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ELEMENTARY STATUTORY INTERPRETATION: RETHINKING LEGISLATIVE INTENT AND HISTORY

VICTORIA F. NOURSE*

Abstract: This Article argues that theorists and practitioners of statutory interpretation should rethink two very basic concepts—legislative intent and legislative history. Textualists urge that to look to legislative history is to seek an intent that does not exist. This Article argues we should put this objection to bed because, even if groups do not have minds, they have the functional equivalent of intent: they plan by using internal sequential procedures allowing them to project their collective actions forward in time. What we should mean by legislative “intent” is legislative “context.” For a group, context includes how groups act—their procedures. Once one accepts this position, we must rethink the very concept of legislative history. Legislative history is not a search for a mental state, behind the words, but a search for decisional context. We should give up talking about legislative history, replacing it with the far more helpful notion of legislative decision and statutory context.

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Intent is unfortunately a confusing word.

—Dean James Landis¹

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

—Jeremy Waldron²

Text without context often invites confusion and judicial adventurism.

—Senator Orrin Hatch³

INTRODUCTION

It is often said that statutory interpretation assesses meaning. This is true but incomplete. Poems and novels mean. Statutes are more than meanings. People do not march or vote based on poems or novels. Some have suggested that statutes are particular kinds of communicated meanings—commands to judges and citizens. This is also true but incomplete. Such a view imagines law made from “nowhere.” Statutes are decisions made in an electoral and procedural *context*. It is no exaggeration to say that, without that context, democracy evaporates. A statute’s legitimacy in our constitutional order depends upon context: that the law is the product of an elective, democratic process rather than autocratic fiat.

Recently, I elaborated a theory of statutory interpretation foregrounding legislative decisionmaking as essential to determining a statute’s meaning.⁴ The claim of that theory is that text is central but cannot be understood without looking at legislative context. Call this “legislative decision theory.” That theory is subject to two important objections. Textualists claim that Congress, as a

¹ James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886, 888 (1930).

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

³ Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43 (1988).

⁴ Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L. J. 70, 99 (2012). I originally described this as “decision theory” simpliciter. *Id.* at 73 n.4 (explaining this distinction). Here, I use the term “legislative” decision theory to distinguish it from welfarist accounts. The term “decision” remains crucial as it more properly conveys the legitimacy of congressional processes, and avoids the deep ambiguities of the term “intent.” *See infra* notes 57–88 and accompanying text.

group, can have no intent,⁵ and that it follows that one cannot look beyond the text. Call this the “group-intent objection.” Textualists also argue that the only way to determine controlling text is by excluding legislative history. Call this the “legislative history objection.” Purposivists are happy to invoke legislative history. Nevertheless, purposivists have never set forth a consistent theory of legislative history nor answered the “intent” question other than to substitute “purpose” for intent. In this Article, I aim to illuminate both the “group intent” and the “legislative history” objections.

First, this Article addresses the “group-intent objection.” Contrary to the implications of both textualism and purposivism, Congress has the functional equivalent of intent. Congress’s functional equivalent of intent, like that of any group, depends upon sequential procedures. Procedures are how a group plans.⁶ The way to look at intent is not to imagine some meaning behind the meaning in an individual’s head. Of course, Congress has no mind.⁷ Congress’s procedures—its way of planning—is its way of having intent. When we consider Congress’s intent, we are asking for the context in which Congress has legislated and that includes, most importantly, procedural context.

Second, this Article addresses the legislative history objection. Any philosopher of language will tell you that plain meanings do not exist without an understanding of the communicative context of the speaker.⁸ If I say “I take the fifth,” it may seem “plain” to lawyers that I am talking about the Fifth Amendment to the U.S. Constitution. Nevertheless, that is only because listeners have added their own context—a legal and judicial context—to the statement. “I take the fifth” could as well mean the fifth amendment to a bill in the Senate or the fifth doughnut in a line of doughnuts. Text, without context, can be radically indeterminate, a mere vessel in which to pour judicial assumptions.

When Congress passes a statute, it does so against a background context of rules, procedures and deliberation. That context does not exist in anyone’s

⁵ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) (“Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver.”).

⁶ The planning of an idea is of notable importance. For further discussion, see generally MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY (Ernest Sosa et al. eds., 1999); SCOTT J. SHAPIRO, LEGALITY (2011).

⁷ As we will see, shifting from “intent” to “purpose” does not solve the problem. See *infra* notes 51–89 and accompanying text.

⁸ Semantic content is exceedingly sparse, as Scott Soames and other philosophers of language have shown. Scott Soames, *Vagueness in the Law*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 95, 97 (Marmor Andrei ed., 2012). Many statutes are written using terms that, from a philosopher’s perspective, are “extravagantly vague,” such as negligence or reasonableness. Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 18 (Andrei Marmor & Scott Soames eds., 2011).

head: it is public and constitutionally sanctioned.⁹ For years, we have called this context by the term “legislative history,” but in fact that term is misleading in a number of ways that will become evident. There are important differences between statutory history (the history of the text of the statute), statutory usage (the semantic content as understood by members of Congress), and public documents sanctioned by the group (committee reports). Both textualism and purposivism are poorer for failing to parse these different meanings of legislative history. Both should give up the notion that legislation operates according to coherent narrative principles as if what Congress did was a “history.” Legislative “history” should be replaced with legislative “context,” informed by the view that statutes are not stories, but elections.

In Part I of this Article, I argue that Congress does have the functional equivalent of intent, but this requires us to jettison the standard “ghostly minds” definition of “intent.” My argument rejects a claim that has captured the imaginations of great legal minds from Max Radin¹⁰ to Ronald Dworkin¹¹ to Justice Antonin Scalia. If it is true that government by “unexpressed intent” is decidedly tyrannical,¹² government by constitutionally supported procedures is decidedly democratic. Next, I show how recent work in positive political theory and philosophy on group agency supports my views and should render us more skeptical of claims implying that groups—from Congress to Harvard—cannot act in ways we recognize every day.

In Part II of this Article, I address the all-or-nothing legislative history debate. I argue that both textualists and purposivists need a more realistic and disciplined understanding of legislative history. Basic notions like the fact that statutes are elections—some texts win and some lose—must be incorporated into the quest for legislative context. Lawyers and judges should stop imposing narratives on a process that is built to be redundant and oscillating. This Article

⁹ See U. S. CONST. art. I, § 5 (providing that each House of Congress may “determine the rules of its proceedings . . .”).

¹⁰ See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (arguing against intent). As John Manning explained, “[t]he textualists’ intent skepticism can be traced to the work of Max Radin, a noted legal realist.” John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 n.81 (2003) (recapitulating Radin’s argument against intent); see William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372–73 (1990) (discussing the textualists’ debt to Radin).

¹¹ See RONALD DWORKIN, *LAW’S EMPIRE* 314, 335–36 (1986) (“So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.”); see also RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 19 (2012) (arguing that Dworkin asserts as a “tacit premise . . . that the legislature cannot have an intention because it is an institution.”).

¹² See SCALIA, *supra* note 5, at 17.

concludes with a plea for more understanding about how statutes are made in building any democratic theory of statutory interpretation.

I. THE GROUP-INTENT OBJECTION RECONSIDERED

It is no exaggeration to say that the two major theories of statutory interpretation judges use today—textualism and purposivism—are built upon the conceptual ashes of “legislative intent.” Legal process theory—dominant in the field for the last half of the twentieth century¹³—shifted the terrain to “purpose” because of realist critiques of “intent.” When textualism arrived in the 1980s, it put its arms around the realist critique declaring that Congress had no intent—interpreters should look only at text. In both cases, textualists and purposivists launched their campaigns from the same conceptual starting place—the question whether Congress could have an “intent.”

In this Part, I will consider that objection at length and respond that Congress does in fact have a functional equivalent of intent. I begin by providing a background on legislative decision theory in Section A. In Sections B and C, I examine the modern theoretical objections to intent and the meaning of intent. In Section D, I explain why Max Radin’s view of intent was incorrect. This Part concludes with a discussion of group intent and group agency.

A. A Brief Background in Legislative Decision Theory

If legislative decision theory were found on a bumper sticker, it might read “Statutory Interpretation Finally Goes to Congress.” None of the primary theories of statutory interpretation have a positive theory of how Congress works.¹⁴ Chapter 5 of Hart & Sacks’s *The Legal Process*, entitled “The Legislative Process,” weighs in at a healthy 314 pages, but less than five percent of those pages deal with congressional rules or procedure.¹⁵ Justice Scalia’s fa-

¹³ Legal process has been the preferred theory of those who propound it, such as Justice Stephen Breyer, and the major target of those who reject it, such as Justice Antonin Scalia. See generally William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. 865 (2013) (discussing Justice Breyer’s and Justice Scalia’s viewpoint on legal process theory). Both Justices were schooled in the technique at Harvard. *Id.* at 866. Thus, it is not surprising that it would be dominant, in positive and negative forms, on the Supreme Court. See *id.*

¹⁴ Cf. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 152 (1989) (“A normative theory of interpretation without a positive theory of politics may lead us simply to defeat our own ends.”).

¹⁵ See generally HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1958) (discussing the legislative process, but devoting little attention to congressional rules and procedures). To its great credit, the materials do address one of Congress’s most important functions, appropriations, and reprint at length hearings on a matter

mous Tanner lectures make mention of some congressional processes in a paragraph or two, ultimately deeming congressional intent impossible.¹⁶

Legislative decision theory argues that the meaning of a federal statute cannot be determined without knowing basic principles of Congress 101,¹⁷ akin to the kind of knowledge accessible to a first year law student about the elements of a trial. From there, it seeks to reverse engineer statutory text. Put in other words, the theory looks for how textual decisions are made within the context of a set of sequential decisions.¹⁸ Knowledge of basic procedural moves is essential context for understanding routine practices. Consider a game of chess: if you tried to make sense of it, with no knowledge of the rules, the players' actions might seem strange chaotic moves on a checkered board. Similarly, trying to make sense of a trial transcript without knowing the basics of trial procedure could yield just as much confusion. So, too, it should seem strange to try to understand Congress without understanding its institutional procedures.¹⁹ If one can teach students the fine-grained elements of the hearsay rule, I am quite sure one can teach them the difference between a conference report and a committee report.

Legislative decision theory differs from textualism. Like all theories of statutory interpretation, it starts with the text. But it does not end with text. It defines "textualism" as the practice of drawing boundaries around text and

involving flood insurance which, today after various tremendous hurricanes, appears surprisingly relevant. *See id.* at 963–87.

¹⁶ SCALIA, *supra* note 5, at 31, 32. Justice Scalia writes, "[g]overnment by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver." *Id.* at 17. Furthermore, he posits that "with respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent." *Id.* at 32; *see* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651–52 (1990) (arguing that Justice Scalia adopted Radin's critique against collective intention and describing the notion "[t]hat a majority of both houses of Congress . . . entertained *any* view with regard to [relatively minor] issues" as "utterly beyond belief").

¹⁷ Legislative decision theory does not require that one cultivate the kind of knowledge of Congress akin to that of its most erudite students, just as knowledge of civil or appellate procedure does not require memorization of the various rules governing the differing filing procedures for briefs in differing courts of appeals.

¹⁸ *See* Nourse, *supra* note 4, at 93–98.

¹⁹ Some will reply that aspects of the process are well known, but, in fact, it is fairly evident from caselaw that the most learned of jurists remain confused about the most basic congressional procedures. *See id.* at 94–95 (demonstrating that the Supreme Court did not consider the rules of Congress when attempting to resolve ambiguous statutory language). Others will reply that the rules are only part of a more complex process. It is often said that we live in an age of "unorthodox lawmaking" and new forms of congressional procedures. But similar changes have occurred in the judiciary, for example, in civil procedure, without making nonsense of a trial's basic sequential ordering. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS, at ix (4th ed. 2012). For example, no one thinks that managerial judging means that motions come after jury instructions. So, too, no one should think that in an age of unorthodox lawmaking cloture comes before bill introduction.

claiming that the text's meaning can be exhausted by semantic content plus syntax (and perhaps the text of similar statutes or canons).²⁰ By contrast, legislative decision theory argues that semantic meaning of congressional text requires resort to congressional *context*. Even when semantic content appears clear from the face of the statute, the inquiry cannot stop. A faithful agent of Congress must understand Congress's meaning and that meaning can only be found by looking to Congress's textual decisions in procedural context.²¹

Legislative decision theory also differs from purposivism. It focuses on how *textual* decisions were made—what one might call statutory history, rather than *purposes*. The point is not to roam around legislative history, but to target the relevant point of decision. Legislative decision theory actually makes the search for the point of decision easier and faster by targeting the relevant texts (substantially aided by new computer databases),²² and starting the process from the back-end of lengthy lawmaking efforts. This approach acknowledges the vital importance of statutory ends—the “mischief” Blackstone once impor-

²⁰ This is the definition I take to be used by textualists who draw a strong distinction between textualism and purposivism. See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1554 n.42 (2008) (“The main dividing line on the present Supreme Court is between textualists, who emphasize the conventional semantic meaning of the enacted texts, and purposivists, who emphasize the goals that Congress sought to pursue in enacting the text.”). Textualists maintain that they are not literalists in that semantic content may go beyond the “four corners of the text” to include “specialized conventions and linguistic practices peculiar to the law,” as well as “off-the-rack canons of construction peculiar to the legal community,” which help to flesh out semantic content. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81, 82, 83 (2006).

²¹ Positive political theory supports this emphasis on procedure. We know, for example, that whatever stability or equilibrium can be found in politics is a result of rule-following. See Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 29 (1979) (“[I]nstitutional structure—in the form of rules of jurisdiction and amendment control—has an important independent impact on the existence of equilibrium . . .”). This was Kenneth Shepsle's great insight in his rebuttal to logical claims made about democracy's inherent irrational character associated with Kenneth Arrow's cycling theorem. *Id.* Dan Rodriguez and Barry Weingast, for example, have urged that it is irrational not to look to legislative history because legislative process provides more, rather than less, information about legislative meaning. 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, 1422–23 (2003). Unlike some claims made by positive theorists, however, legislative decision theory is parsimonious. It requires no application of theories developed within the political science literature, voting patterns, or concepts that would be difficult, if not impossible, for judges to apply.

²² Some argue not that intent is impossible as a logical matter, as did Radin, but as a practical matter. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1839 (1998). The practicality objection deserves greater analysis but has been largely overtaken by technology. Computer databases now allow precise searches for terms using a keyboard's “Control F” function as a tool. I have timed students while they found discussions of particular amendments, cloture, and particular terms. Searches that would have once taken lengthy periods now take minutes.

tuned statutory interpreters to identify.²³ But it argues that we only recur to such reasoning as a matter of statutory *construction* rather than interpretation, when all resources about textual meaning have been exhausted.²⁴

To both textualists and purposivists, legislative decision theory emphasizes the importance of legislative context in two ways. First, it insists that if one is going to read legislative history, one should read it correctly. Second, and more controversially, it argues that reading legislative history correctly is crucial to reading a statute's text. In major statutory interpretation cases, both textualists and purposivist judges have misread legislative history in ways that should be more obvious. No one confuses a dissenting opinion with a majority opinion, nor should one confuse losers' with winners' legislative history.²⁵ Everyone knows that key amendments passed after basic provisions should be considered very important text. Finally, some committees, namely conference committees, cannot change bill text agreed upon by the House and the Senate. Yet even textualists have failed to recognize that, in some cases, the text they find so crucial, absurd and even unthinkable, is text any member of Congress would devalue, harmonize, or ignore precisely because it was added by a part rather than the whole of Congress.²⁶

To summarize: although this is not the venue in which to explicate the normative bases of the theory, the point is to focus on democratic contexts rather than judicial ones. Without self-conscious judicial constraint, there is a risk that judges will simply write the law that they want. If Congress's context is not considered, it will be the judge's context that determines the choice of text and its meaning. The question the interpreter must ask is: what did Congress decide? And that question cannot be answered if one does not know the rules by which Congress makes decisions. At the very least, one cannot be a faithful agent to a principal to whom one has sworn willful (textualist) or lazy (purposivist) blindness.

²³ 1 WILLIAM BLACKSTONE, COMMENTARIES *58, *61.

²⁴ When purposivists attribute a purpose to Congress, they are imposing, not finding, Congress's meaning. This may be a proper theory of statutory construction. There are good reasons to believe, for example, that a purposivist inquiry catches legislative meaning at its likely level of generality. If one is to attribute meaning to members, there are reasons to believe that members are likely to understand and communicate the meaning of legislation in broad, generalist, terms. Rather than a fine-grained analysis of text, they are likely to vote on how the bill will be seen by voters, who are not experts in legal texts.

²⁵ Nourse, *supra* note 4, at 75.

²⁶ *See id.* at 94–95 (further elaborating on this idea).

B. Modern Theoretical Objections To Legislative Intent

It should seem strange that we still talk of legislative intents rather than legislative decisions. We write easily of Supreme Court decisions as “decisions.” That the Supreme Court may change its “mind”—that the Court may overturn its own precedent—does not prevent us from calling its work “a decision.” That the decision is partial—that the Court may divide 5-4—does not prevent us from calling its work “a decision.” That the decision is in part delegated—that the Court allows clerks to draft opinions—does not prevent us from calling its work “a decision.” We dub the Supreme Court’s written work a “decision”—however subject to change or division or delegation—because its action has a finality within the judicial world. All of this could be said, but is not, of Congress’s decisions in committee reports or in text, which have meaning within a legislative world. Reports and votes and text are public acts, even though subject to revision, delegation or complete reversal. And, yet, there is no more basic linguistic practice in statutory interpretation than describing these public acts as “legislative intent.”²⁷

The term “legislative intent” is as ancient as American²⁸ and British statutory interpretation.²⁹ Nowhere is its meaning more important, however, than when it comes to the “group-intent objection”—the claim that Congress can

²⁷ One might ask why we do not look for the Supreme Court’s intent. In fact, we do: when the meaning of a Supreme Court decision is unclear, or even unfortunate or contentious, we quickly resort to procedural context to determine meaning. So, for example, if a concurring fifth vote is necessary to reach a result, the opinion of a single justice may become the meaning of the Court. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952). This follows from the basic procedural principle that a decision of the Court is a decision by a majority of the members of the Court. One might contend that, even if this is true, one does not look “behind” individual opinions to “cert” memos and other pre-opinion documents to find meaning. We do not do this for the same reasons we do not look to individual representatives’ statements to find the meaning of a majority-passed statute; an individual justice has no authority to speak for the Court, just as individual senators have no authority to speak for the U.S. Senate. As this footnote shows, in cases where meaning is uncertain and matters, we do look “behind” the meaning of a majority opinion to find the central “agreed-upon” doctrine, even to the extent of relying upon the opinion of an individual justice. Rules matter to meaning. Change the rules of majority voting in the court and you will change the meaning of a decision. We might, for example, have a rule that a precedent only existed if there were nine votes or six votes, in which case our understanding of the meaning of a 5-4 decision would change. Indeed, it would be no decision at all.

²⁸ *See Helms’ Lessee v. Howard*, 2 H. & McH. 57, 94 (Md. 1784) (“The intent of the legislature is to be collected from all parts of the act.”); *Robin v. Hardaway*, 1 Jeff. 109, 118 (Va. 1772) (quoting Blackstone on the “intent of the legislature”).

²⁹ *See BLACKSTONE, supra* note 23, at *59 (“The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable.”); *see also* THOMAS HOBBS, *LEVIATHAN*, ch. XXVI, at 133 (Empire Books 2011) (1651) (“[I]t is not the Letter, but the Intendment, or Meaning; that is to say, the authentic Interpretation of the Law (which is the sense of the Legislator,) in which the nature of the Law consisteth.”); *see also* JOHN FINNIS, *AQUINAS* 255-58, 257 n.19 (1998).

have no intent.³⁰ The “group-intent objection” was first proposed in a seminal article written in the 1930s by the realist-skeptic Max Radin.³¹ His argumentative ax was blunt: A group legislature has no intent precisely because of its collective character.³² “[t]he intention of the legislature is undiscoverable in any real sense”³³ Radin’s critique has become a classic in the legal theory of realism. For our purposes, the argument is more important for its extraordinary lasting power and extravagant effect on statutory interpretation theory. Citation to Radin is ubiquitous by both textualists and purposivists.³⁴

In the 1980s and 1990s, Justice Scalia embraced Radin’s critique as the baseline from which to launch his plea for textualism and against purposivism: there being no collective intent, text alone should govern.³⁵ Of course, Radin, the left-wing realist-skeptic, would have been shocked to learn that his approach had been appropriated by an avowed formalist conservative.³⁶ This reversal of fortune, nevertheless, was made possible, in part, because of intellec-

³⁰ See Radin, *supra* note 10, at 870 (proposing the “group intent objection”).

³¹ See generally Radin, *supra* note 10.

³² *Id.* at 870.

³³ *Id.* For purposes of this Article, I define the thesis in these terms: Radin (and his followers) do not think it literally impossible to form a group intent; instead, they demand that each person in the group have the same mental state, so that it is practically impossible. See *id.* My thanks to Larry Solum for making this point to me.

³⁴ For only some of the citations to Radin’s intent argument by two prominent statutory interpretation figures, see the work of purposivist William N. Eskridge, Jr. and textualist John F. Manning. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 n.113 (1987); William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 635 n.118 (1990); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012 n.13 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332 (1990); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in A Nutshell*, 61 GEO. WASH. L. REV. 1731, 1736 & n.32 (1993) [hereinafter Eskridge, *Speluncean Explorers*]; Eskridge, *supra* note 16, at 642; John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 430 (2005); John F. Manning, *The Necessary and Proper Clause and Its Legal Antecedents*, 92 B.U. L. REV. 1349, 1364 (2012); John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1761 & n.37 (2012); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1611–12 (2012).

³⁵ See Eskridge, *supra* note 16, at 651–52 (“[H]is attack was primarily a realist one. Thus, Judge Scalia followed the Radin critique of the concept of legislative intent.”).

³⁶ Radin’s left-wing sympathies were opposed by conservatives of his day. See Hans A. Linde, *Hercules in a Populist Age*, 103 HARV. L. REV. 2067, 2069 (1990) (reviewing JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE* (1989)) (noting that “in 1939 a conservative attorney general, Earl Warren, blocked confirmation of an eminent Berkeley professor, Max Radin, for alleged left-wing sympathies,” for a position on the California Supreme Court). Justice Scalia’s conservative leanings are well known. See *60 Minutes: Justice Scalia on the Record*, (CBS television broadcast Apr. 27, 2008), available at <http://www.cbsnews.com/news/justice-scalia-on-the-record/>, archived at <http://perma.cc/RM5L-5LBU> (“I mean, I confess to being a social conservative, but it does not affect my views on cases.”); see also JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 76 (2009) (recounting Justice Scalia describing his life as a conservative before becoming a justice as “isolated, lonely . . . like a weirdo.”).

tual failure. The dominant school of thought in statutory interpretation, the legal process school, pioneered in the Hart and Sacks materials,³⁷ never answered Radin's skeptical critique in a way satisfying to scholars of statutory interpretation. Having left it standing, the legal process school was soon impaled by it.

At first glance, it might seem as if Hart and Sacks's move to "purpose" answered Radin's challenge. But, as Radin's own article makes quite clear, substituting purpose for intent does not, *as a conceptual matter, take care of the matter of group agency*. Radin's critique against a "group intent" applies as well to "group purposes." If there can be no collective intent, there can be no collective purpose. In fact, at least as far as the collectivity critique, there appears no difference between the terms "purpose" and "intent."³⁸

Hart and Sacks recognized this, emphasizing the complexity of attributing a purpose to a statute and explaining that the legislature could have multiple purposes.³⁹ They argued that a judge could determine the most reasonable purpose, the one offering a law's best account. Hart and Sacks shifted from a speaker's meaning view to a listener's meaning view, moving the debate from statutory interpretation (the discovery of meaning) to statutory *construction*

³⁷ HART & SACKS, *supra* note 15, at 89. Hart and Sacks were not alone in their advocacy of purposivism. *See, e.g.*, Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947). Nevertheless, their "exceptional" materials on legal process have "provided the name, the agenda, and much of the analytical structure for a generation of legal thought." William N. Eskridge Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 15, at lii. Purposivists recognized the claim that legislatures may not have anticipated particular, specific results, and sought to use "purpose" to solve that problem. *See* Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 374 (1947) (arguing that even though legislatures form no specific intent concerning many interpretive controversies, judges may, nonetheless, resolve doubtful uses by reference to "the general purpose" that lies "behind the statutory words"); HART & SACKS, *supra* note 15, at 89 (questioning whether, during a "general codification of the law of inheritance," the "likelihood that the legislature . . . consciously said to itself . . . 'as an incident of all the other things we are now doing, we are here deliberately deciding,'" the specific question whether the murdering heir should receive an inheritance); *id.* at 92–93 (contrasting an approach seeking the "intention of the legislature" on the "question" before the court with an approach which deemed the court bound to background "principles and policies" unless it had made a different "purpose" "clear openly and responsibly"); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677 n.11 (1997) ("[T]hose who focus on general purpose stress the difficulty in reconstructing *specific* intent.") (emphasis added).

³⁸ Radin, *supra* note 10, at 878 ("[T]o interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed."). If one carries purpose as far as it will go, "the avowed and ultimate purposes of all statutes, because of all law, are justice and security." *Id.* at 876.

³⁹ *See* HART & SACKS, *supra* note 15, at 1378 (recommending that the interpreter assume that the "legislature was made up of reasonable persons pursuing reasonable purposes reasonably"); *see id.* at 1188–96, 1374–77 (suggesting that prototypical instances of statutory application can evoke multiple purposes).

(the determination of legal effect).⁴⁰ Hart and Sacks's solution may well be one followed by today's great purposivist judges,⁴¹ but it has never quieted purposivism's critics. Textualist detractors emphasize that purposivism expands the domain of statutes. Furthermore, there are "multiple purposes" to any statute and, therefore, the attribution of a single purpose may be arbitrary or activist.⁴² At the very least, the "multiple purpose" critique has been a prominent arrow in the quiver of objections against purposivism.⁴³

If nothing else, no one can say that skepticism about groups because of their collective nature has gone away. If anything, it has intensified over time because it has been repeated, and sometimes endorsed, by the greats of modern jurisprudence and political science. Ronald Dworkin recapped the argument almost verbatim in his work, calling it the "speakers' meaning" view.⁴⁴ Dworkin claimed, just like Radin, that the multiplicity of the legislature made it impossible to collect an original intent.⁴⁵ Jeremy Waldron picked this up in

⁴⁰ See Lawrence B. Solum, *Orginalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 455–56 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 95 (2010).

⁴¹ See STEPHEN BREYER, *ACTIVE LIBERTY* 85–101 (2005) (defending purposive interpretation).

⁴² See, e.g., John F. Manning, *The New Purposivism*, 2011 *SUP. CT. REV.* 113, 151–52 (discussing Radin's famous identification of the multiple purpose "conceptual" problem). This is sometimes called the problem of generality after Radin's claim that one could state the purpose of all laws at a very high level of generality as "justice and security." See *id.*; see also Radin, *supra* note 10, at 876 (stating that "the avowed and ultimate purposes of all statutes, because of all law, are justice and security"); Stephen F. Williams, *Rule and Purpose in Legal Interpretation*, 61 *U. COLO. L. REV.* 809, 811 (1990) ("Notice that as soon as the analysis of purpose is divorced from the means selected, all limits are off. Every purpose can always be restated at a higher level of generality."). Whether described as the "generality" problem or the "multiple purpose" problem, the claims made here remain the same.

⁴³ See Eskridge, *Speluncean Explorers*, *supra* note 33, at 1744–45 (explaining the critique of purposivism: "that purpose is *too* easy to determine, yielding a plethora of purposes, cross-cutting purposes, and purposes set at such a general level that they could support several different interpretations. Purposive statutory interpretation, therefore, might be even less determinate than more traditional approaches. This has been a standard criticism of legal process interpretation . . .").

⁴⁴ See DWORKIN, *supra* note 11, at 314, 315 ("When a friend says something, we may ask, 'What did he mean by that?' . . . Our answer to that question describes something about his state of mind when he spoke."). Under the "speakers' meaning" view, judges look to legislative history . . . to discover what "state of mind" the legislators tried to communicate. *Id.* Legislative materials are "evidence" of the legislators' "mental states." *Id.* at 314. So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds. See *id.* at 314–15. Dworkin misunderstood the notion of speaker's meaning derived from the philosophy of language, which focuses on the meaning the speaker intended to convey to her audience based on the audience's recognition of the speaker's communicative intentions. See H.P. Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, in 4 *FOUND. OF LANGUAGE* 225, 225, 230 (1968).

⁴⁵ See DWORKIN, *supra* note 11, at 320–21. Under Dworkin's theory, a judge is required to "combine . . . various opinions into some composite group intention." *Id.* at 320. "[W]e must worry about how to consolidate individual intentions into a collective, fictitious group intention." *Id.* at 336.

more sophisticated fashion.⁴⁶ His principal target was constitutional interpretation, but in a long chapter on statutory interpretation he repeated Radin's claims about collectivity as inconsistent with intent.⁴⁷ Finally, the great Kenneth Shepsle gave positive political theory's imprimatur to the "group-intent objection" with the very title of his paper, "Congress is a They, Not an It."⁴⁸

C. Analyzing the Meaning of Intent—Three Modalities

The "group-intent objection" is correct in a trivial, semantic sense, but deeply wrong in an important, empirical sense. By definition, no group has a single human mind. Few dispute that proposition; it is a trivial claim. It is not a trivial claim, however, to eliminate groups from our social life. That is an extravagant argument amounting to the rejection of most of our social world, from Microsoft to Harvard to the Catholic Church. To see this, we must first be clear about the meaning of "intent." Bottom line: there is such a thing as legislative intent, but only if we define intent in a way that does not carry with it embedded assumptions that, by definition, only apply to individuals. Congress has the functional equivalent of intent by acting through its sequential procedures. When we ask about Congress's intent, what we are asking for is not its mental state, but an elaboration of its actions within the procedural context in which it acted.

For some time now, scholars in jurisprudence, statutory interpretation and political economy have questioned whether collectivities "intend" in any way other than a metaphorical sense. As explained earlier, the philosopher Jeremy Waldron and before him Ronald Dworkin⁴⁹ have argued against the concept of legislative intent, views that have been echoed in different forms by Joseph Raz and John Gardner.⁵⁰ Recently, however, the philosopher Phillip Pettit and political economist Christian List have provided the conceptual foundation for

⁴⁶ See Waldron, *supra* note 2, at 128.

⁴⁷ See *id.*

⁴⁸ Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992). This is not the uniform view among political scientists as others embrace legislative intent. See Rodriguez & Weingast, *supra* note 21, at 1422–23.

⁴⁹ DWORKIN, *supra* note 11, at 19 (arguing against collective intention); WALDRON, *supra* note 2, at 119–46; see John Gardner, *Some Types of Law*, in COMMON LAW THEORY 51, 56 n.14 (Douglas E. Edlin ed. 2007) (identifying Dworkin and Waldron as "[n]otable doubters" of the thought that an institution may have intentions).

⁵⁰ JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 284 (2009) (arguing that law is intentional, but the intention involved in the act of legislating is "very minimal" and "does not include any understanding of the content of the legislation"); Gardner, *supra* note 49, at 56. (arguing that "parliament often has no intention to make the particular changes in the law that it ends up making when it legislates," but has a more humble intention to act to change the law). This may be akin to the notion I suggest below, that intention may be used to describe an act that is not involuntary or accidental. See *infra* note 72.

an important response to these claims. List and Pettit decry as “extreme” the idea that collectivities have no group agency, branding it “eliminativism.”⁵¹ Eliminativists reject the agency of a vast range of entities within the social world with which we interact on a daily basis and to whom we attribute agency and thus responsibility.⁵² Eliminativists, in short, have gone too far in eradicating social life.

If this is correct, there are important implications for the “group-intent objection.” If the argument claims that Congress is a collectivity and because it is a collectivity it cannot act as a group agent, then the argument assumes what it is trying to prove and eliminates group agency. What do I mean by group agency? In this Article, I use this term to mean public action, recognized by those inside the group as legitimate group acts. When a corporation issues a report and members within the group recognize and attribute this to the group according to pre-determined standards, the group itself considers this as a group act (its *ex ante* procedures determine this). Acts differ from intents, meanings, and beliefs because they are *observable and do not exist solely in one or more minds*. Putting on one’s shoes is different from thinking about putting on one’s shoes and telling someone else that you are about to put on your shoes. That an act may take the form of speech or words does not deny it the status of an act as distinct from a mere mental state.⁵³

An act that the group would recognize as a group action (i.e. authorized by the group or part of that group’s organization or procedure) is an exercise of group agency.⁵⁴ This is a descriptive and a prescriptive claim in the following sense. Just as trial procedures make sequential processes legitimate as part of

⁵¹ CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY 74 (2011) (“If the emergentist tradition reified and mystified group agents, hailing them like transcendent realities, the eliminativist tradition went to the other extreme.”).

⁵² *Id.* at 5 (“Once we recognize a collective entity as an agent, we can interact with it, criticize it, and make demands on it, in a manner not possible with a non-agential system.”). Margaret Gilbert has used the term “singularism” to describe a similar phenomenon. MARGARET GILBERT, ON SOCIAL FACTS 12, 433 (1989); see LIST & PETTIT, *supra* note 51, at 74 (“Singularism asserts that there are no pluralistic agents, in any literal sense of the term, only the singular agents constituted by individual human beings . . .”).

⁵³ J.L. Austin, *Performative Utterances*, in THE PHILOSOPHY OF LANGUAGE 291, 292 (A.P. Martinich & David Sosa eds., 6th ed. 2013).

⁵⁴ For example, just as a corporate report, such as a 10K filing, is viewed as a legitimate group action even though it may have been written by a part of the organization, and never be read by the Board of Directors, so too similar actions (committee reports) should be viewed as legitimate public acts of Congress, not mental states. This applies to acts attributable to individuals as well as collective acts. When an individual offers an amendment, the amendment is his own, but to be a legitimate group act, it must follow group-authorized procedure. On the other hand, an offhand statement made by an individual legislator or a colloquy that did not follow the rules would not be considered a group act. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 665–67 (2005) (Scalia, J., dissenting) (“Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.”).

the trial without regard to the outcome, congressional procedures make intermediate steps in the process legitimate because there has been a prior commitment by the group to act in this particular way—no matter who wins or loses. The prior commitment legitimizes the act and also delegitimizes acts that do not follow such procedures as acts that the group may disavow or which may be later deemed to fall outside the arena of group action. Consider, for example, two rogue employees writing a false 10K report inflating the value of a company, or two rogue Senators making speeches giving a false context to a statute.⁵⁵ Claims to act for a group are not automatically legitimate, but must be consistent with prior procedural, and within this sense, normative commitments.

1. Three Modalities of Intent

Intention is everywhere in life and law, and it is “confusing.”⁵⁶ Philosophers have debated, and continue to debate, the meaning of intention.⁵⁷ So, too, do linguists and literary theorists and intellectual historians.⁵⁸ More recently, psychologists and social psychologists have entered the field with experimental evidence suggesting that the attribution of intention begins at the earliest of ages.⁵⁹ For some time now, we have known that humans are particularly adept at reading the “minds” of others.⁶⁰ At a minimal level, it seems undeniable that Congress acts with some intention. Few believe that statutes appear by accident. Votes are not delivered at the point of a gun. However, once one

⁵⁵ *Id.* at 666.

⁵⁶ Landis, *supra* note 1, at 888.

⁵⁷ See generally G. E. M. ANSCOMBE, *INTENTION* (2nd ed. 1963) (providing a seminal philosophical analysis of intention); BRATMAN, *supra* note 6 (discussing intention generally and in the context of shared cooperative activity); DANIEL C. DENNETT, *THE INTENTIONAL STANCE* (1989) (presenting a theory of intentionality and mind); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* (1983) (explaining intentional phenomena); Kieran Setiya, *Intention*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2014), <http://plato.stanford.edu/archives/spr2014/entries/intention/>, archived at <http://perma.cc/BXS4-HPF9> (discussing theories of intention).

⁵⁸ See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 86–116 (1989); *MEANING & CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 73–78 (James Tully, ed. 1989). See generally *INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION* (Bertram F. Malle et al. eds., Bradford Books 2003) (2001) (providing analyses of intention by psychologists, social psychologists and philosophers).

⁵⁹ Amanda Woodward et al., *How Infants Make Sense of Intentional Action*, in *INTENTION AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION*, *supra* note 58, at 150–51 (summarizing existing theories and contending that “infants, before they acquire the communicative tool box of the 12–24-month-old, understand some aspects of intentional action”).

⁶⁰ See DENNETT, *supra* note 57, at 51 (“[F]olk psychology . . . can explain the fact that we do so well predicting each other’s behavior on such slender and peripheral evidence; treating each other as intentional systems works . . . because we really are well designed by evolution . . .”).

passes this “minimalist” threshold, serious arguments arise about the existence of group intent. Here, my hope, if nothing else, is to bring greater clarity to the arguments about intent based on a new typology of intent modalities. Ultimately, I hope to show how assumptions about particular intent modalities may lead to simplistic, and question-begging, views about Congress as a group agent, and that these modalities are not the only ones possible.

a. *Mental Intent*

When I say that I “intend to do something,” the reader is likely to think of a mental state. This is especially true in law, where mental states play such an important role in tort and criminal law.⁶¹ When lawyers seek “legislative intent” they sometimes mean that what they are looking for is to “reconstruct[]” the mental state of the members who would have voted on a bill.⁶² They are talking of intent as mental state. Philosophers note that it is not necessary for the individual to have a sign in his head saying “I intend to do something,” as lawyers often posit. An individual may in fact do something automatically—without a “mental event”—in which case the intention and the act coincide. Put another way, the mental states that constitute an intention can be dispositional; they need not be occurrent. For example, lawyers trying to prove state of mind do not expect to discover a picture of the brain, but infer “intent” from action or behavior.⁶³ Whereas, in the field of statutory interpretation, the general view holds to the notion that there is a separate “mental event” associated with the creation of statutory text.

b. *Communicative Intent*

Intent-as-communication is a staple of standard versions of statutory interpretation theory.⁶⁴ Dworkin explained this notion (one he disavowed),⁶⁵ as the

⁶¹ See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 118–19 (6th ed. 2012) (describing mens rea (the latin term associated with intent) and discussing the concept of murder as the “intentional killing of a human being”).

⁶² Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (“I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction.”).

⁶³ See DENNETT, *supra* note 57, at 15 (“[T]he intentional strategy consists of treating the object whose behavior you want to predict as a rational agent with beliefs and desires and other mental stages.”).

⁶⁴ See Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989) (positing a hypothetical involving a commander giving garbled orders).

⁶⁵ DWORKIN, *supra* note 11, at 315–16. Dworkin’s target is the species of constitutional argument known as originalism, but his arguments are couched in more general interpretive guise and are in part focused on statutory interpretation. See *id.* at 313–54.

“speaker’s meaning” view.⁶⁶ That view “assumes that legislation is an occasion or instance of communication.”⁶⁷ The “ruling model of this theory is the familiar model of ordinary speech.”⁶⁸ In ordinary speech, as linguists, literary theorists and others have shown, it is common sense to hold that statements are made with the purpose to communicate. As Stanley Fish, one of intent-as-communication’s most zealous⁶⁹ interpretive defenders explains, “interpretation always and necessarily involves the specification of intention.”⁷⁰ Under the idea of intent as “communication,” “[e]veryone who is an interpreter,” including statutory analysts, is in “the intention business.”⁷¹ This view is distinct from the mental state approach because it requires the conveyance of meaning from one party to another: one can have a mental state (for example, a secret wish) and yet never communicate that internal state to another.⁷² This modality thus raises the potential for a mistaken attribution of intention, faulty communication of that intention, as well as improper uptake on the part of the listener.⁷³

c. *Pragmatic Intent*

A different meaning of intent focuses on the communicative situation. Pragmatism, in its original philosophical sense, takes the view that one cannot know one’s ends without acting to achieve those ends. Intent under such a view is not merely a mental state but a mental state contemplating “present and future conduct,”⁷⁴ and, more importantly, may not be knowable except by observing action in context—in the situation. Contrary to the “snapshot picture”—frozen in time—of mind or communication, under this pragmatic idea of intent, intents may change over time as new and relevant information be-

⁶⁶ *Id.* at 315.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Stanley Fish, *The Play of Surfaces*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 300–01 (Gregory Leyh ed., 1992) (“[T]here cannot be a distinction between interpreters who look to intention and interpreters who don’t, only a distinction between the differing accounts of intention put forward by rival interpreters . . .”).

⁷⁰ *Id.* at 300. Fish is debating constitutional interpretation in this piece, but his statements are equally applicable and have been invoked to explain the speaker’s meaning theory in other contexts. WALDRON, *supra* note 2, at 124–25.

⁷¹ Fish, *supra* note 69, at 301.

⁷² I am rejecting a theory of communication here in which the speaker encodes and the listener decodes the utterance. That theory would allow for secret intentions that no listener could have grasped. Instead, the theory of communication asserted here depends upon the communicative intentions of the speaker. See GRICE, *supra* note 58, at 86–116.

⁷³ See Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 102–04 (2000).

⁷⁴ BRATMAN, *supra* note 6, at 2. Intentions are “elements of stable, partial plans of action concerning present and future conduct.” *Id.* Intending involves “a commitment . . . over time . . .” *Id.* at 4.

comes available.⁷⁵ Like pragmatist theories of meaning more generally, pragmatic intent is context-relative—it focuses on the communicative *situation*.⁷⁶

Background context will influence the intention or plan. For example, one cannot know how to win a game of chess if one does not know the background context—the rules of chess or the significance of the checkered board within the context of those rules. The pragmatic intent modality assumes that unstated background context is important; it is not enough that intent is a mental state or a communicated mental state. Pragmatic intent emphasizes communicative context as essential to find meaning. In sum, if one can infer intent from action, the first two modalities are neither necessary nor sufficient to understand intent.

This applies to both ordinary meaning and statutory meaning. Consider the sentence “I take the fifth.” Lawyers are likely to assume that an individual, within a court of law, has refused to testify. This understanding assumes a crucial context. If that context is changed, the statement’s meaning changes. “I take the fifth” as a response to the question in a bakery “which one will you take?” might mean the fifth doughnut or, in the context of waiting for a taxi, the fifth car in line. In the context of the Senate, it might mean the fifth amendment, not to the Constitution, but to the bill under consideration. These examples show how assumptions made from context are extraordinarily common and potentially crucial to determine meaning. As Professors Goldsworthy and Ekins have written, “[i]f presuppositions are not grasped, almost anything we say is open to being misunderstood in unpredictable and bizarre ways.”⁷⁷ To modify one example discussed by Goldsworthy and Ekins and originated by John Searle: if I order a hamburger in a restaurant, I assume that the hamburger will be cooked at a sufficient temperature so as not to make me sick, that it was refrigerated to remain fresh before cooking, and that it will be cooked not frozen or, as Searle originally noted, encased in a solid Lucite cube.⁷⁸ We know this from context, not logic—from the procedures by which hamburgers are typically ordered and prepared.

To the extent that statutes are valid commands, they must be uttered within a particular context pursuant to particular rules and processes, not at a baseball game or a theatrical performance (different contexts with different rules).⁷⁹

⁷⁵ *Id.* at 2 (“[M]any times, in the face of new and relevant information, we recognize that it would be folly to stick rigidly with our prior intention.”).

⁷⁶ *Id.* at 21; GRICE, *supra* note 58, at 222.

⁷⁷ Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39, 55 (2014).

⁷⁸ *Id.* at 56 n.61 (citing JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 127 (1979)).

⁷⁹ To the extent that statutes are seen as commands, they are performatives and are subject to Austin’s original analysis which holds that performatives only work if they are consistent with *ex ante*

Although context is important in understanding ordinary speech, statutory speech operates in a particularly “formalistic” context, to borrow Jeremy Waldron’s term.⁸⁰ As we know from the linguist Paul Grice, ordinary speech conventions generally assume that information will be limited and relevant, but no such assumption is warranted in the Senate because its procedures allow unlimited speech.⁸¹ So, too, it is generally assumed that ordinary speakers are cooperating with each other—an assumption that becomes outlandish in the context of a legislative debate between warring parties.⁸² Because congressional procedure often suspends the maxims of ordinary speech, rules for ordinary speech may be necessary but are not sufficient to understand congressional meaning.

Perhaps most importantly for purposes of the group intent objection,⁸³ pragmatic intent is not (like our earlier versions of intent) inherently singularist⁸⁴—it is not limited to a single individual at a moment in time. Instead, it contemplates acting with more than one person over time. Once one acknowledges that intent may be reflected in action, it is possible to imagine “we-intentions.”⁸⁵ So, for example, two people can agree in advance to tie each

rules for the performance. See Austin, *supra* note 53, at 293. So, if I say “I divorce you” in a cocktail party setting, the performance will not “come off”—no one would think that my mere statement of the words “I divorce you” would effectuate a legal divorce because it did not comply with the proper procedures for a legal divorce, and was not uttered in the proper context for a legal divorce. *Id.* As Austin explained, the performative utterance will be “unsatisfactory . . . if certain rules, transparently simple rules, are broken.” *Id.* Put in other words, Austin’s theory of performatives assumes conformance with rule-context. For example, an opera singer could utter the words of a statute at an opera and no one would think it was a command to the audience but instead a performance of an opera (or at most the performance of a command within an opera). For a statute to be a statute—a valid command—it must be consistent with the procedures by which the people consent to be governed.

⁸⁰ See WALDRON, *supra* note 2, at 70.

⁸¹ THE PHILOSOPHY OF LANGUAGE, *supra* note 53, at 282 (providing an example to show how Grice’s maxim of relevance may be suspended in particular contexts).

⁸² This explains why canons of interpretation cannot act as substitutes for an understanding of legislative context. Miller’s fine article on Grice and canons elaborates the argument for canons, but does not address the assumption that members are engaged in ordinary speech. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183. At the most crucial point of legislative compromise, the places we most want to know legislators’ meaning, they are not likely to be engaged in a cooperative enterprise.

⁸³ One potential meaning absent from this list is “intent as reason.” See BLACKSTONE, *supra* note 23, at *58–61. In statutory interpretation, a purposivist might argue that intent reflects a reason about a statute, for example, and that this is what is meant by “intent.” Like motivation or other meanings for intent, this idea is subject to all of the claims I make here about intent as mental state assuming it is static, private, and idealized as a mental event. There is no reason not to think of intent as reason, but to do so is unhelpful in situations of group agents since the implicit analogy to mind causes worries about whether groups can have internal, private, mental reasons.

⁸⁴ GILBERT, *supra* note 52, at 12.

⁸⁵ BRATMAN, *supra* note 6, at 110 (“That we do sometimes have intentions that are in an important sense shared seems clear. We commonly report or express such shared intentions by speaking of what *we* intend or of what *we* are going to do or are doing.”). If action reflects intent, then a group

other's shoes, or they can simply act to tie each other's shoes (in the absence of a joint mental state or a shared agreement). In either case, we can say that they have the intent to tie shoes. As long as they act to tie each other's shoes, it does not matter whether they had a mental picture contemplating such action or an overt communicative agreement to tie each other's shoes. Pragmatic intent thus builds upon but does not negate the possibility of other kinds of intent. Intent may be envisioned as a state of mind, or it may be envisioned as a feature of communication, or it may be reflected in action.

In the context of lawmaking, pragmatic intent is particularly important because plurality defines political action. As Hannah Arendt once emphasized, political action presumes the viable existence of groups. Political action cannot "be done in isolation from others—independently of the presence of a plurality of actors who from their different perspectives can judge the quality of what is being enacted."⁸⁶ To elicit the consent of others, which sits at the heart of representation, deliberation and persuasive communication, one cannot give speeches in a closet. As Arendt described it, "plurality is specifically *the* condition—not only the *conditio sine qua non*, but the *conditio per quam*—of all political life."⁸⁷ For the plurality to reach agreement on political action it must follow procedures allowing the many, the plurality, to speak in one voice at the very same time that voice speaks for many.

D. Radin's Error: Intent as State of Mind

Armed with these ideas of intent, we can return to Radin's collectivity objection and see that it depends upon assumptions about intent that beg the question he seeks to answer.⁸⁸ Radin wrote that "[t]he chances that of several hundred men each will have *exactly the same determinate situations in mind*⁸⁹ . . . are infinitesimally small."⁹⁰ He posits cases where "the minds of the legislature [are] uniform."⁹¹ He suggests that a minority's objection bars collective

of two or more individuals acting in a coordinated manner can be recognized as sharing an intention. *See id.*

⁸⁶ *See* Setiya, *supra* note 57.

⁸⁷ HANNAH ARENDT, *THE HUMAN CONDITION* 7 (2nd ed. 1998).

⁸⁸ This was how James Landis, in his response, understood Radin's argument: "To insist that *each individual legislator* besides his aye vote must also have expressed the meaning he attaches to the bill . . . is to disregard the realities of legislative procedure." Landis, *supra* note 1, at 888 (emphasis added).

⁸⁹ Radin, *supra* note 10, at 870. Here, Radin is identifying what has been called, in constitutional theory, the "expected applications" view of interpretation. This is different from meaning as it is a projection of meanings, a set of expectations about how the meaning might be applied, not semantic content.

⁹⁰ *Id.*

⁹¹ *Id.*

intent.⁹² Congress would have an intent if everyone agreed, if they had “exactly the same” intent.⁹³ In a corollary to this claim, Radin argues that there can be no group intent because only a few members have the same intent.

Three immediate objections arise. The first is *unanimity*: no one believes that collective entities, whether corporations or universities, only act when everyone shares a unanimous intention or set of factual assumptions.⁹⁴ Yet Radin wants “exactly the same” intents “in mind,” minds that are “uniform,” several hundred men with “the same . . . situations in mind.”⁹⁵ Faculties and corporations and churches make decisions all the time in the face of disagreement. Moreover, there is nothing in the law that suggests to the contrary. We do not hold corporations to account only when all members of the organization line up and sign an affidavit agreeing to the decision. Perhaps more importantly, no one believes that majoritarian decisions are impossible or illegitimate because a majority does not include everyone. Indeed, majoritarianism presumes disagreement.⁹⁶

The second implausible assumption goes to the static nature of group agency. The “same intent” objection implies that representatives share the same intent at the same time. This assumption deserves scrutiny. Faculties, unions, and churches make decisions *over time*, not instantaneously.⁹⁷ No one says a corporation or university or labor union has not made a decision because of the time it takes to make that decision. Perhaps most importantly, we know

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The “same intent” problem may not be unique to Radin, as Ekins argues that both John Gardner and Joseph Raz’s theories of minimal or humble intention suffer from this problem. EKINS, *supra* note 11, at 114 (“Raz and Gardner . . . [make] the unsound assumption that the legislature’s intention must be an intention held by each legislator (or each legislator in the majority).”).

⁹⁵ Radin, *supra* note 10, at 870.

⁹⁶ One might argue that some of the organizations I have identified are not necessarily “democratic,” but follow hierarchical norms. In fact, school boards, unions, non-profit organizations, and the proverbial town hall purport to operate by democratic, majoritarian principles. Even the modern corporation has a form, at least in theory, of shareholder democracy. These organizations operate with respect to some form of procedure seen as legitimate for that form of organization. Most organizations include some forms of hierarchy even as they claim resolute democracy; the House of Representatives and labor unions are examples. *See, e.g.*, WILLIAM PRIDE ET AL., BUSINESS 198 (11th ed. 2011) (“The pattern of delegation throughout an organization determines the extent to which that organization is decentralized or centralized.”).

⁹⁷ Diego Gambetta, “Claro!”: *An Essay on Discursive Machismo*, in DELIBERATIVE DEMOCRACY 19 (Jon Elster ed., 1998) (providing a contrarian example proving the oddity of the assumption that intent is instantaneous). Gambetta explains that “Claro!” is “Spanish for ‘Obvious’ ‘I knew it all along!’ ‘Nothing you say surprises me’—a belittling snap response that greets those who express an argument, especially if not at all obvious, in countries of that culture.” *Id.* at 20–21. “In a culture of this kind . . . agents . . . are unlikely to listen to one another’s arguments, let alone be persuaded by them.” *Id.* at 21.

that Congress makes decisions through procedures over time.⁹⁸ As Jeremy Waldron has rightly emphasized, these procedures are Congress's "constitution."⁹⁹

Finally, Radin makes a seemingly more plausible argument by asserting that there can be no group agency because only a few members may draft legislation. He writes: a "legislature certainly has no intention whatever in connection with words which some two or three men drafted . . ." ¹⁰⁰ Unlike the earlier two objections, this objection recognizes what appears, at first glance, to be empirical reality. Participation in legislating tends to be concentrated on a few who stake their political futures on the difficult course of bill passage.¹⁰¹ But the "few" who draft a bill cannot pass it. Senators who write for two or three people, as opposed to 60,¹⁰² are engaged in a fool's errand.¹⁰³ They must anticipate not only a majority but a supermajority. If drafting be the work of "the few," legislating is the work of "the many" (and under supermajoritarianism, the "super-many").

Ultimately, this claim of the "few" suffers from the same theoretical objection as its cousin, the unanimity argument. If we are prepared to accept the notion that groups do act, we should also know that they often act through "a few members." Ultimately, the claim of "the few"—that a few write the law¹⁰⁴—goes too far: it applies to all collective action. Corporations and un-

⁹⁸ See U.S. CONST. art. I, § 5 (providing that each House of Congress may "determine the rules of its proceedings . . ."). The House and Senate rules can be easily found online. See RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 112-161 (2013), available at <http://clerk.house.gov/legislative/house-rules.pdf>, archived at <http://perma.cc/98BQ-SSMZ>; STANDING RULES OF THE SENATE, S. DOC. NO. 112-1 (2011), available at <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>, archived at <http://perma.cc/PC3A-RC68> [hereinafter SENATE RULES].

⁹⁹ WALDRON, *supra* note 2, at 123.

¹⁰⁰ Radin, *supra* note 10, at 870.

¹⁰¹ RICHARD L. HALL, PARTICIPATION IN CONGRESS 3–4 (1996).

¹⁰² Almost every bill requires a supermajority in the Senate to pass the cloture barrier. See GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 10 (2006) ("The Senate's rules that protect unlimited debate . . . effectively require supermajorities for the passage of legislation . . ."); see also 157 CONG. REC. S311 (daily ed. Jan. 27, 2011) (statement of Sen. Harkin) (noting that in the 110th and 111th Congresses, there were 275 filibusters in just over 4 years. "It has spun out of control. This is not just a cold statistic of 275 filibusters. It means the filibuster, instead of a rare tool to slow things down, has become an everyday weapon of obstruction, of veto.").

¹⁰³ It is well known that to draft legislation is an act of anticipation of others' preferences. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 10 (1990). One must draft to satisfy not only one's own constituents, but also other members and their constituents. See *id.* If the sole representative wants her draft to become law, she must anticipate a tremendous variety of "vetogates"—hurdles that must be surpassed before a proposed bill becomes law. See William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1443, 1444–47 (2008) (laying out a vetogates model for lawmaking in the United States and describing nine such vetogates).

¹⁰⁴ Note that this partiality critique applies to the *text* as much as the legislative history. Partiality is a reason to be skeptical of the entire legislative process, including legislative text: if the few write

ions and universities delegate decisionmaking to smaller groups to reduce the transaction costs of decisionmaking. Delegation is considered part of the culture and proper practice of corporate management.¹⁰⁵ The few may draft a joint letter, but those who have authority to act for the many sign it. Thus conceived, this objection turns out to be a soft form of eliminativism. If the final decision is the result of less than all, and that fact brands the decision as illegitimate, then all collective bodies and their actions are potentially illegitimate-because-partial.

The most important point to see about Radin's argument, however, is the idea of "intent" on which it relies—an idea revealing the fundamental weakness of his claims. Radin's idea of intention is our first modality of intention, as a static private mental event. He writes of "situations *in mind*" and "pictures *in mind*."¹⁰⁶ He muses that legislators have "different ideas and beliefs," specifically equating this with a mental event:

The chances that of several hundred men each will have exactly the same determinate situations *in mind* . . . are infinitesimally small. The chance is still smaller that . . . the litigated issue, will not only be *within the minds* of all these men but will be certain to be selected by all of them as the present limit [to which the statute] should be narrowed.¹⁰⁷

Lest one think Radin not committed to the idea of "intent-as-mental-state," consider his argument that, in an extreme case, "it might be that we could learn all that was *in the mind of the draftsman*."¹⁰⁸ Or his argument that "[e]ven if the contents of *the minds* of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior."¹⁰⁹

Given this idea of individual intent, Radin *must be a group skeptic*: if intent lies within the private world of individuals' minds, then it is impossible to conclude that groups have intent. Groups do not have minds. This shows, how-

the text, then it has no priority, nor legitimacy, as the product of the group, since formal adoption by the whole rests upon a false sense of legitimacy.

¹⁰⁵ Organizational literature takes delegation as a basic part of proper management. ANDREW J. DUBRIN, *ESSENTIALS OF MANAGEMENT* 152 (9th ed. 2012) ("A well-planned and highly structured organization reduces the number of nonprogrammed decisions."); HAROLD KOONTZ ET AL., *ESSENTIALS OF MANAGEMENT* 184 (5th ed. 1990) ("Delegation is . . . an elementary act of managing."); W. PRIDE ET AL., *supra* note 96, at 190 ("The third major step in the organizing process is to distribute power in the organization . . . The degree of centralization or decentralization of authority is determined by the overall pattern of delegation within the organization.")

¹⁰⁶ Radin, *supra* note 10, at 870.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *Id.* (emphasis added).

ever, that this particular argument against group agency begs the question, relying upon a contestable assumption about intent. Radin almost admits this when he states, “[t]hat the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”¹¹⁰ Assuming an idea of intent by definition incompatible with group agency, it follows that Radin’s argument cannot be anything but a claim against group agency writ large.

Radin’s arguments are not substantially improved by the more sophisticated arguments made by Dworkin and others against group intent based on the speaker’s meaning model. Dworkin argues, like Radin, that collectivity poses a particularly difficult problem for interpretation.¹¹¹ Let us assume that Dworkin borrows two meanings of intent—intent-as-mental-state¹¹² and intent-as-communication between two persons. As Dworkin writes: “So long as we think legislative intention is a matter of what *someone* has in mind *and means to communicate* by a vote, we must take as primary the mental states of particular people because institutions do not have minds”¹¹³ In either case we see the same problems. Even if we imagine that the individual is “communicating,” this does not solve the problem of combining individual minds or communications. Indeed, Dworkin is at pains to use the “combining minds” problem to launch his alternative, one asserting the need to construct the best view of the law as interpretive method.

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

¹¹⁰ *Id.*

¹¹¹ DWORKIN, *supra* note 11, at 335–36. Dworkin states:

So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.

Id.

¹¹² *See id.* at 336, 337 (arguing that the judge must consider the hopes or expectations or more detailed political opinions [legislators] have *in mind* when voting.) Dworkin further notes that the judge “accepts that he must take more pains to discover the *mental* attitudes that lie behind legislation than the *mental* states of people he meets in pubs Whose *mental* states count in fixing the intention behind the Endangered Species Act?” (emphasis added). *Id.* at 318.

¹¹³ *Id.* at 335–36 (emphasis added).

communication. If we assume at the start that intent signals a communication from one person to another, then we beg the question in favor of individuals again. Define communication as *C* (singular) and it cannot be *C* (group).

E. Group Intent Reconstructed

The typology of intent modalities set forth previously aims to further the debates about group intention in statutory interpretation, pushing the theory beyond the conventional arguments, toward greater specificity. In this section, I move from the critique to a more positive view. I aim to construct a plausible account of group intent, a project that neither realists nor purposivists have tackled.

1. The Virtues of Congressional Context

Let us begin with the basic proposition that actions taken within an organization like Congress cannot be understood without understanding their procedural context. To take a simple example, let us say that you want to know the meaning of the statement—“go to the floor!” One might assume that the statement means to drop to the floor to do push-ups. But in the congressional arena, it means something else. If a Senator asks you to “go to the floor” it means to go to a particular place in the Senate known as “the floor,” or the Senate chamber. The most devoted advocate of “intent,” must recognize that context changes meaning.

Legislative context also helps us to understand individual communications from one person to another or “speaker’s meaning.”¹¹⁴ Consider a statement made by Hubert Humphrey in the debate about the 1964 Civil Rights Act. At issue was an amendment offered by Senator Tower on the question of what kinds of tests employers could give employees. Humphrey said: the “*Motorola* [decision]”¹¹⁵ was discussed, discussed and *cussed*.¹¹⁶ To the naïve legal reader, ignorant of the actual context, the statement suggests that Humphrey was trying to communicate his firm opposition to the *Motorola* decision. In fact, in the context of the debate, the meaning of the statement and what Humphrey sought to communicate was quite different. Humphrey was saying

¹¹⁴ Posner, *supra* note 62, at 817, 818.

¹¹⁵ In 1964, in *Myart v. Motorola, Inc.*, an Illinois employment board ruled that a general ability test for applicants for assembly-line jobs was discriminatory. No. 63C-127 (Ill. Fair Employment Practices Comm’n Feb. 26, 1964), *reprinted in* 110 CONG. REC. 5662–664 (1964).

¹¹⁶ 110 CONG. REC. 13,504 (statement of Sen. Humphrey) (emphasis added).

to his colleagues that *Motorola* was irrelevant because the issue had already been addressed in the post-cloture compromise text before the Senate.¹¹⁷

More importantly, congressional context helps us focus on conduct over time, as decisions change. When views change, they change in the context of a structure leading to action—a law. Imagine if we were to freeze-frame the views of Senators on civil rights in 1964. Many Senators' views about race, *ex ante*, would appear quite rigidly racist. Now, fast forward to the “longest debate in history” on the Civil Rights Act.¹¹⁸ As the debate went on, legislators changed their views. And they changed their views not because their beliefs about race changed, but because their views about the wisdom of voting for the bill—action in congressional context—changed.

2. Constructing a Theory of Group Intent

If congressional context is helpful with respect to all the previously discussed intent modalities, it has the added virtue of helping us construct a plausible vision of group intent. *Congress has the functional equivalent of intent and that equivalent lies in its sequential procedures.* These procedures are how a group plans for the future. To get some intuition for this, we must first rid ourselves of the notion that intent is inevitably located in a mind or “embodied.” Sometimes when we talk of intent, it seems almost impossible not to believe in a physical mind. That a group is not individually “embodied” does not logically bar the functional equivalent of the embodied. So, for example, a wheelchair is not made of biological material, but it enables bodily movement. So too, here, group procedures are not embodied, but they are the functional equivalent of what is generally seen as embodied in mind. Just as the wheelchair allows an individual to move, so too a group's procedures allow it to plan for the future as a group and, in this sense, have group intent.¹¹⁹

The pragmatic modality of intent, by focusing on communicative context, allows for “we-intentions” that are more than the sum of individual mental states or communications. These intentions may be shared consciously or not, with or without overt communication between the parties. For example, sup-

¹¹⁷ See Nourse, *supra* note 4, at 114–18 (further explaining this debate). By using this example, I do not mean to suggest that Humphrey's statement alone is enough. It acquires group status because it is made by the manager of the bill and, further, because it explains the procedural context of the amendment.

¹¹⁸ See generally CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

¹¹⁹ To borrow another disembodied metaphor, consider a computer programmed to spit out legislation, a metaphor used by Jeremy Waldron to reject the notion of group intent. See WALDRON, *supra* note 2, at 131–33 (discussing the Wollheim machine). In my view, the program for that computer operates just like congressional procedure. In this sense, the computer metaphor supports—rather than undermines—claims for the functional equivalent of group intent.

pose that a group of Senators file a cloture petition.¹²⁰ Those Senators have signed their name to a document, acting to close debate. From this *action*, we can infer that the members share a “we-intention.” This does not require that Senators communicate with each other or that we know anything about what is inside their heads; they may simply sign without discussion. Nor does it suggest that the signatories have precisely similar “we want cloture” mental pictures in their heads. Signing may be a thoughtless act. But if the members act in parallel, whether by painting a house¹²¹ or signing a document, even without a mental event or communication, we can infer that they had the we-intention to do the act.

In the legislative context, this is important for two reasons. Principles of congressional action are “we-intentions” in the *pragmatic sense of the term* “intention.” Members act based on rules and procedures. Let me be clear that this does not require that all members agree to those procedures, have mental states agreeing to those procedures, have communicated about the procedures, or have even read the procedures. *All they have to do as a group is act according to the procedures.* If the group shows by its actions a “we-intention” to abide by congressional process, that is enough for the pragmatic modality of intent. Lest this confuse (as “intent” almost immediately forces us into thinking of mental states) there are easy examples of similar coordinated action. Chess players who simply sit down to play the game without a word are operating based on a “we-intention” to jointly play the game in the pragmatic modality of intent.¹²²

The “we-intention” of congressional *procedure*¹²³ can be conceived as a “meta-intention” in the following sense. It is a “we-intention” to provide a

¹²⁰ The cloture rule permits sixty percent of the Senate to “vote to end a filibuster on any debatable motion.” Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 551 (2010); see SENATE RULES, *supra* note 98, R. XXII, at 20–21 (providing for the closing of debate after a cloture motion).

¹²¹ Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327, 331–32 (1992).

¹²² See *id.* at 340 (“A joint activity can be cooperative down to a certain level and yet competitive beyond that . . . [In playing chess,] [y]ou and I do not intend that our subplans mesh all the way down. But you and I do intend that our subplans mesh down to the level of the relevant rules and practices. Our chess playing . . . is jointly intentional, and it involves shared cooperation down to the cited level.”).

¹²³ No one should misconstrue this as the claim that Congress only has group intent with respect to its procedures. Consider an example from chess. No one says that the game cannot have taken place, or that any move is not the playing of chess, because individuals sat at the board. Simply because they are playing by the rules of the game, we can infer a shared intent to play the game, and conclude that each game and each move is conducted pursuant to the rules is a legitimate action of a group activity conducted with the group intent to “play chess.” Lest this not convince, consider the actions of corporations pursuant to rules. We can say that action following the corporation’s procedures to issue 10K reports is a group action and reflects group intent to issue the 10K. We do not dis-

framework for individual we-intentions in the future.¹²⁴ A pragmatic we-intention¹²⁵ with respect to congressional *procedure* governs processes for every statute. For example, acting pursuant to congressional procedure reflects a pragmatic “we-intent” that if a majority votes for the statute, that vote prevails for every member in the group—no matter what their mental state or what they have communicated about the bill. Those who oppose the statute share a pragmatic we-intent with those who favor the statute to *act* as a group “we” as far as the resulting legislation. And, why is this? Because, as even group intent skeptics like Ken Shepsle¹²⁶ understand, if there is any core to a group, it is the organization and procedures governing that group.

Group agency of any entity, whether it is a church, a corporation, or a university, depends upon procedures to plan future action. Acting pursuant to congressional procedure reflects a group intent to allow any particular piece of legislation to constitute the act of the group. Think of the rule as a signpost saying: “any act that follows according to these procedures is now stamped as legitimate group action.” This applies to all steps within congressional process legitimated by the rules. There is nothing terribly exotic about this: when we agree to abide by a Supreme Court decision or an election, even if we disagree with the outcome, we do so because we have made a commitment to procedures we believe are legitimate.

To summarize: as we saw earlier, the problem with the group intent objection is that it imagines intent as the mental state of an individual. Intent does not require a mental state, nor need it be limited to individuals. Intent may be inferred from action. Group intent may be inferred from group action. Group action happens because of sequential procedures. This is how the group plans for the future. If this is correct, then when one looks for “congressional intent,” one is not looking for any special mental state behind text or action—whether of individuals or groups. Instead, one is looking for crucial context for interpreting group action. Put in other words, one is looking for the public meaning of public acts done according to the rules. Congress has no mind, but it has the functional equivalent of intent—a way to plan for the future. And that “way” is essential context for understanding its actions.

miss this action because there were individuals involved or because the individuals had minds or because individuals talked to each other creating the report.

¹²⁴ Special thanks to David Luban for clarifying this distinction.

¹²⁵ Nothing in my claim about a “we-intention” to act pursuant to the rules requires that there be a we-intent on any particular statute, whereby intent one means shared mental states or statements or even votes.

¹²⁶ Compare Shepsle, *supra* note 48, at 254 (arguing against the notion of legislative intent), with KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 374 (2d ed. 2010) (arguing that “[p]rocedures are required to cut through all this instability,” given that “there is no equilibrium to majority voting”).

F. Group Agency, Sequential Procedure, and Feedback

Lest one remain skeptical, it is important to see how recent work on “group agency” parallels my claims about group intention. The philosopher, Philip Pettit, and political economist, Christian List, have recently modeled what they call “group agency” in an attempt to put to rest sophisticated claims made by political economists that groups can never act rationally under the Arrovian cycling thesis.¹²⁷ Although that thesis is beyond the purview of this paper, List & Pettit’s arguments provide substantial analytic support for rejecting the “group intent objection.” Even if one rejects my version of group intent, at the very least, their arguments suggest that the skeptical “cash value” of group intent skepticism—that groups cannot act—should be rejected.

List and Pettit argue that group decisions emerge as a result of sequential processes involving feedback.¹²⁸ As they explain, “a group’s performance as an agent depends on how it is organized: its rules and procedures for forming its propositional attitudes . . . and for putting them into action.”¹²⁹ Procedures allow decisions that do not correspond to the intentions of any particular member but may nevertheless be said to constitute group agency. Feedback allows individuals to shift from their original preferences to ones that they “judge . . . better, for the group to accept.”¹³⁰ To embrace this account of group agency, it is important to recognize what the theory does not entail. It does not entail some spectral intent hovering above the group. Pettit and List reject this view of the “group-mind” as a failed legacy of an “emergentist” tradition in which group-think emerges in mysterious fashion.

List and Pettit are also quick to explain that their model *does not eliminate individuals*. The formal model uses the concept of supervenience¹³¹ to describe the relationship of individuals to groups. Imagine that we have data-points arrayed on a graph based on particular numerical positions (3 on the horizontal axis, 4 on the vertical axis). Now we add another one hundred data-

¹²⁷ LIST & PETTIT, *supra* note 51, at 58. Their argument is aimed at addressing the problems of incoherency suggested by positive political theory and Kenneth Arrow’s theorem. That part of their analysis is beyond the scope of this paper.

¹²⁸ *See id.* at 63.

¹²⁹ *Id.* at 81.

¹³⁰ *Id.* at 63.

¹³¹ List and Pettit explain supervenience as follows:

Think of the relation between the shapes made by dots on a grid and the positions or coordinates of the dots Nothing causal needs to happen in order for the positions to give rise to the shapes; suitably positioned, the dots simply constitute the shapes Fix the number and positions of the dots and, as a matter of logical necessity, the shapes will be fixed as well.

Id. at 65.

points, placing them on the graph based on given coordinates (5/6; 10/3; 4/2 etc.). By the time we are done, we see that the datapoints create a square shape. The square shape is the group attitude; it is more than the individual datapoints, but it does not eradicate those individual datapoints. The bottom line: one does not have to give up methodological individualism, or posit a “group mind,” to believe that it is possible for a group to act in ways that no individual member prefers *ex ante* or even *ex post*.

Although List and Pettit make a variety of arguments about group agency, for my purposes, the central conceptual innovation is that sequential procedures are points of preference, aggregation, and revision.¹³² In this, List and Pettit reject the caricatured assumption that “preferences are fixed.”¹³³ In fact, as economists have known for several decades, preferences do change and they should change with new information, under basic theories of rationality. They also change because new reasons arise about alternative courses of action, including new procedural reasons.¹³⁴ Put in other words, rules and procedures may force endogenous preference-shifting. In this sense, there are no stable exogenous preferences. As long as preferences cannot yield a result without proceeding through a gauntlet of rules, preferences will shift as a result of those rules or, if not, they will yield no result at all.

List and Pettit’s insights on group agency are more than theoretical—they are also realistic. It is a fact that Congress works through sequential procedures.¹³⁵ One would need no such rules if members could simply sit down and determine, on a moment’s notice, how they would vote.¹³⁶ That, after all, is the

¹³² See *id.* at 63.

¹³³ Franz Dietrich & Christian List, *Where Do Preferences Come From?*, 42 INT’L J. GAME THEORY 613, 614 (2013).

¹³⁴ Economists have been grappling with this for some time and concede that preferences can change with new information as in Bayesian analysis, where initial probabilities are changed on the basis of new information. See LIST & PETTIT, *supra* note 51, at 12–13, 16. Dietrich and List argue that differing alternatives can change one’s preferences, even if there is no new information. Dietrich & List, *supra* note 133, at 613. One need not accept that account to accept the relevance of sequential procedures asserted here, as these procedures are means to provide new information (information about the voting preferences of other members).

¹³⁵ See generally SINCLAIR, *supra* note 19 (discussing the legislative process in the House of Representatives and the legislative process in the U. S. Senate).

¹³⁶ I am not arguing against the relative stability of members’ preferences. See, e.g., Keith T. Poole & Howard Rosenthal, *Patterns of Congressional Voting*, 35 AM. J. POL. SCI. 228, 228 (1991). Aggregate data prove the obvious truth that members try to vote consistently on issues—no one wants to be a “flip-flopper” at election time. See *id.* at 261. However, at the margin, on first votes, non-roll call votes, important procedural motions (i.e. cloture), or on votes for which there is no clear precedent or effect, members have considerable leeway to form their preferences. Political pressure and social change may as well yield “evolution” of members’ views on controversial issues. For example, consider recent transformations on the question of gay marriage by various politicians. See *Sen. Nelson Endorses Same-Sex Marriage*, CNN: POLITICAL TICKER (Apr. 4, 2013 5:57 PM), <http://politicalticker.blogs.cnn.com/2013/04/04/sen-nelson-endorses-same-sex-marriage/>, archived at <http://>

claim made by those who accept a static, internal, notion of intent. In fact, legislation is always beset by the vagaries of time and uncertainty. *Ex ante*, members often do not know the preferences of other members or even their own constituents. That uncertainty is managed by procedural means: procedures force members to reveal their preferences. With new information about preferences, other members in turn may change their preferred positions.

To pass legislation, members must obtain the support of others—at least a majority if not a supermajority. Procedures allow for feedback as to how others will vote on a proposal or what bill changes are necessary to secure a member’s vote. So, for example, let us say the chairman of a committee proposes a bill. That bill is then heard in committee. At the markup, changes are made. The new bill may no longer reflect the preference of any single committee member, but does reflect the shared preference to move the legislation to the floor for debate. If the bill ultimately passes, it may not reflect the individual or additive preferences of individual members. This should not cause dismay because it is inherent in the process of aggregation and persuasion.

To bring this down to earth, consider the Civil Rights Act of 1964.¹³⁷ Prior to bill debate, members’ preferences were likely to have been all over the board. Some would rather have had no bill (it was a long and fierce filibuster).¹³⁸ Some wanted a stronger bill. But once faced with the likelihood that the filibuster would fail, and the possibility of electoral consequences once the bill passed,¹³⁹ some members’ preferences changed. Members who *ex ante* preferred no bill changed their preference to vote for cloture.¹⁴⁰

This example illustrates how procedural processes create occasions for testing preference aggregations reached by subordinate bodies. When the Senate debates a bill,¹⁴¹ before cloture is achieved, a compromise bill will be “sub-

perma.cc/DN63-4HS6 (“Florida Sen. Bill Nelson . . . joined a wave of Democratic senators announcing their support for same sex marriage, reversing his position”); Michael Falcone & Z. Byron Wolf, *Republican Rob Portman Supports Gay Marriage*, ABC NEWS, Mar. 15, 2013, <http://abcnews.go.com/Politics/OTUS/republican-rob-portman-supports-gay-marriage/story?id=18736731>, archived at <http://perma.cc/969J-GZ2V> (“U.S. Sen. Rob Portman, R-Ohio, once on the short-list to be Mitt Romney’s 2012 running mate, has reversed his opposition to gay marriage”).

¹³⁷ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C. (2006)).

¹³⁸ *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilRightsAc-t1964.htm>, archived at <http://perma.cc/CP4Q-N27C>.

¹³⁹ See SINCLAIR, *supra* note 19, at 19–21. This example reveals what is implicit in the examples given in this Part: perceived electoral pressure (a bill whose “time” has come) is an important and often dominant force motivating individuals to shift preferences. See *id.*

¹⁴⁰ See *id.*

¹⁴¹ In the House, the Rules Committee, which issues the rules for debate on any bill, can second-guess committees’ judgments and offer the opportunity for amendments. See *id.* at 36–44.

stituted” for the committee bill.¹⁴² For example, in the case of the 1964 Civil Rights bill, the Mansfield-Dirksen substitute was offered.¹⁴³ That bill included a number of compromises tempering the law’s impact on business.¹⁴⁴ As the bill moved through the process, procedural rules allowed for what Pettit and List describe as preference aggregation and transformation. Ex ante the final bill may not represent the wishes of any member, but because of this internal dynamic, it comes to represent the act of the whole.

II. LEGISLATIVE HISTORY RECONSIDERED

The idea that a group could have the functional equivalent of intent will not satisfy those on either side of the great debates about legislative history.¹⁴⁵ Textualists claim one should never look at legislative history; purposivists think all legislative history just fine. I reject both positions. I argue that textualists must refer to some forms of legislative history, particularly statutory history, to find the proper text. Furthermore, I argue that purposivists need to develop far more discipline in searching for legislative context. Both textualists and purposivists must distinguish between legislative history as statutory history, legislative history as a record of usage, and legislative history as a record of Congress’s decisionmaking process (statutes as elections). Put in other words, both sides must begin to have a much more sophisticated theory of legislative context. Section A of this Part begins by considering whether purposivists are able to identify the relevant legislative history. In Section B, I consider textualists’ ability to identify the right text. In Section C, I discuss legislative history and group attribution.

A. Can Purposivists Identify the Right Legislative History?

Despite the widely received notion that legislative history is a self-evident concept, it is important to make several distinctions, most importantly between statutory history (the history of the text of the statute) and legislative history writ large (the deliberative context). As we will also see, there are different ways of using legislative history—as indicia of semantic “usage” or to determine “purpose.” In this Section, I argue that *legislative history-as-history* should be reconceived. Statutes are not made in narrative form, but oscillating political battle. Searching for legislative context should target disputed mean-

¹⁴² *Id.* at 50, 53–56, 72–85.

¹⁴³ WILLIAM N. ESKRIDGE JR. ET AL., *CASES ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* at 19–20 (3d ed. 2001).

¹⁴⁴ *Id.* at 19.

¹⁴⁵ Some will make constitutional arguments, which are addressed elsewhere. Victoria Nourse, *Legislative History and the Constitution* (forthcoming U. Pa. Const. L. Rev. 2014).

ings with the least effort for the most illumination, with due attention to congress's procedures and most importantly to the question of who won or lost the debate. Certainly, it should not be the object of any discussion of legislative history to capture the will of a concerted filibustering minority.

1. Statutory History and the Multiple Purpose Problem

Purposivists have purportedly never seen legislative history that they did not like. They typically argue that legislative history should be used to find purposes. There are three significant problems with this effort. First, just as one can pick and choose texts, it is easy to pick and choose purposes. Indeed, it is obviously easier to pick and choose purposes since legislative history is almost by definition more voluminous than the text of the statute. Second, in any important debate, cross-purposes proliferate, which is to say multiple purposes may cancel each other. Third, and perhaps more importantly, purposivism often assumes that Congress has not made a decision about specific texts when, in fact, it may well have done just that or, at the very least, confined the inquiry far more substantially than would an inquiry into purpose alone. Put in other words, purposivism has the capability of making relatively easy cases more difficult.

We can see this best with an example. In 1989, in *Public Citizen v. U.S. Department of Justice* ("the ABA case") the U. S. Supreme Court considered whether the American Bar Association's committees recommending judicial nominees were required to comply with the Federal Advisory Committee Act (FACA), a sunshine law.¹⁴⁶ The law was triggered when the President "established" or "utilized" any committee of two or more persons.¹⁴⁷ The President had obviously not "established" the American Bar Association but, on the other hand, he did appear to have "utilized" their advice on judicial nominations.¹⁴⁸ Justice William J. Brennan asked whether Congress could possibly have had the "purpose" to cover a vast range of private entities, such as the NAACP or the American Legion, when these organizations provided advice to the President.¹⁴⁹ Ultimately, the majority opinion, in an act of apparent judicial surgery, concluded that the term "utilize" did not really mean "utilize," but something more like "establish."¹⁵⁰

Justice Brennan's invocation of purpose does not solve the multiple purpose problem. One cannot conclude, as the opinion suggests, that the only pur-

¹⁴⁶ *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 443 (1989).

¹⁴⁷ *Id.* at 452.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 452, 453.

¹⁵⁰ *Id.* at 463–64

pose of the statute was to exclude preexisting private entities. In fact, Congress might have wanted precisely the opposite result—albeit in *some* cases. Government contractors, for example, were excluded. But if oil and gas companies were on a committee advising the EPA on greenhouse gases, Congress wanted FACA to apply. In fact, committee reports cited the quasi-private National Academy of Sciences and its private advisors as an example of a “covered” entity.¹⁵¹ In short, the purposivist analysis here is subject to the multiple purpose critique.

Statutory history could have avoided this problem. Rather than looking for purpose in a voluminous record, one looks for how the pesky, seemingly absurd, term “utilize” appeared in the statute. One finds that both houses passed language covering committees “established” by the government, and that “utilize” was never passed by either house, but first appeared in conference committee.¹⁵² That decisional path gives important context to the meaning of the term. Under the rules, committees cannot change text that has been agreed to by the House and Senate (in this case “established”).¹⁵³ In the absence of objection, on the grounds that this rule has been violated, members are entitled to assume that conference changes are not significant.¹⁵⁴ Taking this statutory history approach, one can say that the Court should not interpret the term “utilize” to mean anything significantly different from “establish.” One can reach this result without weighing multiple purposes, or a lengthy holistic recitation of the history of the FACA;¹⁵⁵ it can be reached by tracing statutory text. For purposivists, however, it has never seemed necessary to trace the process, as well as the purpose, of statutes.

2. False Assumptions About Congressional Lack of Foresight

One of purposivism’s standard assumptions is that Congress is unlikely to have decided the specific question before the court because of foreseeability (the legislature could not imagine every consequence). But this is an assumption, not a necessary truth. Textualists suggest an analogous assumption. They urge that purposivism tends to expand the domain of statutes, by moving the inquiry up a level of generality, replacing a specific text with a more general purpose.¹⁵⁶ The implicit assumption is that any recourse to legislative history

¹⁵¹ *Id.* at 460 n.11 (citing H. R. REP. NO. 91-1731, at 15 (1970)).

¹⁵² For further discussion, see generally Nourse, *supra* note 4.

¹⁵³ CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 812–13 (1989) (“Conferees cannot remove language both chambers agree on, or insert new provisions not in either chamber’s version.”).

¹⁵⁴ See Nourse, *supra* note 4, at 93–98.

¹⁵⁵ *Public Citizen*, 491 U.S. at 455–65.

¹⁵⁶ Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 552 (1983).

will be more general than the text of the statute.¹⁵⁷ However well worn these claims, they are based on a falsifiable empirical assumption—that Congress did not address the specific question. There is no reason to think that this is *always* the case.

Consider the canonical case, *Church of the Holy Trinity v. United States*, decided in 1892 by the U.S. Supreme Court.¹⁵⁸ Professor Vermeule has written the classic argument supporting Justice Scalia’s interpretation, claiming that the legislative history shows members knew that the statutory terms—“labor or service of any kind” covered all kinds of labor including “brain toilers.”¹⁵⁹ Professor Chomsky has written an equally lengthy reply arguing to the contrary and emphasizing the legislative history as a source of a much narrower purpose excluding the minister.¹⁶⁰ However, neither asked whether the legislative history had anything specific to say about ministers or religion. In fact, there is legislative history that comes close: Senator Morgan explained that “[p]eople who can instruct us in morals and *religion* and in every species of elevation by lectures . . . are not prohibited.”¹⁶¹ This example shows that if one is focused on purpose, at a high level of generality, one may well miss this legislative history.¹⁶² Of course, if one never looks at legislative materials, or if one is look-

¹⁵⁷ Radin, *supra* note 10, at 871 (“Interpretation is an act which requires an existing determinate event—the issue to be litigated—and obviously that determine event can not exist until after the statute has come into force.”).

¹⁵⁸ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 458 (1892). In *Holy Trinity*, the Court considered whether a federal law prohibiting a U.S. employer from contracting foreign laborers applied to a church that contracted with a pastor in England. *See id.* Professor Chomsky has written the classic law review article focused on the purpose of the Act to cover the mass importation of slave labor. *See generally* Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000) (focusing on the idea that the law at issue in *Holy Trinity* was designed to cover mass importation of slave labor).

¹⁵⁹ Vermeule, *supra* note 22, at 1835, 1852.

¹⁶⁰ *See generally* Chomsky, *supra* note 159.

¹⁶¹ 16 CONG. REC. 1633 (daily ed. Feb. 13, 1885) (statement of Rep. Morgan) (emphasis added). Morgan opposed the bill but supported the lecturer amendment. *Id.* For a lengthier discussion of this case, see Nourse, *supra* note 4, at 118–28. In my opinion, this single statement does not resolve the case, but it does suggest that the semantic meaning of “lecturer” could well include a “minister.” *See* 16 CONG. REC. 1633 (daily ed. Feb. 13, 1885) (statement of Rep. Morgan).

¹⁶² The only academic to have noted the lecturer exemption at the outset of the debate was Professor Tribe who focused on the constitutionality of the statute and thus had no reason to peruse the legislative history. Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 5, at 92.

ing for something a good deal more general,¹⁶³ then one may miss the more specific lecturer text and its explication entirely.¹⁶⁴

3. Statutes as Elections, Not Stories

There are significant dangers to roaming around legislative history with no appreciation for congressional procedure. Purposivists, for example, seem to be willing to find “purpose” anywhere and without regard to time. So, for example, although early committee reports may well be irrelevant by the time of final language on large bills, this seems to be no barrier to their citation.¹⁶⁵ So, too, purposivists seem to be willing to look for statutory evidence of purpose based on all sorts of evidence that Congress may or may not have had before it—regulations, advisory committee reports etc. One might of course justify this on the ground that purposivists are trying to make the law as a whole “coherent.” But this does not explain for example, why no purposivist has ever argued that one should not cite those who opposed the bill, even a filibustering minority.¹⁶⁶

Purposivism’s permissive everything-is-ok approach toward legislative history can quickly get the interpreter in trouble. It is likely to lead to the familiar charge of “picking one’s friends,” and there are far more friends to pick in legislative history than in statutory language. It is also likely to lead to “representative” dangers, where by “representative” I mean that purposivists’ lack of discipline can lead them to expend extra effort to impose on a statute a meaning that members, based on bill text, would not have had. Consider the lengthy legislative history discussion written by Justice John Paul Stevens in the 1989 U.S. Supreme Court decision *Green v. Bock Laundry Machine*.¹⁶⁷ There, Justice Stevens provides an erudite lecture on the origins of the eviden-

¹⁶³ So, for example, in *Holy Trinity*, if one determined that “lecturer” was the relevant text, then one would look to the most relevant and specific legislative context—discussions of the lecturer exemption. Senator Morgan’s remark on “lecturers on religion” does not slam the door shut. After all, it is the statement of a single Senator and he might have referred to itinerant speakers on the Chataouqua circuit, not behind a pulpit. The point is simply that the legislative history makes clear that members took the lecturer exemption seriously.

¹⁶⁴ To suggest that there are cases in which purpose may bias the legislative history inquiry is not to argue that purposivism as a theory of statutory construction is wrong. We are all purposivists now: even Justice Scalia has embraced purposivism as long as it is based on the text of the statute. It is to say that roaming around legislative history looking for purposes should be reserved for cases when all other approaches are exhausted.

¹⁶⁵ For an example of this phenomenon, see *United Steelworkers v. Weber*, 443 U.S. 193, 230–52 (1979) (Rehnquist, J., dissenting) (citing congressional debates that occurred before introduction of the crucial statutory provision at issue in the case, as well as minority reports); see also *infra* notes 173–175 and accompanying text (discussing this aspect of *Weber*).

¹⁶⁶ Nourse, *supra* note 4, at 114–18.

¹⁶⁷ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 514–24 (1989).

tiary doctrine governing the admission of a witness's prior felony convictions.¹⁶⁸ After a lengthy survey of non-legislative materials, including legal treatises and American Law Institute proposals,¹⁶⁹ he ultimately concludes that the Congress decided to apply something close to the common law rule, allowing the admission of prior-crimes evidence. A strong "pro-common law" purpose, nevertheless, is hard to square with the back and forth textual changes that actually occurred in Congress. The Senate passed the common law rule. The House passed a wildly different rule contrary to the common law. The Houses went to conference and *they changed the rule* to adopt *neither* the House or the Senate version. Given this back and forth, it is hard to see a coherent purpose to adopt the common law. As this shows, the building of text is not necessarily a coherent process, but a debate which oscillates, as Congress decides, redecides, and then compromises.

Traditional ways of doing legislative history can lead to fantasy narratives, imposing coherence on a tale never meant to be coherent. In the famous affirmative action case, *United Steelworkers v. Weber*, decided by the U.S. Supreme Court in 1979, Justice William Rehnquist described legislative history in a lengthy dissent.¹⁷⁰ Like Justice Stevens in *Bock Laundry*, Justice Rehnquist writes a history devoid of understanding basic principles of congressional process. First, the opinion ignores statutory history, which certainly has a better pedigree than roaming the record. The most important and specific statutory provision on affirmative action was section 703(j) which was added in the Senate prior to cloture—that provision specifically provided that no company would be "required" to impose affirmative action.¹⁷¹ Not only did the opinion ignore the preeminence of a later, qualifying and more specific text, it also cited a vast amount of legislative history that could not possibly have had anything to do with section 703(j). For example, the Rehnquist dissent cited debates on the House floor, in committees in the House, and early Senate debates before cloture.¹⁷² What is worse, the opinion even cited a minority report: surely filibustering minorities should not determine the meaning of a bill. Stat-

¹⁶⁸ *See id.*

¹⁶⁹ *Id.* at 511–14.

¹⁷⁰ *Weber*, 443 U.S. at 230–52 (Rehnquist, J., dissenting).

¹⁷¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (2006) ("Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group."). Cloture was voted on June 10, 1964. *See* 110 CONG. REC. 13,327 (1964). Section 703(j) is reprinted in the precloture bill at 110 CONG. REC. 13,315 (1964). *See* Nourse, *supra* note 4, at 106–08 (discussing the relevant history of the bill).

¹⁷² *See* Nourse, *supra* note 4, at 106–08 (discussing this aspect of Justice Rehnquist's dissent in *Weber*).

utes are elections: some views win and some lose. To the extent that statutes have coherence, it is the coherence of votes, not of stories.

Purposivists have assumed, without question, that legislative histories should be narratives. But this assumes that the making of a statute is a narrative process—that it is possible to tell a coherent tale, rather than one in which zigzagging and contradiction prevail. As students of narrative¹⁷³ know, the secret and perverse logic of narrative operates in reverse. Narrative is created by “a discoverer standing at the *end* of the process, then laid out as a plot leading from beginning to discovery. Earlier events or actions make sense only as their meaning becomes clear through subsequent events.”¹⁷⁴ The same is true of legislative history and congressional process. Imposing a narrative is in fact far harder than zeroing in on the key amendment or a change in bill text. Imposing a story line on an electoral give and take can prove a time-consuming exercise in judicial imagination. Purposivists have made their work much harder than it has to be by failing to distinguish statutory history from legislative history, and from failing to understand how legislative history is made. In the process, they have inadvertently invited the textualist reply that they seek to find justification for a result in legislative history, rather than engage in a principled search for contextual meaning.

B. Can Textualists Identify the Right Text?

Textualists concede that there is no way to understand the meaning of a term without context.¹⁷⁵ They urge that they are not literalists, but understand the basic modern findings of linguistics that meaning is inherently contextual.¹⁷⁶ They avidly consult particular kinds of context, such as canons or dictionaries as evidence of semantic meaning. The question becomes, of course, why procedural context should not count as important context and why it

¹⁷³ The “logic of narrative” is one of reverse engineering, “the determination of means by ends.” Peter Brooks, *Law and Humanities: Two Attempts*, 93 B.U. L. REV. 1437, 1458 (2013) (quoting Gérard Genette, *Likelihood and Motivation*, in FIGURES II, at 94 (1969) (the work of a literary theorist)).

¹⁷⁴ *Id.*

¹⁷⁵ BRYAN GARNER & ANTONIN SCALIA, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 33 (2012) (arguing that the context embraces textual purpose, historical usage, and syntactic setting). Garner and Scalia write, “[t]he principle of semantic content of words is limited to permissible meanings But some do not accept it: They seek to arrive at legal meanings through some method other than discerning the contextual meaning of words and sentences and paragraphs.” *See id.*

¹⁷⁶ “Modern textualists start from the premise that ‘a large number of contextual understandings will be assumed by all speakers of a language,’ and that many such understandings will be ‘largely invariant across English speakers at a given time.’” Manning, *supra* note 10, at 2458. “In contrast with the plain meaning school’s emphasis on literal meaning, modern textualism screens out many absurdities at the threshold by accounting for the contextual nuances of language, especially the particular nuances and conventions that the subcommunity of legal speakers has developed to facilitate effective legal communication.” *Id.*

should not take priority if the textualist aims to be a faithful agent of Congress rather than Blackstone or Webster. Put in other words, why ignore Congress's rule context, when even the constitution supports the creation of those rules by each house of Congress?¹⁷⁷

Textualists have not articulated a rationale, however, about why some context matters rather than others. Why do dictionaries and canons count? Why not legislative context? More importantly, why are dictionaries and canons more faithful expressions of Congress's meaning? We know, from recent empirical studies, that drafters *tend not to know canons*.¹⁷⁸ We also know that canons have no specific constitutional sanction, as do Congress's rules.¹⁷⁹ If textualism is all about rules (as some have contended), then why not Congress's rules? At the very least, textualists should concede that the all-or-nothing position is untenable, based on the very principles they hold dear—respect for text, semantic meaning, and judicial restraint.

1. Entextualization: Choosing the Right Text

To find the meaning of language one must identify the key text. Lawyers learn to identify and pull chunks of text out of a larger statute. Linguists call this process “entextualization,” which means that some language is identified as “the” relevant language. So, in *Holy Trinity*, the Court focused on the terms “labor or service of any kind.”¹⁸⁰ This process of “entextualization” is an identifiable step in the process of attributing meaning—even if it has been almost entirely ignored by statutory interpreters.¹⁸¹ If the text “entextualized” is wrong or incomplete, so too will be the interpretation.

Hundreds of pages, quite literally, have been written about *Holy Trinity*,¹⁸² a case Justice Scalia made the poster child for new textualism. In his deservedly famous Tanner lectures,¹⁸³ he concluded that although the result might seem odd—using an anti-slave labor statute to cover a British minister—the statute did in fact cover the rector. The statute said “labor” of any kind, and that in-

¹⁷⁷ See U. S. CONST. art. I, § 5 (granting authority to the individual houses of Congress to set their own rules of proceeding).

¹⁷⁸ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 902 (2013).

¹⁷⁹ Cf. U. S. CONST. art. I, § 5.

¹⁸⁰ 143 U.S. at 458.

¹⁸¹ Entextualization appears to be a move that takes a term—such as labor or lecturer—out of context. The text appears, once isolated, to have no context, having been isolated as an autonomous object for legal analysis. However, isolating text is a process by which the text is in fact “recontextualized” within the judicial process, according to judicial values. See *id.*

¹⁸² See *supra* notes 158–164 and accompanying text.

¹⁸³ SCALIA, *supra* note 5, at 18–23.

cluded brain toilers. That argument assumes that there is *one relevant text*. Focusing on the term “labor” is a choice, and a significant one. As this and other cases show, the first frame by which one analyzes a case may not be the best or only one. In fact, there is another relevant text—the statutory exemption for “lecturers”—a text that appears to cut precisely in the opposite direction, excluding the good rector. There is no immediate reason based on the semantic content of “lecturer”¹⁸⁴ to believe that ministers do not count as “lecturers.” One who lectures (who orates at a lectern in front of groups of people) includes a minister.¹⁸⁵

Textualism requires a theory of which text to pick—a theory of entextualization. If one does not see that “lecturer” may be relevant, then presumably one has made the case plain by fiat, not fact. Statutory history can provide a check against errors at the entextualization stage—relying upon the wrong, or a partial, text. If statutory history were analyzed, one would compare the bill as introduced and passed by the House, the bill as introduced and passed by the Senate, and the final text. When comparing these bills (which computers can do rather easily these days), there is a far greater chance that one will note textual changes and thus differences. In *Holy Trinity*, for example, a comparison of statutory text helps the reader focus on the lecturer exemption.

2. Not All Text Is Alike: (or, at least Congress’s rules say that).

To see why interpreters should analyze statutory history, it is important to remember that Congress’s rules give greater weight to some texts as opposed to others¹⁸⁶ Consider the *ABA* case again.¹⁸⁷ If one had started with statutory history, one could easily have avoided the Justices’ conclusion that the statute was absurd.¹⁸⁸ Statutory history reveals that both houses had passed the term “establish” (leaving the *ABA* out), but the conference committee added the term “utilize” (potentially covering the *ABA*). If a conference committee adds language that significantly changes the bill, it violates House and Senate

¹⁸⁴ Note that in urging a broad interpretation for “labor,” textualists are using a semantically extensive meaning of the term, and presumably that same type of meaning should be applied to other terms in the statute. An extensive meaning for the term “lecturer” would include any person who could lecture, therefore excluding the rector. “Labor” could, by contrast, be interpreted to mean a prototypical laborer, or manual laborer. See generally Nourse, *supra* note 4, at 124–25 (illustrating the difference between prototypical and extensive meanings).

¹⁸⁵ See *supra* note 161 and accompanying text.

¹⁸⁶ See H.R. DOC. NO. 112-161. Text added in conference committee, as this example shows, is viewed under the rules differently from other text. Members assume that the committee has followed its rules not to make significant changes in texts that are already agreed upon. Put in other words, if both houses pass text, that text takes priority in the committee and on the floor.

¹⁸⁷ *Public Citizen*, 491 U.S. at 440.

¹⁸⁸ See *id.*

rules.¹⁸⁹ Under those rules, members of congress are entitled to interpret “conference committee” text as the equivalent of “no significant change,” in the absence of a floor objection. No one in Congress wants a committee rewriting the bill, trumping the will of 535 members. Indeed, a court that gives “utilize” the same weight as “establish” in this case does precisely what textualists often claim that they want to avoid—it gives authority to language that only *a part of Congress* wrote.

Statutory history—tracing the path of the law’s language—is also likely to reveal conflicts in text that faulty entextualization decisions obscure. Consider *Bock Laundry*, in which the U.S. Supreme Court considered whether an evidentiary rule applied to a plaintiff if the statute said “defendant.”¹⁹⁰ No one thought the statute made any sense, including Justice Scalia, but everyone focused on a single term “defendant.” As in the *ABA* case, the pesky, seemingly absurd term in *Bock Laundry*, appeared in conference. Perhaps more importantly, in reviewing the statutory history, one finds that there were other terms potentially relevant to the question whether the evidentiary rule at issue applied to civil cases. Both houses passed language that appeared to cover civil and criminal cases, as is standard in evidentiary rules, by covering all witnesses.¹⁹¹ The term “witness” was never discussed as part of the Supreme Court’s statutory analysis, even though it seems to exclude an interpretation that the rule applies only in criminal cases. Instead, the Justices focused on a single term—defendant—the one added in conference—the term with the least legitimacy from textualists’ own perspective.¹⁹²

3. Juriscentric Cognitive Bias

The third problem at the entextualization stage is cognitive bias in determining “plainness”—the problem of finding language “plain” to a judge that would not be “plain” to a member of Congress or might be “plain” in an entirely different way.¹⁹³ In interpreting statutes, all statutory interpreters agree that the standard cannot be the “will of the judge,” but the “will of Congress.”¹⁹⁴ But every judge is faced with the ancient problem of the philosopher in the

¹⁸⁹ See H.R. DOC. NO. 112-161.

¹⁹⁰ *Bock Laundry*, 490 U.S. at 527.

¹⁹¹ See *id.* at 509–10.

¹⁹² Textualists claim that committee reports should not be relied upon because they do not represent the membership as a whole, but only part of Congress.

¹⁹³ When I assert the possibility of judicial bias, I do not mean that judges are any less biased than other decisionmakers, simply that everyone is biased toward their own context and against foreign or unknown contexts. Social psychologists have found, for example, that people as a general rule tend to attribute social phenomena to individuals rather than the situation. They tend, thus, to fail to focus on context.

¹⁹⁴ GARNER & SCALIA, *supra* note 175, at xvi–xxviii.

cave: one's perspective may be darkened to the world, in this case darkened to the world of Congress. We can never know, *ex ante*, whether Congress would have made a decision on a particular text different from the one made by intuitive judicial reflection. As the great contracts scholar Corbin argued, every interpreter uses some extrinsic evidence, even if it is the interpreter's own life experience: "[W]hen a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of *his own personal education and experience*."¹⁹⁵ If this is correct, the only way to protect against *ex ante* judicial bias is to look for some kind of check.

We know, for example, that there are famous cases in which the plainness judgment, at the entextualization stage, was quite wrong. In 1992, in *Pepper v. Hart*, decided by the House of Lords, the most famous example of this occurred.¹⁹⁶ The question was how to calculate taxes on fringe benefits: the taxpayer was a teacher who received an educational benefit for his children at his school. When the case was initially argued, the Lords agreed that the statute was plain, ruling for the government that "expense incurred" was expense to the employer for non-employees as opposed to the marginal cost of adding another student. On reargument, after the Lords looked at Hansard (Parliament's records), they reversed. Hansard showed that a parliamentary decision had been made and that decision was precisely the opposite of the apparent "plain" meaning of the text before looking at the legislative history. Put in other words, legislative context changed the "plain" meaning quite radically, from a plain meaning against the taxpayer to one for the taxpayer.¹⁹⁷

Textualists might respond that these examples are simply instances of *bad textualism*. The Lords in *Pepper* should have known that the statute's meaning was not plain.¹⁹⁸ Likewise, the Supreme Court in *Bock Laundry* or *Holy Trinity* should have known that there were texts in need of reconciliation.¹⁹⁹ This recognition alone, however, does not provide much help in resolving such cases. Once a judge finds conflicting texts—"labor" and "lecturer" or "witness" and "defendant"—how are these to be reconciled or interpreted? If the semantic content does not yield a single answer, but points in two directions, then the

¹⁹⁵ Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implication for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 197 (1998) (quoting Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965)) (emphasis added).

¹⁹⁶ *Pepper v. Hart*, [1993] A.C. 593 (H.L.) 634 (U.K.)

¹⁹⁷ *See id.* at 627 (opinion of Lord Browne-Wilkinson). On reargument, the court noted that legislative history indicated a deliberate decision to withdraw a provision of the tax law which would have resulted in heavier taxes for the teacher in this case. *See id.*

¹⁹⁸ *Cf.* [1993] A.C. 593 (H.L.) at 634.

¹⁹⁹ *C.f. Bock Laundry*, 490 U.S. at 527; *Holy Trinity*, 143 U.S. at 458.

statute has no “plain” meaning. Textualists will insist that judicial canons can be useful in resolving conflicting texts. But it is clear that this is not true in all cases. It is certainly not true in the *ABA* case²⁰⁰ or *Pepper*.²⁰¹ Ex ante, canons cannot tell one if the text is plain, which text to pick, or how to reconcile contradictory texts.

4. Legislative History and Usage

Finally, even if none of these arguments persuade, textualists should concede that legislative history may be used as evidence of semantic meaning.²⁰² The congressional record is an extraordinary resource for understanding how members (presumably English speakers) use words, namely semantic usage. Nevertheless, once one opens the door to legislative history as a form of usage, it is difficult to understand why it should not be opened to include Congress’s decisions on specific texts. Let us assume, in *Pepper*, that we can find one hundred uses of the term “benefit” and all of them suggest a narrow definition supporting a ruling against the taxpayer. If we know, as we do know from the case, that the government withdrew and opposed that result, then semantic content becomes a way to replace Parliament’s actual decision with the results of a strange judicial adventure in semantics.

Usage inquiries suffer from two other significant problems. First, they depend upon determining the appropriate term in the statute at the “entextualization” stage. If you think that the only relevant term in the *Holy Trinity* case is “labor,” for example, your usage inquiry will be skewed, and pointless if you choose the wrong text. Second, the usage inquiry can distort if it does not look to the *sequence* of Congress’s decision. Would it have helped, for example, to find how Congress used the term “utilized” in the *ABA* case? In fact, it would have distorted our best evidence of Congress’s actual decision: the statutory history showing that “utilized” was added in conference committee.

C. Legislative History and Group Attribution

Now that we have identified different forms of legislative history, with their vices and virtues, it is possible to consider the issue raised by the first Part of this Article, which is the degree to which the question of “group” action should affect the interpretation of legislative context. Elsewhere I have elaborated on the ways in which Congress’s sequential procedures should affect the reading of legislative history. But once we enter the world of group action it

²⁰⁰ *Public Citizen*, 491 U.S. at 440.

²⁰¹ See [1993] A.C. 593 (H.L.) at 634.

²⁰² SCALIA & GARNER, *supra* note 175, at 33.

becomes clear that this is not enough. If we are looking for legislative “context” we should recognize that the context includes the recognition that statutes are made over time by winners and losers.²⁰³ We should also remember that legislative context must be public action legitimized by “the group.”

If this is correct, it provides an important opportunity to distinguish between legislative context properly attributable to the group and not properly attributable to the group. For example, courts are skeptical of individual members’ statements as the claims of lone wolves. They should be: members *themselves* see individual members’ speeches as little more than the reflection of a particular member’s preferences. On the other hand, the group views some individual statements as performing a larger deliberative function, as when statements are made by the author of the amendment or manager of the bill. To be a “manager” or “author” is to assert representative positions of those supporting the bill. Implicit group attribution is part of the common-sense of legislative context. Statements violating the rules or having no ability to persuade the group (such as remarks inserted after debate) should not be considered proper group action or proper legislative context.²⁰⁴ So, for example, in 2006, in *Hamdan v. Rumsfeld*, the Supreme Court properly disregarded deceptive statements made by legislators, just as they would be rejected by members of Congress as post-hoc attempts to influence the courts.²⁰⁵

This raises questions about items like committee reports, traditionally the “gold standard” for legislative history. That conventional wisdom deserves serious rethinking,²⁰⁶ but not because these reports are the work of a committee as opposed to the whole (the argument textualists tend to make). Ex ante, the whole delegates to the committee. In the absence of anything else, the committee report may be the best evidence of meaning of the whole. Members view the committee report as important *on the committee bill*, for example. The problem is the committee bill may bear no resemblance to the statute. If it turns out the committee bill was significantly amended (as it often is), then an early committee report may be entirely irrelevant. For example, if the key statutory provision first appears in a compromise substitute created to overcome a filibuster, then the earlier committee report may have little relevance as it relates to a now-superseded version of the bill.

In sum, there are two kinds of questions we must ask in developing any complete theory of legislative context. At the wholesale level, the question is

²⁰³ Nourse, *supra* note 4, at 75.

²⁰⁴ Further explication of this idea is outside the scope of this paper. For more information, see Nourse, *supra* note 4, at 71–72.

²⁰⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 583 (2005).

²⁰⁶ In part, it deserves rethinking because interpreters should not believe that because they do not find a committee report there is no legislative history. Many statutes bypass committee for example.

about the group: if there is no group authorization (i.e. post-hoc or deceptive statements) or no possibility of group attribution (i.e. statements members attribute only to individuals) the legislative context should be rejected without special justification. At a retail level, however, even if properly authorized, in any particular case, evidence of legislative context may be irrelevant because of the statutory sequence and history. As for committee reports, this latter judgment has become increasingly likely because: (1) the high incidence of the filibuster means that the bills considered in the Senate are likely to vary quite a bit from committee bills; and (2) the high incidence of partisanship makes it more likely that bills will evade the committee altogether.²⁰⁷

CONCLUSION

Textualism and purposivism were created during a century-long period of legal education marked by “juriscentricity.”²⁰⁸ In this world, professors taught and enculturated “students to respect, admire, and emulate the thought, the knowledge, the wisdom, and even the style of great judges, not great legislators.”²⁰⁹ By comparison, the great statutes of the twentieth century, which liberated entire peoples (namely blacks and women and the disabled and the aged) became a kind of “faux law,” or lower law, the work of usurpers too stupid to understand “higher” constitutional law, and motivated only by the self-interest of “uninformed [and] hate-filled constituents.”²¹⁰ No wonder there are no courses on congressional procedure and no wonder no one knows about Rule XXII, the cloture rule, or that the Senate requires a supermajority to pass all legislation.

The good news is that all this is beginning to change, albeit after a century of calls for its change. Recent scholarship is full of new and important work revealing that the juriscentric focus has given us a rather skewed view of the legislative process. Professors Gluck and Bressman have shown that, contrary to what some judges assume, drafters do not know canons.²¹¹ Professor Parrillo has explained that the idea of legislative history was constructed by post-New Deal administrative lawyers for their state-building purposes.²¹² Professor

²⁰⁷ See Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39, 43 (2014) (claiming that the current filibuster system has changed decision making in the Senate in a significant way).

²⁰⁸ Robin West, *Toward the Study of the Legislated Constitution*, 72 OHIO ST. L.J. 1343, 1348 (2011).

²⁰⁹ *Id.* at 1347.

²¹⁰ *Id.* at 1349.

²¹¹ Gluck & Bressman, *supra* note 178, at 901–02.

²¹² See generally Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266 (2013) (describing how the New Deal administrative state pushed legislative history on the judiciary).

Eskridge has perfected his pathbreaking study on congressional overrides of judicial statutory interpretation,²¹³ showing how and when Congress is likely to respond to judges' interpretive errors. This new scholarship reflects the urgent need to reverse the gravitational pull of juriscentricity, the need to aim our efforts away from how judges think we should interpret statutes to how Congress and the President make statutes.

If this is right, it is time to move beyond the great debates about legislative intent, and to elevate Congress to the position of group agent. To speak of Congress as having or not having an "intent" has become something of a slur. As if, unlike courts, Congress does not have the commitment to make a decision or acts in ways that hover in mental ether rather than in public. We know, of course, that the GI Bill, the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Violence Against Women Act are quite durable, having helped change a nation. And yet lawyers are quite comfortable treating these statutes as something lower in the most banal of discursive methods, by reducing them to bits of text or fleeting intents. My point is not to valorize Congress. A group agent is only as good as the procedures it adopts. When searching for Congress's meaning, we must attend to that context and not let ourselves be deceived by the conventional connotations of the terms legislative "intent" or "history."

²¹³ See generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014) (describing congressional overrides of judicial statutory interpretation).