.”²¹⁶ Political scientists studying international affairs, such as James Fearon, have known for some time that game theory must take into account audience costs, by which they mean costs to the domestic audience of particular position taking in international conflicts.²¹⁷ Remember Mayhew’s cacophonous Congress: Senators are speaking to their constituents as much as to their congressional opponents.²¹⁸ It is entirely possible that the deal makers are not talking to each other at all. Instead, the cost to constituents drives the bargain. Analyses of cheap talk and signaling focus on parties in the horizontal Court–President–Congress dimension.²¹⁹ But if signaling is also intended to satisfy the electoral, third-party connection, the cost calculus may well overemphasize the costs of horizontal signals.

Reconsider a game theory analysis of the Tower Amendment including the electoral connection. Rodriguez and Weingast assume that moderates’ concessions should be given more weight by courts. But what if the moderates’ concessions were not in fact concessions? As we have seen, Senator Humphrey and others believed the Tower Amendment was redundant.²²⁰ Given their bill

sion, Professor Charles Shanor, for affirming that this interpretation is consistent with the EEOC’s understanding.

216. Groseclose & McCarty, *supra* note 57.

217. See Fearon, *supra* note 57.

218. MAYHEW, *supra* note 12, at 106.

219. See Rodriguez & Weingast, *supra* note 135, at 1526–29.

220. See *supra* note 212.

supporters, they had every reason to emphasize redundancy. So, too, Senator Tower may have cared little about whether his amendment was repetitive. The Senator from Texas may have relished relitigating an issue raised by the Senator from Illinois—*Motorola* was an Illinois case after all—even though Dirksen had lost the point in the compromise negotiations prior to cloture. As Senator Humphrey put it: *Motorola* had been “discussed, discussed, and cussed” in the negotiations.²²¹ Redundant or not, the cost of ambiguity was low relative to the gain in constituent support for the majority and minority. Senator Tower could go home and claim that his amendment promoted business interests and interred *Motorola*. Senators Humphrey and Case (opponents of the amendment) could go home and claim that they had stopped the Republicans from allowing any professionally developed test. In short, what game theory sees as a significant cost from a horizontal perspective may disappear from a vertical one (the electoral audience).

Game theory’s failure to incorporate audience costs is not a small, technical objection; it is a large, theoretical one. There is every reason to believe, for example, that the vertical, electoral connection will trump horizontal ambiguity costs. To be sure, legislators have an interest in making a bill effective, so they should want courts to interpret the bill to make it work. Timing, however, makes it likely that the vertical may trump this horizontal concern. A representative’s electoral fate depends upon the claim that she has done something; a court may undo that, but the judicial intervention is likely to be long after the election. For example, the Violence Against Women Act’s civil-rights remedy was passed in 1994 but was not found unconstitutional until six years later (three House electoral cycles).²²² Moreover, even if a court rules against the representative, that might not yield electoral costs; it might simply add to the salience and importance of the member’s position. More people might vote for her precisely because a court rejected her position.

The theoretical problem is more than game specification; the theoretical problem lies in assuming that deals can be *understood outside a particular institutional structure*. Game theory assumes that a deal is a deal, whether it exists in business, the international arena, or a legislature. It fails to appreciate that institutions may change the nature of the bargaining. As Professor John Ferejohn (a savvy political theorist) has explained, the idea of “separability”—the notion that preferences are exogenous to institutions—is radical and “likely to be wrong.”²²³ Without understanding how institutions change the game, game theory produces a self-fulfilling prophecy. If you accept that there is a contract, then it follows that the contract should be honored. But this is too simple an understanding of congressional bargaining—our best evidence tells us that what looks like a deal may be no deal at all (or at least a different deal than

221. 110 CONG. REC. 13,504 (1964).

222. See *supra* note 58.

223. Ferejohn, *supra* note 101, at 74.

one perceived by a court based on text alone). In fact, statutes are less like contracts and more like elections. They are winner-take-all. Whether the final tally was close, 99–1 or 61–39, matters not at all to a judge, and rightly so.

Judges risk significant errors if they seek to enforce the views of moderate coalitions. The most important risk is in assuming that *there is a moderate coalition* for any particular statutory text. Neither Senator Dirksen in the compromise negotiations nor Senator Tower in his amendment had enough votes to pass a bill allowing a company to use any “professionally developed” test. If a court were to assume, counterfactually, that Senator Tower was a moderate and his first, losing amendment was necessary to the deal, enforcing it would give an avowed opponent of the bill far more power in court than he had in Congress. Reconstructing no-deal as if it were a deal amounts to judicial activism on behalf of legislative minorities. The Senate already provides enormous structural protection for minorities. As Professor Levinson and Professor Dahl have explained, very small populations have enormous power in the Senate, even in a system requiring only fifty-one votes. The filibuster only enhances the minority’s power. If, in a true majoritarian (fifty-one vote) system, there were sufficient votes to pass a bill without the filibuster-induced moderate coalition, then a court adopting the minority coalition’s interpretation may reproduce the effects of a filibuster rule by means of statutory interpretation. In such a case, courts risk activism on behalf of a superminority falsely dubbed a majority.

III. THEORIES OF STATUTORY INTERPRETATION AND THEIR IDEAS OF THE SEPARATION OF POWERS

“Nothing that is human escapes statutory interest.”

—Bill Eskridge²²⁴

All theories of statutory interpretation worry about judicial lawmaking. That worry is not simply a question of judicial activism, but of constitutional power. Professor Jerry Mashaw has argued that statutory interpretation theories must be constitutional theories.²²⁵ Professor Manning agrees: “[I]t is difficult to avoid the relevance of the constitutional structure in evaluating methods of statutory interpretation”²²⁶ Mashaw and Manning are right: at least implicitly, the claim of activism or judicial lawmaking is an assertion by one department over the constitutional powers of another. That is a question of the separation of powers. And yet no scholar has attempted to provide a theory of statutory

224. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 8 (1994).

225. Mashaw, *supra* note 155, at 1686.

226. John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1163 (2007).

interpretation grounded in the Constitution entire.²²⁷

This question should be more important because many ideas of Congress now most powerful in the statutory interpretation literature acknowledge gaps or ambiguity in statutes. Textualists' chaos theory implies vast gaps. Purposivists assume that courts will partner in filling gaps. So, even if one rejects the theory I propounded in Part I, one should at least consider the risk that interpreters will improperly exercise lawmaking power. That in turn should make more urgent the question of what power "lawmaking" is and how that power should be exercised in a system of separated powers.

Since Alexander Bickel articulated the countermajoritarian difficulty, courts have worried about exercising legislative power in striking down laws as unconstitutional. In fact, there may be *more reasons* to worry about the exercise of statutory interpretation given the supermajoritarian difficulty. If a court errs, it may enshrine in law that which is directly contrary to the will not only of a majority but a supermajority. And, yet, as a relative matter, courts exercising the power of judicial review to strike down a statute as unconstitutional are more conscious of the potential to aggrandize their power. In statutory interpretation cases, courts have no long or overt tradition of self-conscious constitutional self-control about exercising their lawmaking powers, and their decisions (if in error) are far less likely to be seen as a question of aggrandizing power as they are likely to be wrapped in the mantra of legislative intent, even if they contravene supermajoritarian preferences.

That faulty statutory interpretations may be overridden does not repair this problem; it may lull courts into a false sense of security that their errors will be easily reversed. There may well be many statutory interpretation cases that deserve to be overridden as a matter of simple majoritarian will, but will not because of the supermajoritarian difficulty. Once the court rules, one can never go back; the political landscape has changed because one side of the political debate can now invoke the rule of law in favor of its interpretation; the original supermajoritarian coalition is impossible to reconstruct. Given already scarce legislative resources and demands on legislators' time, the idea that "Congress can always override" should not relieve courts of worrying far more explicitly about aggrandizing their power in statutory interpretation.

That statutory interpretation has not been grounded in the separation of powers should be more surprising because, in fact, just as theories of statutory interpretation assume a theory of Congress, they also assume a theory of the separation of powers. In this Part, I set forth those theories and critique them. I offer an alternate way of conceiving of the separation of powers, grounded in the *Federalist Papers* and based on the representational texts of the Constitu-

227. A claim based on the separation of powers is different from a claim that *structure* in some way supports a particular theory of statutory interpretation. See *infra* note 267 (discussing John Manning's claims about why structure militates against purposivism).

tion, a theory I have elaborated elsewhere at some length.²²⁸ As applied, that theory supports a public meaning approach toward statutory interpretation, one which demands that courts not blind themselves to legislative history as evidence of ordinary or public meaning.

A. TEXTUALISM, PURPOSIVISM, AND GAME THEORY AS FORMALISM AND FUNCTIONALISM

There are two primary theories of the separation of powers: one dubbed “formalist,” the other dubbed “functionalist.” The formalist draws bright lines separating the departments and resists structural innovations. The functionalist tolerates departmental overlap and embraces structural change. The formalist invokes functional labels (“the executive power”) with enormous significance, prizing precise descriptive separation; the functionalist relies, like the formalist, on functional labels (separating out powers in terms of kinds) but acknowledges that the Constitution’s text provides for both separated and shared powers.²²⁹ The Supreme Court has adopted neither theory, shifting back and forth between them.²³⁰

1. Textualism as a Formalist Theory of the Separation of Powers

As we have seen, academic textualism embraces elite lawyerly meanings, relying upon canons and common law to fill legislative gaps. In this sense, textualism asserts, or at least assumes, a *formal and unitary theory* of the separation of powers. If a court must fill a gap in a statute, it should use judicial, not legislative, meanings (canons, common law, precedent). This is reinforced by the textualists’ injunction to not look at legislative history. Separation of powers formalists imagine (counterfactually) that the constitutional text creates functionally pure categories. This explains statutory interpretation scholars’ battles about the meaning of “judicial power.”²³¹ It also explains textualists’ embrace of the Bicameralism and Presentment Clause: that Clause applies only when lawmaking power is at issue.

Very few separation of powers scholars would recognize either of these

228. See Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) [hereinafter Nourse, *Vertical*]; Nourse, *supra* note 7; V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835 (2004) [hereinafter Nourse, *Anatomy*].

229. For a succinct and careful description of formalism and functionalism, see Kathleen M. Sullivan, Comment, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 91–101 (1995). On the relationship between formalism and functionalism, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1530 (1991) (arguing that the debate surrounding both models “hangs in midair, moored to no grander objective”); see also Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488–94 (1987) (rejecting formalism in favor of functionalism for the administrative levels of government).

230. Compare *Bowsher v. Synar*, 478 U.S. 714 (1986), and *INS v. Chadha*, 462 U.S. 919 (1983), with *Mistretta v. United States*, 488 U.S. 361 (1989), and *Morrison v. Olson*, 487 U.S. 654 (1988).

231. See Eskridge, *supra* note 7; Manning, *Equity*, *supra* note 7.

claims as a theory of the separation of powers. Neither has been consistently adopted by the Supreme Court, or scholars, as a theory of the separation of powers.²³² We have three departments, not one; any theory of the separation of powers must explain their relationship. Perhaps more importantly, any attempt to define judicial or legislative power apart from the separation of powers is anti-originalist, for neither the members of the Constitutional Convention nor the constitutional ratifiers viewed the departments as in the least separable. Indeed, they spent most of their time arguing about how the departments should be related to one another and whether one would be too dependent on the other.²³³ Madison rejected “parchment barrier” solutions such as the textual injunction in the Massachusetts constitution to “separate” the departments²³⁴ because these textual provisions had failed in practice in state constitutions long before the Constitutional Convention.²³⁵ One need not scour a lengthy history for this; just read the *Federalist Papers* sequentially from No. 46 through No. 51.

On structural matters I am “decidedly conservative” and “deeply reverent” of the Founders’ plan.²³⁶ From that perspective, I worry about a false essentialism in the separation of powers. The Constitution’s text does not create separate departments along functional lines. The President’s veto power is under Article I, not II, as “legislative power”; the Congress’s power to adjudicate impeachments is under Article II, not Article III.²³⁷ More importantly, the text upon which formalists typically rely—the Vesting Clauses²³⁸—does little real constitutional work. The first sentences of the Vesting Clauses (which set forth the adjectives “legislative,” “judicial,” and “executive”) can be cut from the Constitution and absolutely nothing happens: as I have demonstrated at length elsewhere, the Supreme Court still sits, the Congress is elected, and the President presides over the Executive Branch.²³⁹ As Madison predicted, it is the representational provi-

232. For some sophisticated theories, see Brown, *supra* note 229, at 1514–17, 1529–31 (arguing that separation of powers disputes involve important questions of individual rights); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124 (1994) (emphasizing the checks and balances between the President and Congress); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (arguing that “the Constitution circumscribes the power of the branches by limiting the ways each can act”); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 228 (explaining a “minimal” conception of the separation of powers); Strauss, *supra* note 229, at 522 (“[C]ourts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government . . .”); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 303–07 (1989) (emphasizing a rule-of-law approach that minimizes conflicts of interest).

233. See Nourse, *Anatomy*, *supra* note 228, at 751–54; Nourse, *Vertical*, *supra* note 228, at 839–41.

234. *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting).

235. Nourse, *supra* note 7, at 474, 486, 495.

236. Nourse, *Anatomy*, *supra* note 228, at 900.

237. See U.S. CONST. arts. I, § 7, II, § 4.

238. U.S. CONST. arts. I, § 1, II, § 1, III, § 1.

239. See Nourse, *Anatomy*, *supra* note 228, at 839; see also Nourse, *Vertical*, *supra* note 228, at 761–68 (demonstrating how changes in vertical relationships can change horizontal structure).

sions of the Constitution—the ones that create voting and electoral connections, and through them, appointment powers—that drive the separation of powers, by aligning the incentives of the “man” with the constitutional rights of the “place.”²⁴⁰

Justice Cardozo was right when he suggested that grand structural principles cannot be reduced to adjectives.²⁴¹ Doing so encourages overbroad readings, whether of legislative, executive, or judicial power.²⁴² Adjectival formalism in the executive sphere has led to admissions that unitary theories may lead to aggrandizement of power by the Executive, premised on the idea that the adjective takes on the meanings of those who seek to apply it, ignoring the President’s role in the entire Constitution.²⁴³ Similar risks—infidelity to text, emptiness, or aggrandizement—can appear in statutory interpretation. Interpreters who rely upon legalist as opposed to ordinary meaning risk expanding the domain of statutes to accord with *judicial* rather than *popular* meanings. Relying on the Bicameralism Clause alone risks legitimizing an empty list of zeros and ones and—if applied across the board—would bar judges from relying on judicial canons or common law and might even require them to affirmatively embrace absurd results.²⁴⁴

Critics will claim I have been too quick to reject the formalists’ affection for bicameralism. In cases like *INS v. Chadha*, for example, the Supreme Court has explicitly relied upon the Bicameralism Clause to strike down the one-house legislative veto.²⁴⁵ *Chadha* was correct to strike down the one-house veto. The Court’s reliance on the Bicameralism Clause, however, raises serious questions, for the same reason that relying on the single adjective “executive” raises problems in defining the President’s role in the separation of powers. First, overbreadth: the majority’s definition of “legislative power” was broad enough to cover vast amounts of activity uncontroversially carried out by executive agencies.²⁴⁶ Second, uncertainty: as critics of *Chadha* rightly note,²⁴⁷ even members of the Supreme Court could not agree upon the proper function being

240. THE FEDERALIST NO. 51, at 337 (James Madison or Alexander Hamilton) (Cosimo 2006).

241. *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (“[A] great principle of constitutional law is not susceptible of comprehensive statement in an adjective.”) (Cardozo, J., concurring in part and dissenting in part).

242. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

243. *See* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 84–88 (2009).

244. Manning, *supra* note 81, 2,391–92.

245. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

246. The emphasis here should be placed on *executive* agencies. There is nothing in this argument that depends upon the controversy about independent agencies (a controversy I find overblown). As a realistic matter, a President can fire the heads of independent agencies if he has a good reason. This has proven little barrier to a unified executive department as an administrative matter; this is, however, a far different claim than one that the President has unitary powers in all matters, such as war. *See* Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 B.U. L. REV. 273, 294–302 (2011) (reviewing STEPHEN G. CALEBRESI & CHRISTOPHER S. YOO, *PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)).

performed, a necessary precondition to invoking the Bicameralism Clause (if, as Justice Powell believed,²⁴⁸ the action was adjudication, bicameralism would be irrelevant). Third, aggrandizement: if a court were in fact to assert bicameralism as it was applied in *Chadha*, almost all agency action could violate the Constitution because rules made by agencies are not passed by the House or the Senate nor approved by the President.

2. Purposivism as a Functionalist Theory of Separation of Powers

Unlike textualism, purposivism is far more comfortable with power-sharing arrangements. The purposivists' view of the legislature as acting reasonably is a fiction based on the hope of judicial–legislative interaction. The role of the court under the Hart and Sacks purposivist model is to act as a “relational agent.”²⁴⁹ That of course is a theory of power sharing between Congress and the courts, albeit one that was never explained by Hart and Sacks themselves, much less grounded in the Constitution. Professor William Eskridge, who has done far more along these lines than most, is not terribly worried about courts “making law” or the principle of “legislative supremacy.”²⁵⁰ And the reason he is not worried about courts making law is that he is assuming a functional theory of the separation of powers—that the Constitution enjoins the departments to share power as well as to separate it.

It is certainly true that the Constitution provides for shared powers in some cases, but this does not mean that the “shared-power theory” escapes the failings of a “purist” functional approach. There are just as many problems with an excessively zealous shared-power view of the separation of powers as with an excessively zealous “unitary-power” view. Do we really want Congress to share power with courts to decide individual cases? Do we really want courts sharing the power to remove the Secretary of State? Shared-power theories need cabinining just as much as do separated-power theories. These risks are repeated in the context of statutory interpretation theory. Shared-power theorists never tell us how much power is to be shared, just as purposivists are quick to assume a law's purpose is their own. For this reason, purposivist theories of statutory interpretation, like shared-power theories of the separation of powers, are often criticized as expanding statutes on the one hand and aggrandizing judicial power on the other hand.

3. Game Theory as Combining Formalist and Functionalist Theories of the Separation of Powers

Game theory's assumptions coincide with both formalist and functional

247. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 715–18 & n.181 (1997).

248. *Chadha*, 462 U.S. at 964 (Powell, J., concurring).

249. Eskridge, *supra* note 6, at 321.

250. *Id.* at 322.

models. Like textualists, game theorists embrace a common law, legalistic idea of statutory interpretation: laws are like contracts. To the extent that game theorists emphasize that statutory interpretation should mirror contract law, they imagine the interbranch encounter as governed by judicial values alone. On the other hand, to the extent that game theory reconstructs legislative bargains, it aims toward a greater partnership role, suggesting the relational agent of the purposivist. In this sense, game theory assumes the risks of both formalism and functionalism. These risks may in fact balance each other in positive ways. As I will argue shortly, I believe game theory may reduce the risks of purposivism and textualism, as long as game theorists give up the assumption that statutes are always finely wrought compromises and remember that legislative deals are shaped by Congress's rules.

B. A REPRESENTATIONAL THEORY OF THE SEPARATION OF POWERS

Elsewhere, I have argued that separation of powers disputes have little to do with fights over adjectives like "executive" or "judicial" (or at least these fights are unresolvable at the margins).²⁵¹ The question is not whether we properly assign a functional label: even the Supreme Court finds this extremely difficult to do.²⁵² The question is how shifting power affects power-defined-as-representation. The representational approach "asks whether and how the shifting of tasks among government players affects 'who' will decide,"²⁵³ where the "who" is the people, represented by state, district, and nation. Power is thus defined as the power of the people organized in "constituencies creating the departments."²⁵⁴ In such a world, "the risks are not descriptive impurities, but structural incentives likely to change political relationships between the governed and their governors."²⁵⁵

A simple historical example shows how this approach is consistent with both the text and originalism.²⁵⁶ Imagine a constitution that included the Vesting Clauses precisely as they are today, with their various functional descriptions. Imagine that Congress's powers were limited as they are today to those enumerated (such as the commerce power), and imagine that the President's and the Supreme Court's affirmative powers are also the same. Now, imagine the following changes: the House of Representatives elects the members of the Senate; the President has no veto; and Congress appoints members of the Executive Branch. Such proposals were considered but rejected in 1787.²⁵⁷

251. See Nourse, *Anatomy*, *supra* note 228; Nourse, *Vertical*, *supra* note 228. I am not the only scholar to eschew this exercise. See Merrill, *supra* note 232.

252. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 727, 746 (1986); *Chadha*, 462 U.S. at 951.

253. Nourse, *Vertical*, *supra* note 228, at 759.

254. *Id.*

255. *Id.*

256. See Nourse, *Anatomy*, *supra* note 228; Nourse, *Vertical*, *supra* note 228.

257. The Virginia Plan, which in amended form became our Constitution, originally provided that "members of the second branch of the National Legislature ought to be elected by those of the

Under this constitution, the Congress is still legislating, the President is still executing (indeed, we have purified the President's power by eliminating the Article I veto "legislative" power), and the courts are deciding cases and controversies. *No functional changes have occurred. But the separation of powers will disappear.*

Under this constitution, the House will be more powerful than the Senate—those elected by the House will bow to the House's will. The Congress will be more powerful than the President because he will have no veto threat. And, most importantly, the Congress will take over the Executive Branch, creating the functional equivalent of a one-department government. This will not occur because functions have been mixed, but because political relationships have changed. Real power in our government depends upon control and political relationships, not functional labels, and the Framers knew this quite well. The Constitutional Convention specifically rejected this kind of constitution because it was similar to that of many states in which power led to a "[l]egislative vortex," as Madison put it.²⁵⁸

Stressing representation and relation violates no text. Representation sits at the core of Articles I and II. The Constitution's text shows us that "the departments are created by various political relationships—by voting, by representation, by appointment."²⁵⁹ This should be more obvious: if you allow the House to elect the Senate, the House will control the Senate, which means that some constituencies will be strengthened relative to others. Localities will be more powerful than states. The functions of the House and Senate do not change—both are legislating—but their relationship does, and with that change in relationship comes a shift in powers of representation. To use a more familiar example: the problem in shifting to the Supreme Court the power to go to war is not that the Court is exercising an improper function, but that an unelected court, not the people, will decide.²⁶⁰

C. APPLYING A REPRESENTATIONAL SEPARATION OF POWERS THEORY IN STATUTORY INTERPRETATION CASES

Under traditional views, the separation of powers requires a theory of "judicial" power, "legislative" power, and "executive" power. If I am correct that functional essentialism raises risks, then how does one apply representational analysis, particularly in statutory interpretation? Representational theory looks

first." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., rev. ed. 1966) (recording the May 29, 1787 resolutions proposed by Edmund Randolph of Virginia). The New Jersey Plan, a competing proposal supported by a minority of States, provided the President with no veto power. *See id.* at 242–45. The Virginia Plan proposed that the Executive (which was thought by many to be made up of multiple persons) be appointed by the Congress. *See id.* at 21 ("Resd. that a National Executive be instituted; to be chosen by the National Legislature for the term of years . . .").

258. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 257, at 35 (statement of James Madison of Virginia, July 17, 1787).

259. Nourse, *Vertical*, *supra* note 228, at 758.

260. *Id.*

to risks to the people, to the constituencies driving the internal separation of powers. For example, if you shift power from Congress to courts, you shift power from a state and local constituency to no constituency; if you shift power from Congress to an agency, you shift power from a state and local constituency to a national constituency.

Let us assume that we are worried about shifting lawmaking power to the Judiciary when courts are asked to fill gaps in statutory interpretation. That means we are worried about a shift from a political department (the Congress) to a nonpolitical department (the federal courts), from a department that has a strong electoral connection to one with no overt electoral connection. Let us call this the “judicial aggrandizement risk”—that courts will simply decide using their own judicial views without regard to the people.²⁶¹ Second, shifting power from the Congress to the courts shifts power from a body representing states and localities (Congress) to one that is, if anything, a nationally oriented institution (the federal courts). Let us call this the “federalism risk.” Finally, shifting power from a supermajoritarian body to a body with no representation imposes a risk that a court will impose the meanings of statutory losers rather than winners. Call this the “super-counter-majoritarian risk.” Although I have stated these as risks, there is nothing fortuitous about them—these risks mirror the foundation built in Part I, a foundation grounded in the Constitution’s provisions for representation and bicameralism.²⁶²

Return to *Holy Trinity* to apply a representational analysis.²⁶³ The first risk is that the Supreme Court will apply its own preferred meaning rather than Congress’s meaning—a risk that the Court will not be a faithful agent. Enter our earlier distinction between legalist and ordinary meaning. A court applying legalist meaning without even considering ordinary meaning would, in my opinion, risk violating the separation of powers. Legalist meaning raises the risk of judicial aggrandizement of power by preferring the courts’ meaning (canons, common law) to the people’s meaning (representatives’ meaning). After all, not even academic textualists dispute the proposition that the legislature is the superior of the Court and, that the Court, under principles of legislative supremacy, must defer to its power. If this is right, then academic theorists must stop assuming that elite judicial meanings should apply and start considering that popular, prototypical meaning should be a starting presumption, and that this is not a matter of semantics but of constitutional restraint. This is not a

261. Cases like *Bowsher v. Synar*, 478 U.S. 714, 727, 746 (1986), or *Morrison v. Olson*, 487 U.S. 654 (1988), exemplify this risk because they put substantial power in the hands of persons who have no electoral constituency.

262. As John Manning has written, even without the filibuster, bicameralism and presentment impose “an effective supermajority requirement for legislation,” which gives “political minorities . . . extraordinary power to block legislation or . . . to insist upon compromise.” John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1701, 1717 (2004).

263. *Church of the Holy Trinity*, 143 U.S. 457 (1892).

theoretical point; it has consequences: an insistence on ordinary meaning in *Holy Trinity* would, in my opinion, support the Supreme Court's decision, based on the prototypical meanings of the day.

Judicial aggrandizement is not the only constitutional risk arising from gap filling in statutory interpretation. Federalism is also a risk. Every time a federal court interprets a statute, it risks imposing a nationally appointed body's view on an institution directly connected to state and local entities (the Congress). The statute in *Holy Trinity* pitted large interstate enterprises, such as railroads (which wanted to import labor in mass quantities), against small manufacturers and laboring men, groups far more likely to have local, state-based ties. Courts should be more wary of the potential for this pro-nationalist bias. Federalism supports the claims of those who argue that courts should defer to legislative meaning, including legislative history. This may help to explain why it is that deference to agency decisions has resulted in what should be decried by federalists as a pro-nationalist bias: as Bill Eskridge has shown, and this theory predicts, *Chevron* deference to agencies increases the degree to which national law will preempt state law.²⁶⁴

Finally, there is the risk of super-countermajoritarianism—that a court will impose the meaning not of the majority, but of a small minority, even while it cloaks that meaning in the garb of “legislative intent.” This is particularly acute when courts attempt to reconstruct deals or pick and choose from the legislative record “loser’s” history (rather than using legislative history as a lexicon—as a source of ordinary or legalist usage).²⁶⁵ To apply legalist meaning in *Holy Trinity* (all laborers) risks countermajoritarianism. Why should the arguments of the railroad financiers opposing the bill count as *the* meaning of the legislation? Or why should we assume that Senator Tower's understanding of his amendment merits deference when he voted against the 1964 Civil Rights Act?²⁶⁶ This differs from a simple risk of legalism because it disguises as a majority view that of a superminority. Surely, courts in statutory interpretation cases, if they are to be faithful agents, are to be faithful agents of the majority, not a tiny but committed set of opponents to the bill!²⁶⁷

264. See, e.g., Eskridge, *supra* note 31, at 1443–44.

265. As we have seen above, it may be important to look at losers' amendments or statements to gain a proper context, but positive political theorists are correct in their warning that it would be improper for a court, particularly given the supermajoritarian difficulty, to find the meaning of a law in the statements of those who opposed it. See *supra* section II.C.2.

266. This is certainly true in cases like the Tower Amendment and the Civil Rights Act of 1964 (which we know was filibustered). To adopt the minority view in the Tower case poses the risk of importing the filibuster rule into the statutory interpretation enterprise. See *supra* section II.C.2 (discussing game theory and Tower).

267. Professor Manning seems to suggest that supermajoritarianism and bicameralism argue for precisely the opposite result. See Manning, *Second-Generation*, *supra* note 7, at 1315 (“If the constitutionally or legislatively prescribed rules of procedure give minorities and preference outliers a disproportionate voice in the legislative process, the judge’s job is to give effect to those procedures by enforcing a clear but awkwardly written text.”). Under Manning’s view, features like bicameralism and supermajoritarianism force compromise, and courts should not undermine that incentive. John F.

One might argue that I have stressed issues of judicial deference without emphasizing ways in which the judiciary should in fact check legislative excesses. Indeed, one way of thinking of academic textualism is that, to the extent that it aims to discipline the legislature into writing clearer statutes, it asks the judiciary to check the legislature. As I have indicated above, as a descriptive matter, I think this “disciplining” idea verges on the fanciful: as Adrian Vermeule has shown, courts do not have the institutional capacity to discipline themselves to send a consistent enough message to Congress to change its behavior.²⁶⁸ More importantly, there are no votes in semantic precision, and thus no incentive for the representative to listen to the routine signals of courts, even if the occasional highly salient case may receive legislative attention.

The disciplining argument also lacks normative legitimacy. Checking theory cannot describe the separation of powers. If it did, judicial review would be the norm, not the exception. Congress would be capable of adding checks willy-nilly, such as approving the removal of inferior or superior officers (a sure way for the Congress to inject itself into the executive branch). Because judicial review is the exception, not the norm, disciplining Congress—the analog of judicial review within statutory interpretation—cannot be a legitimate primary role for courts in statutory interpretation cases, if for no other reason than that checks run riot would permit automatic judicial review of all exercises of legislative power, a position contrary to a great tradition of judicial restraint in constitutional law.

D. EVALUATING THEORIES OF STATUTORY INTERPRETATION IN LIGHT OF SEPARATION OF POWERS RISKS

We may now assess the three theories of statutory interpretation we have seen in Part II—textualism, purposivism, and game theory—from a separation of powers perspective. It turns out that the rule that almost all academic purists reject, but which prevails in most federal courts, is the one most likely to reduce constitutional risks. Put in other words, none of the pure academic theories can

Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1650–51 (2001). There is no question that supermajoritarianism forces compromise and that this may be legislatively virtuous. The question remains whether courts should defer to minorities, as opposed to majorities. There are three problems with Professor Manning’s view-from-structure: (1) courts do not create the incentive to compromise; it is demanded by the Constitution *ex ante*; (2) given the strength of the internal incentive, no external force like a court ruling or rule of statutory interpretation is likely to change it (senators do not sit around reading slip sheets; horizontal communication between the departments is weak and full of noise except in the most politically salient cases); (3) courts that seek to perfect this vision of structure in statutory interpretation risk reconstructing the position of a legislator who *opposed the statute*. Surely the Constitution does not require that courts interpret statutes *against the majority will* or exacerbate the already supermajoritarian character of the Congress. Game theory certainly does not support this, nor in my opinion does the Constitution. The only way to tell whether there was in fact a deal that can be reconstructed is to look at legislative history and then to remember that, as textualists rightly claim, it is unlikely to resolve the interpretive issue before the Court.

268. See VERMEULE, *supra* note 8.

lay claim to reducing these risks as satisfactorily as the judicially well-established but academically oxymoronic position linking ordinary meaning textualism with legislative history.

Of all the theories we have seen, it is ordinary meaning textualism that fares the best—if, and this is a significant if—it *declines to blind itself to legislative history*. Ordinary meaning textualism should, in theory, be the most open to public meaning and thus most deferential to the legislature. Who is better at determining ordinary meaning: legislators bound by an electoral connection or judges with no such connection? Looking at legislative history to determine whether usage is legalist or prototypical provides the best chance to reduce the possibility of a judge supplanting his or her legalist meaning for that of Congress and the people. And, for that reason, relative to its competitors (emphasis on the “relative”), it provides the best means of reducing both superminoritarian readings and federalism risks by properly deferring to a body with interests far more closely aligned to states and localities.

If one cares about judicial activism and the separation of powers, one must care about judges deferring to the legislature. The reason we have a separation of powers is that no man, no judge, no president, no legislator may be a “judge in his own cause.”²⁶⁹ As Professors Farnsworth, Guzik, and Mulani have shown, once interpreters are asked to take an external view, one which considers ordinary meaning (as opposed to legalist meaning), they are more likely to check their ideological biases at the door.²⁷⁰ This does not mean that judges or scholars must rummage through the legislative history. The congressional record is not an appellate opinion. Reviewing the legislative record under this view would be an attempt to look for evidence of ordinary meaning. In *Holy Trinity*, reviewing the entire legislative record (not slicing and dicing it up into one-shot exchanges) offers clear and convincing evidence that manual labor was by far the most common meaning used to debate the statute.²⁷¹ This meaning cannot be used to trump the text, but here it supports the prototypical ordinary meaning of dictionaries of the day, not to mention the Supreme Court’s actual result, without invoking either vague legislative spirits or claims of absurdity.

Ordinary meaning is, of course, only a starting point. As humans, legislators use language in both prototypical and legalist senses. In cases involving courts’ own procedures, the risk of legalism may be minimal. Indeed, in such cases, one might even assume that Congress has delegated to courts the authority to interpret the law consistent with courts’ own precedents. Examples here are evidentiary rules such as those in *Bock Laundry*²⁷² or the standard for *scienter* in securities actions. In fact, legalist meaning may be quite appropriate if it is

269. Nourse, *supra* note 7, at 470–71.

270. Farnsworth et al., *supra* note 129.

271. See *supra* section II.B.

272. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 505 (1989).

clear that Congress has used prototypical meaning to oppress. For example, a court asked to interpret race in the context of the nineteenth-century racial terms in the legislative debate on the *Holy Trinity* statute might conclude that such a popular meaning runs contrary to present-day constitutional norms and, to avoid a constitutional question, a legalist meaning of race should prevail.

Game theory has important insights for those who adopt a version of this approach known as “imaginative reconstruction.” Game theorists are right that loser’s history cannot be *the* meaning of the statute. Imaginative reconstruction, however, cannot adopt game theory wholesale without significant modifications. First, it must, as its most sophisticated proponents acknowledge, include audience costs (the vertical bargain), or it will construct an imaginary contract. More importantly, it cannot assume that there is a deal when there is not. If it does, game theory risks aggravating the difficulty it identifies (relying on losers’ history, or constructing history out of thin air). Second, assuming, for example, that any particular word in a statute is the result of a deal ignores the best evidence (if any) of a deal—the legislative history, including changes in textual language. Even assuming that the legislative record is unclear or repeats the ambiguity of the statute, consulting it first (at a minimum as a lexicon)²⁷³ provides better information and greater checking power for judicial activism than blinding oneself to it.

To the extent that purposivism is willing to look to legislative history, it, like imaginative reconstruction, reduces some separation of powers risks but, in the end, may do no better than other theories at minimizing judicial activism and deferring to majoritarian will. Game theory at least has a concept of the difference between winners and losers, between deferring to a congressional majority as opposed to a minority. Purposivism aims to defer, but does not have the understanding or sophistication of imaginative reconstruction, much less game theory. Like academic textualists who occasionally try their hand at legislative history, purposivists slice and dice the legislative record as if it were a judicial opinion, which it most definitely is not. In this sense, academics’ versions of purposivism can yield just as serious countermajoritarian risks as academic textualism: if losers’ history is seen as having the same weight as the record as a whole, purposivism can be as countermajoritarian as a narrow, legalist textualism. To the extent that purposivism relies on losers’ purposes, it raises the potential to increase federalism risks and to impose judicially activist meanings.

Of all the theories, however, legalist, academic textualism poses the most serious separation of powers risks. Literalist, legalist meanings, as Judge Posner has wisely insisted, can be as broad as handing over a sledgehammer for a sleep aid. Academic textualism (imposing boundary, peripheral meanings) raises the greatest risk relative to other approaches because it refuses to check the

273. This is a minimalist use of history and is theoretically different from other uses, a topic I do not address in this Article. See *supra* note 10.

Judiciary's most likely biases toward legalist meaning. It refuses to look outside a judicial world to defer to its constitutional superior, the legislature, for which it exudes a considerable amount of "eat your spinach" contempt. This aggravates federalism risks by potentially supplanting state and local meaning with nationalist meanings and antimajoritarian risks by potentially deferring to super-minorities, not majorities. Only if academic textualists were to use legislative history to check the risks of judicial activism, before imposing judicially created meanings from canons or common law, would they properly respect the separation of powers. Of course, this would mean, to these academics, that they were no longer textualists, a purist proposition with which the Judiciary, including the Supreme Court, has respectfully disagreed.

CONCLUSION

In this Article, I have tried to show how theories of statutory interpretation not only imply a theory of Congress but as well a theory of the separation of powers. Critiquing three leading theories—textualism, purposivism, and game theory—as inconsistent with dominant, evidence-based, institutional features of Congress, I argue that each of these theories may increase risks of judicial aggrandizement and judicial legislation. Whether my analysis is correct or not, it should now be clear that theories of statutory interpretation must move beyond internecine warfare. They must articulate a coherent theory of Congress and, more importantly, ground themselves in a theory of the separation of powers of the Constitution entire.