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A PROCESS FAILURE THEORY OF STATUTORY INTERPRETATION

MARK SEIDENFELD*

ABSTRACT

Despite all that has been written about the choice between purposivist, intentionalist, and textualist approaches to statutory interpretation, to date the literature has not provided a justification for the common judicial practice of relying on intent-based inquiries in some cases and disavowing those approaches for textualism in others. This Article fills that void and, in doing so, lays out a new "legislative process failure" theory of statutory interpretation that has the potential to move the debate beyond a simple choice between textual and intent-based interpretation. This Article argues that Congress and the courts comprise different linguistic communities when they interpret statutory texts. It proceeds to define legislative process failure as occuring when the interpretive mechanisms of those communities produce different understandings of statutory meaning. The paramount question then becomes: What is the legal system's best response to such failure? Legislative supremacy requires that the courts and Congress come to some accommodation to ensure that courts will interpret statutes in accord with the legislature's understanding. That assumption, however, is satisfied as long as Congress knows how courts will interpret statutes and can adjust its process to ensure that statutes will be interpreted as it intends. Legislative process failure theory therefore leads to the subsequent question: Which branch should accommodate the other's method of

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attaching meaning to statutes, and under what circumstances? This Article concludes that, generally, legislatures cannot engage in judicial-type inquiries into statutory meaning while drafting statutes because the cost of engaging in such statutory analysis before identification of the potential provisions that might exhibit process failure is prohibitive. But, once the legislature becomes aware of a process failure, the costs of engaging in judicial-type textual inquiry become manageable, and the error costs of interpretation due to strategic manipulation of legislative meaning greatly increase. Thus, in the face of such awareness, a textual approach is better justified. Having developed the legislative process failure of interpretation, this Article considers several types of failures for which courts should accommodate the legislative approach to attaching meaning to statutes.

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INTRODUCTION

Although academics have identified two opposing schools of statutory interpretation—textualism versus legislative intent[1]—the prevalent judicial approach to statutory interpretation today is a pragmatic combination of the two.[2] Many judges start with statutory text, and if they are comfortable with the meaning they find, they stop there.[3] In a good number of cases, however, they do not find the

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1. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 116 (explaining that modern textualism takes seriously "the signals that Congress sends through the level of generality reflected in its choice of words"); Jonathan Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (contending that textualism's success in convincing interpreters to take text seriously, along with the willingness of its current proponents to consider legislative context, has made it "hard to tell what remains of the textualism-purposivism debate"); Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347, 348 (2005) (arguing that textualists and intentionalists do not disagree as much on the goals of statutory interpretation as they do on whether the search for intent should be rule-like or more open-ended).

2. Some judges, such as Justices Scalia and Thomas and Judge Easterbrook, self-identify or have been identified by others as textualists. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15-17 (2012); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."); Robert A. Katzmann, Madison Lectures, *Statutes*, 87 N.Y.U. L. REV. 637, 678 (2012) ("[A]mong Supreme Court Justices, pure textualists can claim only Antonin Scalia and Clarence Thomas as faithful supporters."). Others, such as Justices Stevens and Breyer, have identified with or been described as purposivists. *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Legislative history helps a court understand the context and purpose of a statute."); William N. Eskridge Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 550 (2013) (reviewing SCALIA & GARNER, *supra*) (describing Breyer as "the Court's best representative of a pragmatic or purposivist approach"); Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1513 (2012) (naming Breyer, Stevens, and Ginsburg as the Justices "most purposivist in their approach to interpreting statutes"). But most judges do not fit comfortably into either school—for example, relying on text when they find it clear enough, but consulting legislative history when they find the text insufficiently certain to resolve the interpretive question. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 17 (2009) ("Few judges limit themselves to a single interpretive tool, and many do not even strongly privilege one approach.").

3. *See, e.g.*, Milner v. Dep't of Navy, 131 S. Ct. 1259, 1266 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) ("As the conclusion we reach today is directed by the text ... we need not assess the legislative history."); United States v. Cheeseman, 600 F.3d 270, 279 (3d Cir. 2010) (refusing

text dispositive and consider other sources of legislative meaning—most notably legislative history—to discern how they believe the legislature intended to resolve the precise question they face.[4] Moreover, when the legislative history does not include evidence of congressional intent on the precise issue, judges often resort to indications of legislative purpose to determine how Congress would have resolved the issue had legislators explicitly considered it.[5] Judges, however, generally do not satisfactorily explain why they sometimes find text sufficient, yet other times believe they need to resort to non-textual sources of meaning. At best, judges explain consideration of legislative history by claiming the statutory provision at issue is particularly ambiguous, or the legislative history particularly reliable or persuasive, when they bother to explain such consideration at all.[6]

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to apply the rule of lenity when a statutory provision is clear).

4. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (stating that the intent of Congress, which controls interpretive questions, "will be discoverable in the text of the [statute], its legislative history, or ... the [statute's] underlying purposes"); Hall v. United States, 99 Fed. Cl. 223, 231 (2011) ("[A] court turns to 'the traditional tools of statutory construction, e.g., legislative history,' if the intent and meaning of a statute are not clear from its plain text.").

5. *See, e.g.*, United States v. DiCristina, 726 F.3d 92, 96-97 (2d Cir. 2013) ("In the event that the text of a statute is not clear, a court interpreting the statute may consult the legislative history to discern 'the legislative purpose as revealed by the history of the statute.'" (quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 627 (1993))).

6. *See, e.g.*, James v. Wadas, 724 F.3d 1312, 1316 (10th Cir. 2013) ("[O]ur task is to determine Congress' intent, beginning with the plain language of the statute itself.... If, however, the text is ambiguous, we inquire further to discern Congress' intent looking to the legislative history and underlying public policy of the statute." (citations omitted)); Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy, 654 F.3d 496, 512 (4th Cir. 2011) (refusing to consult legislative history to override an interpretation "strongly supported by more reliable interpretive tools"); Grant Thornton, LLP v. Office of Comptroller of the Currency, 514 F.3d 1328, 1334 (D.C. Cir. 2008) (rejecting use of legislative history because the statute was "clear enough"). Such explanations essentially are ad hoc; they do not provide a coherent theory for when use of legislative history is appropriate. *See* Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583, 589 (2011) ("Because the law of interpretation lacks a hierarchy for ordering its injunctive principles, it is incapable of identifying a single legally superior interpretation among two or more rival interpretations."); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 777-83 (2008) (describing why judges with an ideological preference for particular outcomes might choose textualism in some cases and intentionalism in others).

Legal scholarship on statutory interpretation recently has attempted to provide a theoretical footing for various approaches to statutory interpretation, most significantly the intent-based approaches of purposivism and intentionalism and their counterpoint, textualism, from which pragmatic interpreters borrow.[7] The scholarship has not, to my knowledge, provided a sound theoretical justification for using evidence of legislative intent in some instances and textualism in others. This Article fills that gap by providing such a theoretical justification for this pragmatic approach to interpretation, as well as some guidance for how judges might implement that approach. That justification first recognizes differences in the way the courts and legislatures ascribe meaning to statutes. When those different mechanisms lead to inconsistent meanings, it then considers the cost of one branch accommodating the mechanism used by the other branch to fix statutory meaning. From this inquiry, it posits what I call a "legislative process failure" approach to statutory interpretation, which justifies judicial use of legislative history in a subset of cases in which legislative history currently influences judicial construction of statutes.

This Article begins by reviewing the fundamental arguments underlying the intent-based and textualist approaches to interpretation. It concludes, as a preliminary matter, that textualists are correct in asserting that legislation need not be, and in many cases will not be, coherent. Legislation reflects bargains by different factions of legislators who had different preferences about what the statute should mean as applied to concrete situations. This Article then argues that it does not follow from this incoherence that judges

7. *See* CROSS, *supra* note 2, at 10-23 (describing the goals of various approaches to statutory interpretation); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 250-56 (1992) (describing judges' invocation of justifications for various approaches to statutory interpretation as reigniting interest in interpretation theory). Leading textualists claim that they do look for legislative intent, but they say that intent is objective—based on the best public meaning of the words of the statute at the time it was enacted. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16-17 (Amy Gutmann ed., 1997); Easterbrook, *supra* note 2, at 65; John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79-80 (2006). Intentionalists and purposivists, in contrast, accept that Congress's subjective intent about the meaning of a statute may be relevant.

should always be textualists, but rather that judges should not deviate from the best reading of the text unless they have evidence of a legislative process failure that makes it likely that the statutory provision at issue does not reflect such a bargain. In the face of such a failure, a judge can assert that a textualist determination of the statute's meaning did not reflect legislators' knowing bargain, justifying some remedy for what amounts to a failure of the "legislative market."

This Article next fleshes out the notion of legislative process failure. Just as those with a different level of trust in markets see the prevalence of market failures differently,[8] those with different beliefs about the appropriate sphere for judicial participation in the law-making process via interpretation will tend to disagree about the prevalence of process failures and about precisely what constitutes such a failure. Nonetheless, this Article will demonstrate that even textualists accept some interpretive doctrines that allow courts to deviate from the best reading of statutory text in the face of evidence of legislative process failure. Therefore, the meaningful question is: Which institution should accommodate the other's mechanism of ascribing meaning when faced with a particular legislative process imperfection?

Finally, this Article fleshes out the operation of legislative process failure theory by discussing possible process imperfections that courts should consider sufficient justification for deviating from textualist principles. Just as the effects of market imperfections might be more acceptable than regulation to remedy those imperfections,[9] different process imperfections might justify different judicial interpretive reactions, from virtually ignoring the text of the statute in a particular case to interpreting the statute in light of the best reading of the text despite the process failure. Hence, this Article discusses how application of intent-based principles might remedy process defects, and evaluates when such applications are warranted.

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8. *See, e.g.*, Giesela Rühl, Book Review, 59 AM. J. COMP. L. 841, 852 (2011) (reviewing ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009)) ("O'Hara and Ribstein's ultimate trust in markets, along with their deeply rooted skepticism towards claims of market failures, should be critically reviewed.").

9. *See* Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 COLUM. BUS. L. REV. 551, 591 (arguing that reforms meant to correct admitted market imperfections may impose more costs than they eliminate).

I. PREVAILING PARADIGMS FOR STATUTORY INTERPRETATION

A. Intent-Based Interpretation

There are two theoretically distinct approaches to intent-based interpretation: purposivism and intentionalism.[10] Traditionally, purposivism seeks to predict the outcome that a reasonable Congress at the time of enactment would have reached had it explicitly considered the precise issue raised in a case.[11] "Purposivists give precedence to *policy* context—evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment [of a statute] would suppress the mischief [at which the statute aims] and advance the remedy."[12] Essentially, judges look for the purpose underlying the statutory provisions at issue in a case, and then choose the interpretation of the provisions that best furthers that goal.[13]

Purposivism allows significant leeway for judges to interpret statutes.[14] The purpose of a statute's provision is not self-evident.[15] This lack of clarity is further exacerbated by the possibility of finding purposes at different levels of specificity. For example, at the broadest level, a judge can plausibly argue that provisions of the Telecommunications Act of 1996 requiring incumbent local exchange companies (LECs) to lease unbundled network elements to competitor LECs on a cost basis aimed to ensure a viable competitive market for local telephone service.[16] But, given that the statute

10. *See* CROSS, *supra* note 2, at 59-60.

11. Manning, *supra* note 7, at 76 ("[O]ne can also plausibly cast purposivism as an objective framework that aspires to reconstruct the policy that a hypothetical 'reasonable legislator' would have adopted in the context of the legislation.").

12. *Id.* at 91.

13. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1592 (2008) ("[P]urposivists take the view that ambiguities can be resolved by identifying the statute's overarching purpose and then determining how the text can best be read to accomplish that goal.").

14. Few courts today invoke what Jonathan Molot calls strong purposivism because that approach to interpretation allowed judges significant leeway to substitute their preferences for those enacted into statute. *See* Molot, *supra* note 1, at 30.

15. *See id.* at 20-21.

16. 47 U.S.C. § 251(c)(3) (2000); *see* Jerry Ellig, *Costs and Consequences of Federal Telecommunications Regulations*, 58 FED. COMM. L.J. 37, 87 (2006) (characterizing the purpose of unbundling as encouraging competition in local telephone service).

required such leasing only for necessary network elements and only to the extent that refusal to lease elements would impair the ability of a competitor LEC to provide local telephone service, a judge could also read the provisions as aimed only to provide affordable access to those elements that would be inefficiently redundant if each LEC had to provide them on its own.[17] This flexibility to find purposes at different levels of generality allows judges to reach very different outcomes when faced with a particular dispute.[18]

Intentionalism usually focuses on evidence of actual legislative intent with respect to the precise question facing the interpreting court.[19] Intentionalism counsels that judges should interpret a statute to reach the outcome in any particular case that reflects the intent of the legislative body that enacted the statute.[20] That is, an intentionalist judge does not seek to determine some overriding purpose of the statutory provision and then, faced with a particular factual context, choose the interpretation that would best further that purpose. Rather, she asks: What was the understanding of the legislature about how the statute would operate in the particular factual context of this case?[21] Although intentionalism recognizes that not all members of the legislature share such an understanding, it assumes that courts can divine the intent of the body as a whole as to how the statute should determine the outcome of particular cases.[22] Intentionalism, however, begins to look a bit like

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17. *See* Jim Chen, *The Magnificent Seven: American Telephony's Deregulatory Shootout*, 50 HASTINGS L.J. 1503, 1516 (1999) (characterizing this provision as meant "to prevent incumbents from using their control of 'bottleneck facilities ... to discriminate against competitors'").

18. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 440-41 (2005) (criticizing classical intentionalists for interfering with legislative bargains by "adjust[ing] the level of generality at which [the] legislation speaks").

19. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L. J. 221, 272 (2010) ("Intentionalism directs the interpreter to ... ask how the enacting Congress would have decided the question—and to construe the statute accordingly.").

20. *See* CROSS, *supra* note 2, at 59.

21. Linda D. Jellum, *The Art of Statutory Interpretation: Identifying the Interpretive Theory of the Judges of the United States Court of Appeals for Veterans' Claims and the United States Court of Appeals for the Federal Circuit*, 49 U. LOUISVILLE L. REV. 59, 88 (2010); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1107-08.

22. *But see* CROSS, *supra* note 2, at 61 (raising some of the problems with judges trying to reconstruct legislative intent about the meaning of a statute in a particular case).

purposivism when, instead of looking for actual legislative intent, it engages in imaginative reconstruction—looking for the meaning that the legislature most likely would have preferred had it explicitly considered the particular interpretive question at issue.[23]

Thus, although the distinctions between purposivism and intentionalism matter, the most important point for this Article is their common willingness to treat all evidence of the statute's meaning as relevant to the court's interpretive exercise, including non-textual evidence that derives from the legislative process.[24] Statutory language is usually the most important evidence, given that language is what was voted on by the members of the legislature. But language and the legislative process that generates it are both imperfect in many respects, and these imperfections together may result in the enactment of language that may not be the best indicator of the intent of the body about the meaning of the statute.[25] For example, language by its nature often is ambiguous. Hence, it may be possible to read it in more than one way, and only one of these readings will reflect the legislature's subjective understanding of the statute. To resolve meaning in such situations, the intent-based school will look at evidence extrinsic to the language of the statute, including evidence of the problem the language was meant to address, norms about how our society operates that give

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23. *See* Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1568 (noting the relationship of imaginative reconstruction to purposivism, but characterizing purposivism as "cast ... at a higher level of generality or abstraction").

24. *See* Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1939-40 (2005).

25. As the Supreme Court has explained during the heyday of purposive interpretation:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543-44 (1940) (footnotes omitted).

an interpretation more or less plausibility, and, most significantly for this article, legislative history.[26]

The problems created by semantic ambiguity are exacerbated by a messy legislative process, which often generates complex texts that members of the legislature do not try to understand by themselves. Instead members rely on their agents in the process—for example, staff members of committees responsible for drafting and sponsoring the legislation—to explain to them the meaning the drafters believed they had incorporated when writing the statute.[27] When an amendment is made from the floor of one of the chambers, there may not be any committee report explaining the change in language, but the debate "on the floor" might shed light on the purpose or underlying intent of the body. In fact, in deciding how to vote, legislators focus more on committee reports and other reliable pieces of legislative history than they do on statutory text.[28] Intent-based interpreters see legislative history as direct evidence of what those who voted for the legislation had in mind. They are therefore willing to consult that history to discern the understanding of the legislature when enacting a statute.

B. Textualism

Textualists believe that the meaning of a statute must derive from the text of the statute without resort to extra-statutory legislative explanations of what that text means.[29] They believe that a court should construe a statute in accordance with the most likely public meaning of its language when the statute was enacted. For

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26. *See* Krishnakumar, *supra* note 19, at 272.

27. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 120 (9th ed. 2014) (contending that members of Congress "defer to the committees' decisions"); Abbe K. 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, 972-73 (2013) (reporting the following remarks of one legislative staffer: "Members don't read text. Most committee staff don't read text. Everyone else is working off [the section-by-section] summaries [in the legislative history].... The very best members don't even read the text, they all just read summaries").

28. *See* Gluck & Bressman, *supra* note 27, at 968-69.

29. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1288 (2010) ("Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text and, in so doing, should reject the longstanding practice of using unenacted legislative history as authoritative evidence of legislative intent or purpose.").

textualists, subjective legislative intent about how the statute should operate or about the meaning of its words, as distinct from the best public understanding of those words, is irrelevant.[30]

Textualists rely on the bicameralism and presentment requirements of Article I of the Constitution to justify this belief, noting that what the Constitution prescribes is a vote on the language of bills.[31] Textualists, however, do not limit their consideration to the four corners of enacted legislation; they do not deny the relevance of context.[32] They will consult contemporaneous dictionaries and other indications of generally accepted meaning at the time the statute was passed.[33] They will even consider the particular mischief at which a statute seems aimed as some indication of how the public at the time would have resolved textual uncertainty.[34] Textualists distinguish these sources, however, from extratextual sources meant to shed light on the legislature's subjective understanding of the text. Hence, textualists categorically reject use of legislative history as a source of statutory meaning.[35]

There are several possible reasons textualists give for distinguishing legislative history from other contemporaneous sources of meaning. First, legislative history represents statements by members of a non-representative subset of the entire legislative chamber.[36] In contrast to dictionaries and other extra-statutory

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30. Manning, *supra* note 18, at 424 ("[T]extualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text."); Nelson, *supra* note 1, at 354 (describing textualists' denial that objective intent of a multimember legislature is a meaningful concept).

31. Molot, *supra* note 1, at 26-27; *see also, e.g.*, Scalia, *supra* note 7, at 24-25; John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 695 (1997).

32. *See* Manning, *supra* note 7, at 79 (stating that purpose may be "a relevant ingredient of statutory context"); Molot, *supra* note 1, at 3 (noting that modern textualists do not merely consider plain meaning, but context as well). In fact, context is central to their focus on the meaning of language. *See* Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994) ("[B]ecause words have no natural meanings, and because their effect lies in context, we must consult these contexts.").

33. *See* Philip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 174-75 (2010) (remarking that although dictionaries are sources of meaning external to statutory text, textualists do not scrutinize the use of dictionaries as they do the use of legislative history).

34. Easterbrook, *supra* note 32, at 61 (the context from which words take their meaning includes "the problems the authors were addressing"); Manning, *supra* note 7, at 78.

35. *See* Manning, *supra* note 18, at 421.

36. *See* Frickey, *supra* note 7, at 250-51.

sources that textualists are willing to consult, that subset of representatives has an interest in having its interpretation credited by the courts.[37] Second, judicial crediting of interpretations set out in legislative history would allow the subset of legislators to secure its preferred interpretation without going through the constitutional requirements of bicameralism and presentment.[38] Regardless of whether that subset has an incentive to attach meaning different from that understood by most members of the legislative body, textualists contend that allowing a subset to determine statutory meaning delegates law-making power in contravention of established Supreme Court doctrine.[39] Third, and independent of any constitutional constraints, the subset of the legislature might be able to insert its preferred meaning for a statute in legislative history even when it could not secure that meaning through the enactment process.[40] Thus, crediting legislative history, or, more problematically, broad purposes judges purport to derive from it, circumvents legislative bargains struck to allow the statute to be enacted.[41]

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37. In a speech given at various law schools, Professor Phil Frickey reported that "Scalia charged that legislative history is the product of legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staff, who create legislative history at the behest of interest groups or to promote their own private agenda." *Id.* at 254; *see also* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV 205, 208-09 (reporting that textualists characterized "committee reports as deceptive shilling for special interests").

38. *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen ... are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); Katzmann, *supra* note 2, at 672-73.

39. *See* Manning, *supra* note 31, at 698-99.

40. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568-69 (2005) ("[J]udicial reliance on legislative materials ... may give unrepresented committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.").

41. Manning, *supra* note 29, at 1311-13 (describing the recent move of textualists to object that the use of broad statutory purpose effectively overrides legislative bargains that are reflected in statutory text); Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1026 (2006) ("[N]ew textualists conclude that 'the Court should hesitate to employ interpretive rules that threaten to disturb clear legislative outcomes, lest such rules unmake unrecorded compromises.'" (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2438 (2003)). *But see* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102

Textualists further argue that the very notion of subjective intent of a multimember body is not well defined.[42] Statutes are bargains among legislators that are reflected in statutory language as the legislative process runs its course.[43] What gets included in the statute may reflect agenda control and logrolling.[44] For this reason, statutes need not prescribe a coherent set of rules that favor a particular regulatory value to a specified extent.[45] Thus, one provision of a bill on environmental protection may strongly favor regulation of pollution, whereas another provision may make it difficult for the EPA and private parties to enforce such regulations.[46] In addition, the legislative process accepts that there will be vetogates, or points in the legislative process when someone with a potentially minority preference regarding a bill can kill it.[47] Sometimes such vetoes can be circumvented only by "buying off" those who can exercise vetoes with other provisions in the bill that may have nothing to do with the vetogate's objection to the original bill.[48] For example, legislation may provide "pork" for an intransigent's

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COLUM. L. REV. 2027, 2064 (2002) (noting that legislative history, unlike broad statutory purpose, may reveal the limits of the legislative bargain).

42. *See, e.g.*, Easterbrook, *supra* note 32, at 68; Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase anyway.").

43. Manning, *supra* note 18, at 431.

44. Whether such techniques improve legislative outcomes is subject to debate. *See* Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1338-48 (2000) (discussing the equality, efficiency, and inalienability concerns of legislative logrolling). But our legal system accepts these techniques as part of the legitimate legislative process. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 487 n.76 (1991) ("[L]ogrolling in the legislative process ... is accepted as legitimate under the political theory of interest-group pluralism that is reflected in much of the Supreme Court's post New-Deal jurisprudence.").

45. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 19 (2001).

46. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 113-15 (describing how the structure of monitoring and enforcement of environmental laws renders enforcement especially prone to capture).

47. *See* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-46 (2008) (describing nine vetogates in the congressional legislative process).

48. Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 918-19 (2012) (describing how those with veto power who oppose legislation increase the costs of enactment because they will stop the legislation unless they are "bought off").

home district if that member's vote is needed for passage of the legislation. But that "pork" is, nonetheless, part of the statute.

Examples exist clearly demonstrating that textualists are correct that language—and not the preference of the legislators, independent of language—dictates statutory meaning. For example, legislative history and other sources on the intent of Congress members who voted for the Civil Rights Act of 1964 indicate that inclusion of prohibitions on sex discrimination in Title VII resulted from a strategic move gone awry.[49] Representative Smith of Virginia, an avid opponent of the Civil Rights Act, added the prohibition of sex discrimination to make the bill so unpalatable to moderate members that Congress would vote down all of Title VII.[50] A coalition of those like Smith, who opposed the bill, and liberal progressives led by five congresswomen, who favored the prohibition of sex discrimination inserted the prohibition in the bill.[51] But, when the vote on the final measure was taken, the moderates decided to vote for the bill despite potential reservations about the prohibition on sex discrimination, and Title VII was enacted.[52] Thus, even though the legislative history provides evidence that a majority of legislators disfavored outlawing sex discrimination, the prohibition against such discrimination was in the bill as passed and appropriately became part of the law.

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49. For a thorough description of the addition of the prohibition on sex disecrimination as a strategic ploy to kill the entire bill, see CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17, 121 (1985). Some have questioned the veracity of this story about the introduction of the prohibition of sex discrimination. *See generally* Rachel Osterman, Comment, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409 (2009). Because I use this story merely to illustrate the problems that can arise from equating law with the legislature's subjective intent, its potential lack of veracity does not affect the analysis.

50. *See* 110 CONG. REC. 2577 (1964) (reporting Rep. Smith's amendment); *id.* at 2578 (statement of Rep. Celler) (remarking that the addition of the prohibition of sex discrimination was a strategic ploy to kill the entire bill); *id.* at 2581-82 (statement of Rep. Green) (remarking the same as Rep. Celler).

51. *See* WHALEN & WHALEN, *supra* note 49, at 117; Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV 1295, 1322 n.113 (1990).

52. WHALEN & WHALEN, *supra* note 49, at 121; Zeppos, *supra* note 51, at 1322 n.113.

Some textualists especially object to the use of a broad statutory purpose to resolve ambiguities in statutory language.[53] Statements of purpose indicate the general goal of the statute, but critics correctly point out that statutes do not mandate pursuance of goals at all costs. Statutory provisions, to quote Judge Easterbrook, represent "a vector," not a ray; it has a direction and a stopping point.[54] That is, purpose is not useful to determine the degree to which a statute mandates pursuing the purpose versus competing legislative goals, including underlying constraints such as cost.[55] More importantly, interpreting statutes to further broad purposes ignores the precise bargains worked out through the legislative process of enacting statutory text.[56]

C. Response to the Textualist Critique

To a great extent, intent-based jurists have moderated their approaches to statutory interpretation in response to much of the textualist criticism.[57] Most academics have recognized a need to cabin judicial discretion and focus on text to assure that the courts are "faithful agents" of the legislature.[58] Today, outside of the invocation of the narrow "absurdity" doctrine, most judges who consider legislative intent do so only after finding statutory language to be unclear.[59] Moreover, it is difficult to defend legislators' intent about

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53. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546-47 (1983) (arguing that courts should not override specific legislative choices about how far to pursue a statutory goal); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2010 (2009) (textualists emphasize that "the level of generality at which a statute speaks itself represents an important element of legislative choice").

54. Easterbrook, *supra* note 2, at 63.

55. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) (Scalia, J., concurring) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal."); Easterbrook, *supra* note 53, at 546-47 (arguing that courts should not override specific legislative choices about how far to pursue a statutory goal).

56. *See* Manning, *supra* note 7, at 92.

57. *See* Molot, *supra* note 1, at 30-32 (reporting on "Textualism's Broad Appeal and Impact").

58. *Id.* at 31 ("[S]cholars ... generally accept that courts should be faithful to legislative instructions and follow laws enacted through bicameralism and presentment.").

59. *See, e.g.*, United States v. Moreno, 727 F.3d 255, 259 (3d Cir. 2013) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition

how they would like a statute to operate—shorn of the cloak of textual meaning—as an appropriate method of interpretation. Hence, the judicial trend today is moving away from seeking evidence of such "naked" legislative intent and toward focusing on the understanding that legislators likely shared about the meaning of the text of the statute.[60] Courts that rely on intent-based interpretation start with statutory language as the most likely signal of purpose or intent.[61] Thus, for example, the inclusion of sex discrimination in Title VII is easily handled by intent-based interpreters. Despite the fact that a majority of legislators did not favor prohibiting sex discrimination, there is no question that they understood that the inclusion of that term in the statute would ban such discrimination and that such a ban comes within the purpose of that provision.

Therefore, intent-based approaches, in any of their modern forms, do not treat legislative history as if it can simply trump enacted text. Rather, those who apply these approaches recognize that the text is enacted; they merely look at legislative history as evidence of what the enacting legislature thought the text meant. I believe that this use of legislative history runs afoul of neither Article I requirements for enacting legislation nor *Chadha's* formalist anti-subdelegation principle.[62] No one claims that legislative history is the law. When the language of a statute is applied, courts have to use some approach to interpret that language. "[L]egislative history is helpful in trying to understand the meaning of the words that do make up the statute or the 'law.'"[63] By giving credence to legislative

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required by the test is not absurd—is to enforce it according to its terms." (quoting Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004))).

60. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Extrinsic materials [such as legislative history] have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."); *see also* Morley v. CIA, 719 F.3d 689, 693 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[W]e should not reflexively cling to FOIA decisions that were decided on the basis of legislative history during an era when statutory text was less central to statutory interpretation.").

61. *See, e.g.*, United States v. Desposito, 704 F.3d 221, 226 (2d Cir. 2013) ("In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning."); Metamoros v. Starbucks Corp., 699 F.3d 129, 134 (1st Cir. 2012) ("We assume that the ordinary meaning of the statutory language expresses the legislature's intent.").

62. *See* INS v. Chadha, 462 U.S. 919 (1982).

63. Breyer, *supra* note 2, at 863.

history, those who rely on intent do not recognize subdelegation to committees or individual members to make law, but rather attempt simply to discern the meaning given the language by those who voted for it.[64] Courts that carefully use legislative history to clarify the meaning of enacted text recognize that legislators often rely on committees to draft and explain language ultimately voted on.[65] They do not, however, automatically credit extra-statutory legislative statements about the meaning of text as informative, let alone dispositive, about such meaning. Rather, they look to whether there is a reason to trust that such statements truly reflect the meaning ascribed to the text by the legislators who voted for the bill.[66] As long as it is the interpreting court that determines the extent to which such history sheds light on the likely meaning understood by those who enacted the statute, creating legislative history does not compel courts to heed it. In that sense, creating legislative history does not constitute legislating. Thus, the formalist critique of the use of legislative history seems overstated.

Modern intent-based theorists also concede the textualist point that legislation rarely leads to a coherent outcome that furthers some purpose in a reasoned fashion. Thus, few judges today are willing to rely on legislative purpose as providing statutory meaning independent of the textual evidence of the bargain struck by the enactment process.[67] In essence, those who rely on statutory purpose

64. If one believes, as intent-based interpreters do, that the appropriate inquiry is the understanding of text by those who voted for it, then use of legislative history is no more problematic than sources of meaning extrinsic to statutory language that textualists accept. Legislative history does not *choose* the meaning ascribed by a majority of legislators any more than dictionaries choose the meaning the public will give to statutory text. *See* Katzmann, *supra* note 2, at 675-76 (noting textualists' willingness to rely on extrinsic sources to determine meaning in context, but also noting that he has not found dictionaries particularly helpful in most cases). Some textualists have essentially conceded that legislative history may not be problematic if used as a source of public textual meaning instead of as determinative of such meaning. *See In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989) ("Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood."); Manning, *supra* note 31, at 733-37.

65. *See, e.g.*, *Exxon Mobil Corp.*, 545 U.S. at 575-76 (Stevens, J., dissenting).

66. *See, e.g.*, United States v. Fields, 500 F.3d 1327, 1331 n.5 (11th Cir. 2007); United States v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003).

67. *See* Manning, *supra* note 29, at 1309-10 (asserting that textualism has provoked courts to "respect the terms of an enacted text *when its semantic meaning is clear*, even if it seems contrary to the statute's apparent overall purpose").

do so as a means of limiting the possible particular understandings that the legislature might have had about case-specific interpretive questions.

As to the critique that legislative intent is not a meaningful concept, the fact that intent can be defined in some cases is sufficient to rebut the textualist assertions that it is conceptually flawed and can never enlighten the meaning of a statute. Focusing on what legislators thought the words of the statute meant greatly restricts the universe of possible "intents," increasing the likelihood of shared understanding. In addition, the work of Condorcet allows one to define legislative intent with respect to some, and perhaps many, questions of statutory interpretation.[68] Under Condorcet's criterion,[69] legislative intent for an interpretation exists when that interpretation wins in a pairwise comparison with all other interpretations.[70] One can derive from Condorcet's criteria that if the question of interpretation essentially reduces to drawing a line along a single dimension on which each legislator is assumed to have an ideal point, and her preference is assumed to decrease with the distance from that point,[71] then there will be a median voter whose preference defines the intent of the body.[72] And there are

68. *See* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 107-46 (1994) (noting that cycling in the real world is rare and describing limitations on empirical studies that might explain why this is so); GERRY MACKIE, DEMOCRACY DEFENDED 17, 86-92 (2003) (contending that, in practice, cycling is rare).

69. *See* Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971, 994 & n.68 (1989) ("[A] choice meets the [Condorcet criterion] if no alternative defeats it by a simple majority.").

70. As the problem of cycling outcomes—and more generally Arrow's Theorem—shows, there may be no outcome that satisfies the Condorcet criterion given the underlying preferences of legislators. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 94-96 (2d ed. 1963); Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 622-23 (2013).

71. Such a distribution is known in the public choice literature as "single peaked" over a unidimensional choice space. *See* Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 261, 263 (1988). Unstable voting equilibria in a body of 100 or more members, whose preferences will be mediated by party loyalty and ideology, will be extremely rare. *See* Richard G. Niemi, *Majority Decision-Making with Partial Unidimensionality*, 63 AM. POL. SCI. REV. 488, 493-94 (1969). Thus, even if thirty percent of the members of Congress do not evaluate issues on the liberal to conservative scale, a Condorcet winning outcome is likely. *Cf.* MACKIE, *supra* note 68, at 86.

72. Andrew Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1280-81 (2005) (describing the proof of this proposition by Duncan Black);

many disputes in Congress in which legislators' preferences align along the dimension from liberal to conservative. This does not mean that it will always be possible for courts to discern the intent of the legislative body from legislative history, or that judges cannot abuse legislative history while claiming to determine that intent. I simply assert that, used carefully in appropriate situations, legislative history can reveal information about legislators' understanding of statutory language.

The greatest problem for intent-based theories, given that it is the language on which legislators vote, is answering the question: Why should courts look to legislative history as an indication of statutory meaning rather than accepting a semantically determined best meaning of the text as dispositive? The fact that a committee that drafted the text or a congressperson who proposes an amendment from the chamber floor had a particular meaning in mind, does not guarantee that the body as a whole shared that meaning.[73] Textualists are correct that statutes virtually never point single-mindedly in one direction, but rather are bargains between legislators. Hence, statutes often will not represent a coherent vision of achieving a single goal, even to a specified extent. Legislative history may provide evidence of intent, but given its manipulability, courts may do better simply to determine the best-accepted meaning of text at time of enactment. This Article answers the question by considering the costs of courts crediting legislative history versus ignoring it when reliable legislative history supports a meaning different from that which would result from textualist interpretation. There are situations in which particular legislative process failures make it likely that most legislators, or at least the median legislator, understood the meaning specified in legislative history rather than an independent best reading of the statute. In such situations, courts can be fairly certain that a judicious use of legislative history provides a better reflection of the legislative bargain that the

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see also Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23, 26-28 (1948).

73. *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 136-37 & n.245 (2001) (reporting that a majority of Justices on the Rehnquist Court in 2001 questioned the reliability of legislative history as evidence of the intent of Congress as a whole, and collecting opinions expressing such concerns).

statute entails than does the best contemporaneous reading of the statute that ignores legislative history.

II. A THEORY OF LEGISLATIVE PROCESS FAILURE

A. The Concept of Process Failure

Having reviewed the textualist and intent-based theories of statutory interpretation, I now set out an alternative that focuses on legislative process failure to determine when a court can justify an intent-based rather than a textual approach to interpretation in a particular case. By "legislative process failure," I mean situations in which the best reading of the words of the statute, using tools and the mechanism on which textualists rely, is unlikely to derive the understanding of the statute to which most legislators ascribed, or for issues on which legislators were likely to have single-peaked preferences, the understanding of the median legislator. In such a situation, textualism is likely to lead to an inaccurate determination of the legislature's understanding of the statute.

Once a court determines whether a statute results from a legislative process failure, it must decide how to remedy that failure. To the extent the court looks at legislative history to help determine the meaning of a statutory provision, the court should first consider whether the pieces of legislative history it would consult are likely reliable signals of the understanding ascribed to the statute by those who voted for it. More generally, before a court decides what techniques to use to determine statutory meaning, it has to evaluate the probability that each technique will signal an inaccurate reading of the original legislature's understanding. The existence of a legislative process failure with respect to a statutory provision does not imply that legislative history or any other extrinsic sources of statutory meaning might not be equally or more greatly flawed than textualism in revealing the legislature's understanding of that provision.

Even after a judge decides that legislative history is likely to lead to a reading of a statute more in line with the understanding of most legislators than a textualist reading, she must further determine why the signal about statutory meaning in the legislative

history was not included in the statute itself. If there is no explanation why the information was not included, one logical conclusion is that the people responsible for creating the legislative history believed that they could not get the language accepted by Congress, which implies that it is not a reliable signal of the reading of the majority or the median legislative voter.[74] In such situations, the difference between the meaning derived using legislative history and that using a textualist approach would not reflect a true legislative process failure. Rather, it would reflect the inappropriate manufacture of legislative history to manipulate judicial outcomes by misleading courts to believe that there was a process failure. But sometimes legislative history's clarification of statutory terms might not be included in the text of a statute even when the legislative process would have passed the bill including such clarification. For instance, the sponsors of a bill might face a deadline, or decide that it would be too inefficient to include clarifying language through the entire legislative process rather than just inserting an explanation in the legislative history even when they could get such clarifying language enacted. In other cases, members of Congress may simply not be aware that their understanding is different from the understanding a texualist court would derive from the enacted statutory language. In other words, there can be true cases of process failure.

As with virtually every approach to statutory interpretation, the legislative process failure approach depends on an interpreter's judgment.[75] The interpreter has to determine whether there likely

74. *See* Manning, *supra* note 31, at 688 ("[T]o the degree that judges are perceived as grasping at any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept." (quoting Int'l Bhd. of Elec. Workers, Local No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring))); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 397-98 (1992) (pointing out that manufacturing legislative history "increases the chances that the member's intentions will become law if they are controversial").

75. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994) (noting that textualism gives leeway to judges to interpret statutes to further their ideological preferences); Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1645 (2000) ("[J]udgment about which legislators' intentions count and how much they count requires careful evaluation of the realities of the legislative process and of how that process

was a legislative process failure and whether using legislative history to address it creates potential error costs from remedying it that exceed the expected costs of the failure. My analysis attempts to explain how such failure can come about and gives examples of what I believe to be instances of such failure. In doing so, I hope to give direction to courts on when to rely on legislative history to clarify or even countermand statutory meaning that derives from a textualist interpretation.

B. The Aim of Statutory Interpretation

Like modern intentionalists,[76] and most judges,[77] the process failure theory of statutory interpretation assumes that the appropriate role of the courts is to give statutory language the meaning that the legislators who voted for it would have understood. I believe that in most cases this assumption is consistent with the proper roles of the legislature and the courts. The legislature's function is to make law—in essence to make the choices of policy that the law will implement and express these choices using language enacted into law. Were courts to ignore legislative understanding of the language chosen, they would essentially undermine the policy choices the legislature thought it was enacting into law.[78] As Joseph Raz reasoned, "It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make."[79]

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works in relation to statutory interpretation.").

76. *See* CROSS, *supra* note 2, at 59; WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14 (1994) (arguing that no theory of statutory interpretation "yields determinate results").

77. Scholars have identified only two Justices of the Supreme Court and a handful of federal appeals court judges as textualists. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts Of Appeals*, 15 YALE J. ON REG. 1, 54 (1998) (identifying Judges Easterbrook and Kozinski as among a handful of textualist circuit court judges); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 130 & n.89 (noting that Justices Scalia and Thomas consider themselves textualists, and that one might also count Justice Kennedy as a textualist).

78. "[G]iven the extreme subjectivity of the Court's dictionary approach and the intrinsic malleability of the language canons, ordinary meaning analysis reflects broad judicial discretion more than a commitment to the principal-agency relationship." James J. Brudney, *Faithful Agency Versus Ordinary Meaning Advocacy*, 57 ST. LOUIS. U. L.J. 975, 976 (2013).

79. Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL

Although most textualists appear to disavow this assumption, Professor John Manning has a more nuanced view. He agrees that legislative supremacy requires that the legislature have intent about what a statute means, but for him, that intent is a construct. Manning asserts that the requisite legislative intent is satisfied if "legislators intend to enact a law that will be decoded according to prevailing interpretive conventions."[80] Thus, he would credit context as important to understanding the meaning of statutory text at the time enacted to the extent that context would affect the public understanding of the language at the time.[81] The problem with Manning's concept of legislative intent, however, is that Congress and the courts do not use the same convention for decoding statutory text.[82] Unless textualists can persuasively argue that the legislature should adopt the judicial textualist key for decoding statutes, the fact that the judicial textualist key would likely lead to statutory meaning different than the meaning most legislators would attach undermines textualists' claim that they adhere to legislative supremacy. The difference, therefore, in legislative and judicial conventions for assigning meaning to statutes raises the question in any particular case: Which institution should accommodate the other's decoding convention?[83]

Moreover, despite textualists' disavowal of the relevance of subjective legislative intent, some of the assumptions they make about language undermine the credibility of this disavowal.[84] For example,

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POSITIVISM 249, 258 (Robert P. George ed., 1996); *see infra* notes 141-55 and accompanying text (discussing conditions that would support legislative supremacy in enacting law).

80. Manning, *supra* note 18, at 432-33.

81. *Id.* at 424 ("[M]eaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text.").

82. Textualists apply the judicial convention to the text, whereas purposivists are willing to try to decipher the likely meaning that legislative decoding imparts to the text. *See supra* Parts I.A-B.

83. That is the question that the legislative process failure approach to interpretation addresses. *See infra* Part II.D.

84. The examples below involve textualists using canons that attribute meaning different from the most likely public understanding of the text at the time the statute was enacted. Hence, Manning's view of intent based on decoding using prevailing interpretive conventions cannot justify textualists' use of these canons. Manning himself has questioned the use of several tools of textual interpretation because of the tension they create with his view of legislative intent. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 426 (2010) [hereinafter Manning, *Clear Statement Rules*] ("'[W]idely held

when a statute uses a term that has been construed by common law courts to have a meaning different from its natural meaning, and it is clear that the drafters of the statute borrowed that term from its legal context, textualists will credit the specialized meaning.[85] Justice Scalia unabashedly claims that this evaluation method does not seek the understanding of the legislators who voted for the statute, but rather merely the objective meaning of the text.[86] For example, he states that if the members of Congress "said 'up' when they meant 'down' and you could prove by the testimony of 100 bishops that that's what they meant, I would still say, too bad."[87] In that hypothetical, however, Congress would be claiming to understand language contrary to clear universal usage, which renders the veracity of the claim suspect, testimony of bishops or not. And it allows Scalia to argue that legislators did not do their job by failing to look up the meaning of the term when they use it, "because that's the meaning the persons subject to the law will understand."[88] But, when Scalia relies on the technical legal meaning of the term

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social commitments' are soft sand upon which to build a regime of clear statement rules."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2419-21 (2003) [hereinafter Manning, *The Absurdity Doctrine*] ("[F]ailure to apply the lessons of modern intent skepticism to the absurdity doctrine calls into question the coherence of the textualists' ... objections to strong intentionalism."). This objection does not apply to the numerous linguistic canons that are explicitly used in the legislative drafting process or that reflect how language is generally used, see *infra* note 110 and accompanying text, because these will not lead to a difference between legislative understanding and likely textualist interpretation.

85. Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1616 (2012). But in that context, it is the textualist who is using an understanding contrary to ordinary meaning. Scalia does not explain why, if legislators understand language based on a natural reading, others would know of and understand the language to convey a technical meaning. *See id.* With respect to a legal term of art that is not understood in its technical sense by legislators, the only people who will understand the technical meaning will be judges who, in parsing the meaning, will research the genesis of the term and how it got into the statute, and perhaps those lawyers who, in their practice, have run into it. In essence, textualists who use technical meaning irrespective of legislative understanding essentially assert that the meaning should be that which is determined by the process used by textualist judges. Similar critiques can be made of textualists' use of complex inquiries into statutory structure, which can lead to meaning contrary to that which most people casually reading a statute would ascribe to it.

86. *Id.*

87. *Id.* at 1612-13. I take Scalia's reference of proof by testimony of 100 bishops to mean that one could prove with certainty that a majority of legislators ascribed the meaning "down" to the term "up."

88. *Id.* at 1616.

"falsely made,"[89] it is he who ascribes to the term an unnatural meaning that would not be given to it by any reader unsteeped in legal lore.[90] Outside of legislators who may have learned the technical meaning of the borrowed term during the legislative process,[91] the only individuals who will be aware of its technical meaning will be judges who, in parsing the meaning of the term, have researched its genesis and its introduction into the statute, and perhaps those lawyers who in their practice happen to have run across it. Thus, the only non-intentionalist justification for a judge to give the term its technical meaning is judicial fiat that the rules for decoding a borrowed term accept the meaning ascribed by a specialized subcommunity that includes neither the speaker nor the likely listener.

Similar problems inhere in textualists' use of at least some substantive canons of interpretation, such as clear statement rules. By using such a canon, the judge is essentially replacing the best objective reading of a statute with one that follows the text less

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89. *See* Moskal v. United States, 498 U.S. 103, 126 (1990) (Scalia, J., dissenting) (relying on a technical common law meaning of "falsely made" to conclude that an official document containing false information was not prohibited by 18 U.S.C. § 2314 (2012)).

90. *See* Manning, *supra* note 7, at 83 (noting that "modern textualists may sometimes have to travel [far] to decipher an obscure legal term of art"). Manning admits that textualists ascribe the meaning that would be given by "a hypothetical reasonable legislator conversant with the applicable social and linguistic conventions." *Id.* But he does not explain why those conventions are peculiar to judges, who are not only lawyers, but spend much time applying legal methods of determining meaning to terms that are known to lawyers who specialize in the field from which the term of art term derives. *Cf.* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1145-46 (2011) (criticizing textualist use of specialized meaning as inconsistent, manipulable, and theoretically unjustified).

91. If the legislators were aware of this meaning, it probably would have been because their staff members participated in the drafting of the statute or read the reports or statements of others who did. *See* Gluck & Bressman, *supra* note 27, at 965-67. Thus, if the reports mistakenly defined the term and the mistake was not corrected, legislators' understanding would probably be the mistaken definition, not the accurate common law definition.

accurately, and in some cases, hardly at all.[92] Scalia, addressing clear statement rules, explains such use by contending that

> some of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation. And the same, perhaps, with waiver of sovereign immunity.[93]

Essentially, Scalia's explanation, translated into active voice by noting that it is Congress that does the decreeing, boils down to an assertion that Congress could not have meant what the statutory text says because legislators would not have eliminated state sovereign immunity so casually. This rephrasing of Scalia's point, however, makes manifest that it relies on attributing to Congress some understanding of the text of the statute that differs from the best reading a court would give it.[94]

Nor can Scalia persuasively fall back on textualism's objective construct of intent. Clear statement rules may be disfavored by Congress given that they are unusual and are likely to trigger

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92. Clear statement rules are bound to undermine legislative bargains when they are applied to statutes that predate the Court's announcement of the rule because those who drafted the statutes in Congress could not have been aware of the rule. They also undermine legislative bargains when the rule is sufficiently indeterminant in terms of how clear the statute must be that drafters will not know how to meet it. *See* Eskridge & Frickey, *supra* note 75, at 85 (discussing the bait-and-switch effect of applying a clear statement rule in a context that Congress could not predict); Gluck & Bressman, *supra* note 27, at 40 (reporting that congressional staff members involved in drafting statutes "were mostly unaware of and do not use 'clear statement rules'"); Michael P. Lee, Note, *How Clear Is "Clear"?: A Lenient Interpretation of the* Gregory v. Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255, 260 (1998) ("Congress may mistakenly neglect to include a state function that it would have wanted to incorporate in the statute.").

93. Scalia, *supra* note 7, at 29.

94. Another way to understand my argument is to realize that if the aim of the judge is to discern only natural understanding of the statute, and not legislators' understanding, then Congress's reticence to provide for such a result casually should be irrelevant to the interpretative process. Note further that those textualists who follow clear statement canons while disavowing reliance on Congress's understanding "function as something other than faithful agents of Congress." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 124 (2010).

significant political reaction. But they matter only when they override the best semantic reading of text, which for textualists is the touchstone of objective meaning. Objective intent can shore up Scalia's reasoning only if the ramifications of the best semantic reading cause society in general to read the statute in a linguistically perverse manner. Ironically, these rules are often used to protect state interests such as sovereign immunity even though states are well represented in Congress and apt to point out text that is likely to harm their sovereign interests.[95] This, too, undermines Scalia's reasoning that as an objective matter, the text has a meaning other than that on its face.

Similarly, Scalia cannot save his position by his complaint that intent-based theories lead to meaning that will not be known to those subject to the law.[96] I will admit that, in some cases, a statute might proscribe (or prescribe) private conduct of those without access to sophisticated legal guidance. In such instances, the proper judicial inquiry may be how the statute will be understood by "ordinary people" subject to it, rather than those who voted it into law.[97] Although legal process failure may not be an appropriate theory for resolving such questions, neither is textualism.[98] Textualists resort to all manner of technical criteria—such as canons of construction, the structure of the entire statute, consideration of terms in surrounding sections of the statute, or even how the statute fits with related statutes—many of which are unlikely to be used by the legally unsophisticated targets of the statutory provision in discerning its meaning. Moreover, textualists seek the

95. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 282-83 (2000) (noting how political parties create a framework in which federal officials depend on efforts of state parties and officials for electoral success); Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME L. REV. 395, 397-98 & n.11 (2012) (arguing that state legislatures' power over congressional districting provides a significant "political safeguard [ ] of federalism").

96. Scalia & Manning, *supra* note 85, at 1616.

97. This position underlies the theory of interpretation set out by Hillel Levin. *See* Levin, *supra* note 21, at 1115, 1119-20 (describing the benefits of interpreting statutes according to contemporary meaning); *see also* Gluck & Bressman, *supra* note 27, at 950 (noting that any interpretive theory that sees the courts as faithful agents of the legislature is different from one that sees courts as faithful agents of the public).

98. *See* Levin, *supra* note 21, at 1118 (criticizing both intentionalism and textualism because both expect "each member of the public [to] be deeply engaged in an inquiry into a law's original meaning").

best meaning of the statute at the time it was passed,[99] which may not be the most natural reading when a person subject to it is considering what the statute requires years later. In such a situation, perhaps the best interpretation would be a straightforward reading of the statutory provision in light of the problems it currently seems to address—divorced from how Congress may have used the term in other statutes or other provisions removed from that at issue.[100] This differs from a reading requiring evaluation of the understanding that would be given to the statute by an omniscient reader years ago.

C. The Relevance of Legislative History

In determining the meaning that most legislators likely gave to statutory provisions, legislative history can be relevant because of differences between how courts assign meaning to statutory language and how legislators draft legislation to effectuate their policy choices.

The method by which courts interpreting statutes assign meaning to statutory provisions can be characterized as Bayesian-like updating of the probability that a provision has a certain meaning.[101] Essentially, a judge starts with some signal of the meaning of a statute—most often the ordinary meaning of the text of the statute. The judge will thereby fix on some rough subjective probability that a particular meaning is the best reading of the statute. The judge,

99. According to Judge Easterbrook, "Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new. This implies that the right interpretive community is the one contemporaneous with the enacting Congress." Easterbrook, *supra* note 32, at 69. In other words, the textualism of today's advocates is originalist as well as textual. *See* Levin, *supra* note 21, at 1108.

100. Recent scholarship on how Congress enacts statutes raises serious questions regarding whether the whole act or whole code canons—which assume particular terms are used consistently throughout a statute or the entire United States Code—describe how drafters understand the text they write. *See* Gluck & Bressman, *supra* note 27, at 930-31.

101. By Bayesian updating, I mean to suggest merely that judges start with an estimate that statutory text has a particular meaning, and then update that estimate as they consider the various tools of statutory construction that they bring to bear on the question of the text's meaning. *Cf.* Shawn Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53, 83 (2012) (explaining "the simple Bayesian sense that all new information can update people's conditional probabilistic assessments of the world").

however, will then consider various tools of interpretation, determining the extent to which these tools support or undercut the initial best interpretation. Thus, consideration of whether a term within a statute is a term of art may change the subjective probability the judge ascribes to the various potential meanings of the text.

Canons of interpretation, such as consideration of words surrounding the relevant provision in the statute might lead the judge to further update her subjective sense of which reading is most likely the best reading of the provision, or for an intentionalist, which reading most likely comports with the understanding of legislators who voted for the bill. I do not mean to suggest that courts engage in a Bayesian updating of probabilities in any formal sense.[102] But to the extent opinions provide a window into how judges interpret statutes, most judges do approach interpretation by independently identifying and considering in a reasoned, serial fashion the effect of various relevant pieces of information such as canons and other tools of interpretation.[103]

The mechanism by which Congress "assigns" meaning to statutory language is not as reasoned as that used by the courts. For starters, legislators usually do not read any of the text of a bill on which they vote, let alone read through all the parts of the bill that relate to a particular provision to discern its "best" meaning.[104] During the drafting process, no one performs the detailed legal analysis a court would undertake to determine the meaning of the bill.[105] Legislators, or at least those with an interest in the bill from

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102. Bayes' Theorem provides a formal relationship between an a priori probability that a proposition is true, and an updated probability given new information that has a certain probability of occurring if the proposition is true. *See* Alex Stein, *The Flawed Probabilistic Foundation of Law and Economics*, 105 NW. U. L. REV. 199, 200-01 (2011) (providing an explanation and proof of Bayes' Theorem).

103. *Cf.* Yair Listokin, *Bayesian Contractual Interpretation*, 39 J. LEGAL STUD. 359, 364-65, 369 (describing how a court interpreting a contract would use Bayesian updating).

104. *See* Gluck & Bressman, *supra* note 27, at 972; *see also id.* at 969 ("If one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the *last* theory one would construct."). A possible exception to Congress's lack of involvement with text is when a particular legislator, at the behest of some supporter or constituent, demands a specific phrase be included in the statute. *See id.* (noting staffer reports that "members participate in drafting only at a high level of generality and rarely at the granular level of text itself"); Katzmann, *supra* note 2, at 655.

105. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600 (2002) ("While staffers [of the Senate Judiciary Committee] are well aware of the general principles of statutory interpretation and

the outset, craft some bargain that the bill is to implement and instruct others to draft the bill to implement that bargain.[106] For significant legislation, drafting is a communal process in which those who write legislation—legislative staff members, lobbyists, representatives from agencies, and the White House—seek agreement on the details of the bill that will implement that bargain, and draft language to incorporate that agreement.[107] They then vet the bill among themselves and the organizations that they represent to try to ensure that the language does incorporate the agreed upon bargain.[108] Less significant pieces of legislation and amendments to bills may be drafted on the floor of the chamber and the process is even less careful about language than it is for bills that get communally vetted.[109]

As the language of the bill is developed, those with an interest in it—essentially those who are part of the drafting process—report to those on the staffs of various members of Congress, or on occasion to the member of Congress herself, about how they see the bill operating, and ask various legislators with whom they have influence either to support or oppose it, or perhaps to support amendments to

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do have in mind generally how a court would interpret the language they are writing, in the ordinary course of drafting they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted."). Nor did the staff at the Office of Legislative Counsel engage in judicial-like analysis of the text of the statutes they drafted, despite their expertise on interpretive law. *Id.* at 603-04.

106. *Supra* note 104.

107. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 150-51 (1997) (discussing the need for "legislators, legislative staff, representatives of the executive branch, lobbyists, and ... professional bill drafting services" to be involved in drafting and vetting bills to get them enacted by Congress, and providing an example to illustrate the same is true in the New York State Legislature); Nourse & Schacter, *supra* note 105, at 591.

108. Under the most thorough drafting process, after a bill is initially drafted, language might be vetted with lobbyists and full committee staff before sending it to the Office of Legislative Counsel for final drafting. Nourse & Schacter, *supra* note 105, at 591. For a more detailed description of how legislative staffers view the role of lobbyists (broadly construed to mean anyone outside the legislature with an interest in a bill), see *id.* at 610-13.

109. MIKVA & LANE, *supra* note 107, at 96 ("Legislators may vote on amendments to a bill solely on the basis of quick staff briefing."); Katzmann, *supra* note 2, at 655; Nourse & Schacter, *supra* note 105, at 592-93. For drafting in conference committee, time constraints often prompt unvetted insertion of language. Nourse & Schacter, *supra* note 105, at 593. Congressional staffers indicated that such last minute drafting raised fears of "provisions being 'slipped in,' people losing track of whether one provision squared with another, or a provision being added to satisfy the needs of a [particular] senator." *Id.*

it. Because textualists interpret statutes by looking at how language is used generally, in the process of drafting and negotiating the language of the bill, and vetting what has been drafted, participants catch much, but not all, language that might give rise to a judicial interpretation other than that which reflects the legislative bargain.[110]

Legislative history fits into this process in several ways. Given the nature of the legislative process, there is no single committee or legislator's office that applies the judicial method of interpretation to determine what the language of the statute means.[111] Instead, the staff members involved in the process use legislative history, especially committee and conference reports, to signal to legislators—who do not have the time or inclination to engage in a detailed linguistic analysis of the bill—how the bill will operate if enacted into law.[112] Generally, however, legislators do not even read the committee reports. Instead, legislative staffers read the reports and sometimes other parts of the legislative history that address questions about which their principals might care. They then use the information in such reports to describe the relevant operation of

110. *See* Gluck & Bressman, *supra* note 27, at 928 (noting that although congressional staff members are not aware of many semantic canons by name, their consideration of the meaning of statutory language is consistent with most such canons); Nourse & Schacter, *supra* note 105, at 603 (reporting that attorneys in the Office of Legislative Counsel felt that they had internalized the canons of interpretation). Gluck and Bressman, however, suggest that some judicial canons are not consistent with how drafting occurs. *See generally* Gluck & Bressman, *supra* note 27 (reporting that staffers use some of the canons in the same way as courts, use others in ways different from courts, and do not use others at all).

111. The closest thing to such an office would be each chamber's Office of Legislative Counsel. Although attorneys in Legislative Counsel may be more aware of, and may have internalized, some of the tools of the judicial mechanism for assigning meaning, such as canons of construction, they do not analyze most statutory provisions in the probabilistic manner that a court would if the meaning of the provision were raised as an issue in a case. *See* Nourse & Schacter, *supra* note 105, at 603-05 (Legislative Counsel attorneys report that they "do not believe they have to do interpretive research in order to [assess how a court might construe the language that they draft].").

112. *See* Gluck & Bressman, *supra* note 27, at 968 ("[M]embers are more likely to vote ... based on a reading of the legislative history than on a reading of the statute itself."); Katzmann, *supra* note 2, at 653 (summarizing the need for members of Congress to rely on statements of their colleagues and especially on committee reports to understand bills on which they vote); Nourse & Schacter, *supra* note 105, at 607 (discussing how reports are frequently negotiated among staff and, among other things, are used "to explain a bill and to obtain support from other offices"). Another major role of legislative history is "to shape the way that agencies interpret statutes." Gluck & Bressman, *supra* note 27, at 972; *see also* Nourse & Schacter, *supra* note 105, at 607.

the statute to their principals.[113] In short, legislative history is often used to communicate the details of the legislative bargain to those who have neither the time nor inclination to work through the technical language of the bill. As such, it signals to staffers or members of Congress the meaning of provisions that would be difficult to discern using a judicial probability updating approach.

That is not to deny that legislative history can be misleading or even abused. Certainly, numerous cases exist describing how legislators or their staff members inserted statements into the Congressional Record to assert that a bill's meaning was contrary to the apparent meaning of its text in a situation in which it is unlikely that anyone in the legislative process would know of the statement, let alone take it seriously.[114] Obviously, the upshot of these cases is that some involved in the legislative process sometimes manipulate legislative history to advocate a meaning that could not survive enactment.[115] Courts should not ignore the potential for such abuse. But that is not the only or even the primary purpose of most legislative history. More often legislative history is used to signal to staff members or legislators the meaning of provisions that would be costly to discern by other means.

D. Reconciling Judicial and Legislative Methods of Determining Statutory Meaning

If one adopts legislative supremacy with respect to defining the meaning of statutes—or in other words, that the role of courts is to

113. *See* Katzmann, *supra* note 2, at 653.

114. *See* Stupak-Thrass v. United States, 89 F.3d 1269, 1299 (6th Cir. 1996); Cont'l Can Co. v. Chi. Truck Drivers Union, 916 F.2d 1154, 1158-59 (7th Cir. 1990) (rejecting a statement contrary to the clear meaning of the bill's text that Senator Durenberger inserted into the record after the House and Senate had agreed on the relevant language); FEC v. Rose, 806 F.2d 1081, 1089-90 & n.15 (D.C. Cir. 1986), *rev'd*, *In re* Nat. Cong. Club, Nos. 84-5701, 84-5719, 1984 WL 148396 (D.C. Cir. Oct. 24, 1984) (noting that the House Committee Report included a statement contrary to the language of the Act, accompanied by no analysis and rejected by numerous statements by bill sponsors on the floor of both the House and the Senate); *see also In re* Sinclair, 870 F.2d 1340, 1342-43 (7th Cir. 1989) (describing reasons why legislative history may be an unreliable indicator of the understanding of a majority of legislators who voted for a bill).

115. *See* Gluck & Bressman, *supra* note 27, at 973 (reporting that some congressional staff members volunteered that they used legislative history to "include 'something we couldn't get in the statute' in order 'to make key stakeholders happy'").

interpret statutes in accord with the legislative understanding of how meaning is assigned to the enacted text—then it is imperative that courts and legislatures agree on the meaning of statutes. For only then will courts give statutes operational meaning that agrees with what the legislature thought it was enacting.[116] This does not mean that courts must acquiesce in the legislative method of determining such meaning. It may be more appropriate for the legislature to modify how it attaches meaning to the words it enacts to comport with judicial interpretative methodology. Were the legislature to alter its "interpretive" methodology, then it would understand statutes to mean what courts would determine that they mean, at least to the extent that the judicial approach to interpretation results in a unique meaning.[117] But, it is possible as well that the judiciary is the appropriate institution to accommodate the legislative method of determining meaning.

When interpreting statutes, courts presume that Congress "legislates with knowledge of our basic rules of statutory [interpretation]."[118] Implicit in this presumption is the expectation that Congress will draft statutes so that judicial interpretation will implement legislators' understanding of the language that is

116. There may be reasons in particular circumstances to allow inconsistency between legislative and judicial understanding of language. *Cf.* Nourse & Schacter, *supra* note 105, at 614-16 (suggesting that it may be impossible to eliminate inconsistencies in how statutes are drafted and judicially interpreted because of the different institutional demands of legislatures and courts). For example, at least according to some constitutional theorists, there may be a reason for courts to interpret statutes with a thumb on the scale to make interpretations that reach certain outcomes less likely. *See* Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1553 (2000) ("Resistance norms, in the form of normative clear statement rules, can enhance the operation of [political safeguards that protect the structural values embodied in Article III of the Constitution].").

117. The problem of coordinating the understandings of the two branches is exacerbated by the fact that two judges who agree on the valid sources of meaning, such as two textualists, can still reach different conclusions about the meaning of a statutory provision. *See* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1531 (1998) (reviewing A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 7) (explaining how a willful judge can "shop dictionaries, canons of statutory construction, or statutory precedents" to support a preferred outcome without relying on legislative history); Michael P. Healy, *Legislative Intent and Statutory Interpretation in England and the United States: An Assessment of the Impact of* Pepper v. Hart, 35 STAN. J. INT'L L. 231, 242-43 (1999) (describing interpretations by two English textualist judges that reached opposite conclusions).

118. *See, e.g.*, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1992).

enacted.[119] But if Congress uses legislative history to communicate to its members its shared understanding of the meaning of statutory language,[120] the textualist refusal to credit legislative history imposes on Congress the burden of evaluating statutory language as textualists do. In short, the textualist search for the best public meaning assumes that this is the one true way to determine statutory meaning regardless of institutional constraints.[121] If the problem is, as I contend, created by the existence of two different communities that use different techniques for ascribing meaning to statutory language, then the assumptions that the textualist mechanism for interpretation is correct, and that legislative reliance on legislative history is incorrect, cannot be maintained. Because language depends on shared conventions of meaning, neither of the approaches of these two communities can be deemed right or wrong. The meaningful question is when, if ever, it is best to force one community to accommodate the other's understanding of text, and if so, which community should have to make that accommodation.

The issue is similar to that raised by the following story, derived from an old joke that pokes fun at Americans visiting Paris without learning French. An American in Paris is seeking directions to the train station, and asks, "Où est la guerre?"[122] instead of "Où est la gare?"[123] The textualist response would be "The war is over," perhaps with a barb that the American should learn French before traveling to France. The intentionalist response would be to follow up with the question, "Why do you ask?" Most likely the two would then realize that the American is looking for the train station, not the war. The question is which is the more reasonable—or cost minimizing—response.

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119. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 645 (1995) ("As constructed by Scalia, the choice to legislate with clarity and precision belongs to Congress.").

120. *See supra* notes 111-13 and accompanying text.

121. *Cf.* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 265, 273 (Ian Shapiro ed., 1994) (arguing that if legislative history is a shared means within the legal community for determining statutory meaning, then courts may appropriately consider it).

122. *Where is the war?*, GOOGLE TRANSLATE, https://translate.google.com (search "Où est la guerre?" from French to English).

123. *Where is the station?*, GOOGLE TRANSLATE, https://translate.google.com (search "Où est la gare?" from French to English).

Textualists claim that there would be advantages to consistent use of their "rules" for interpretation. They claim that such rules constrain judicial discretion in reading statutes, and thereby reduce judges' ability to read statutes to further their personal policy preferences.[124] This, in turn, increases consistency of interpretation, which would coordinate statutory interpretation by various federal courts, reducing the likelihood of differing judicial interpretations of the same statutory provisions.[125] Further, it would align legislative meaning with judicial meaning, decreasing the likelihood that courts will interpret statutes inconsistently with the understanding of most legislators. But it is not at all clear that a set of rules accommodating the legislative approach to finding meaning, which in large part would describe when and how to use legislative history,[126] would constrain courts any less than would imposition of the textual interpretive process.[127] And if such a set of rules constrains courts equally well as the textual approach to interpretation, it would also coordinate interpretation both within the judicial system and between the legislative and judicial branches equally well as the textual approach. Even if the textualist approach provides a more consistent means of deriving statutory meaning, and therefore decreases judicial interpretive discretion, if the legislature cannot or will not comply with that approach, those coordination benefits come at the expense of undermining legislative supremacy about the policy choices that are incorporated into the United States Code. That would still leave on the table the question

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124. *See, e.g.*, Easterbrook, *supra* note 2, at 61-62, 64-65; *see also* Molot, *supra* note 1, at 16, 23-24.

125. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 201 (2007) (noting that textualism purportedly limits judicial discretion, "leading to consistent, predictable interpretations of law").

126. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 90-134 (2012) (laying out some "simple principles for reading legislative history").

127. *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 207-08 (1999) (questioning whether textualism has increased predictability and certainty of statutory interpretation); Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INT'L & COMP. L. REV. 1, 2, 40-41 (1996) (concluding after analysis of several British cases that relying on legislative history to help identify statutory purpose can constrain judicial discretion).

of whether the benefits of interbranch interpretive coordination outweigh the institutional costs imposed on Congress.

I believe that this point is damning for the textualists' belief that their approach is the better one in all cases because there are strong reasons to suspect that Congress will never adhere to the judicial process for determining meaning. That process would impose procedures on statutory enactment beyond those required by the Constitution and thereby greatly interfere with the legislature's law-making function. In determining statutory meaning in a particular case, a court focuses the power of some of the brightest legal thinkers for significant amounts of time to determine the best reading of a statute. Moreover, the interpreting court does so only in response to a legal complaint. That complaint essentially signals that the legislative and judicial interpretive approaches might lead to different meanings for a particular statutory provision. But without this signal from those subject to the statute after it has had a time to operate, the legislature would have to perform such an analysis with respect to any term of the statute that potentially might lead to a difference between legislative and judicial understandings.[128] Essentially, because Congress must attach meaning at the time it enacts a statute, it cannot take advantage of the experience from application of the statute to signal potential process failures. Moreover, textualists like to remind interpreters that individual legislators may have an incentive to engage in strategic behavior to get their preferred interpretation into the statute.[129] But this further complicates the legislative task of determining meaning because it implies that each legislator could only trust a member of his own staff to perform the interpretive analysis. Otherwise, the legislator would risk missing meaning hidden in the structure of the statute, just as the textualists claim the legislator might be unaware of definitions inserted into legislative history.[130] Thus

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128. Staff members from the Office of Legislative Counsel, which has drafting expertise and is supposed to ensure that statutes implement the deals struck by the legislators, report that they do not have the time to perform "top-to-bottom review complete with comprehensive analysis of every bill the office helps to draft." Nourse & Schacter, *supra* note 105, at 604.

129. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1420-21 (2003).

130. My point here is simply that, if each legislator does not engage in the costly task of analyzing the potential meaning of every statutory phrase being enacted, a colleague could

textualists call on the legislature to apply an interpretive process that would require an army of lawyers on the staff of each member of Congress, and would increase costs of enacting statutes to such an extent as to threaten the very ability of the legislature to fulfill its role of making laws that it determines—via constitutionally prescribed processes—are appropriate.[131]

The contention that legislatures generally can cure misinterpretations by courts[132] would also impose huge unnecessary costs on the legislature because enacting statutes is time consuming, resource intensive, and is unlikely to occur even if the court imposes an interpretation with which a majority of legislators disagree.[133] Legislators have only limited time that they devote to passing statutes even when they are reacting to misinterpretations of the meaning that they ascribed to language they originally adopted.[134] The very lack of coherence of the legislative process contributes to the likelihood that Congress will not override such misinterpretations. To override an interpretation, the majority will have to overcome

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strategically mislead him about the meaning of the statute, without resorting to legislative history to implement the deception. Textualist concern about undue influence of legislative outliers may occur via statutory text as well as legislative history. *See* Zeppos, *supra* note 51, at 1323 ("The textualist ... draws a false dichotomy in setting the clear text that cannot be read in different ways against a legislative history that can be manipulated to reach desirable results.").

131. *See* Nourse & Schacter, *supra* note 105, at 619-20 ("[T]he sheer diversity of approaches to the drafting process, the multiplicity of drafters, and the different points in time at which text is drafted suggest the limited disciplinary effect of judicial rulings.").

132. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 58 (2d ed. 2013) ("[T]extualists often respond to accusations that their interpretations lead to unwise or unjust results by insisting that 'if Congress doesn't like it, Congress can fix it.'"); *see also* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1020 (2002) ("Congress is ... implicitly invited to overrule or modify the courts' decisions if Congress decides that they are wrong."); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 121 (2001) ("[I]f Congress believes that the courts have made a serious error in interpreting a federal statute, Congress can amend it.").

133. *See* Ferejohn & Kramer, *supra* note 132, at 974 n.25 ("Congress is often too busy worrying about new laws to spend its time supervising and revising judicial (mis)interpretations of the old ones."); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1409-10 (2005) ("Congress is simply not equipped to react in the normal course to most statutory interpretation decisions and ... [its] track record suggests that its attention to statutory decisions is highly inconsistent.").

134. *See* Schacter, *supra* note 119, at 605 (arguing that Congress is apt to leave in place resolutions of issues by the courts with which most legislators disagree rather than risk the political costs and spend the time to reverse them).

legislative vetogates.[135] One might argue that if a textualist court's interpretation is incorrect, Congress should easily be able to reinstate the intended meaning. By recognizing the legislative bargaining process, textualist misinterpretation will tend to err in the direction of overly crediting special interests and vetogates. To the extent that these groups already have been assuaged or otherwise could not stop the legislative bargain, they should not present a barrier to enactment of corrective legislation. And there probably is some truth to the conjecture that textualist interpretations that deviate from the legislature's understanding of statutory bargains can be corrected more easily than intentionalist misinterpretation, as evidenced by the fact that Congress seems more apt to overrule textualist interpretations than purposivist ones.[136] But one cannot conclude from this differential in ease of correction that the cost of textualist misinterpretations is insignificant. In particular, those who control vetogates, having once obtained their due from the legislative process in exchange for allowing the statute to pass, are not above extracting more concessions now that the court has destroyed that deal and Congress has to enact clarifying legislation to reinstate the original bargain.

Of course, just as the legislature cannot feasibly use a judicial process for ascribing meaning to statutes they enact, courts cannot establish some vetting process similar to that used by the legislature to determine statutory meaning. Such a process would be antithetical to the judicial *sine qua non* of reasoned decision mak-

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135. *See* Eskridge, *supra* note 47, at 1459 (noting that vetogates discourage congressional override of a judicial interpretation via "omnibus legislation" or "large-scale statutory revision"); *supra* notes 47-48 and accompanying text.

136. According to Bill Eskridge, "Congress is much more likely to override 'plain meaning' decisions than any other type of Supreme Court statutory decision" and "rarely appears to override those interpretations grounded on statutory 'purpose.'" William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 (1991). This might reflect that purposivist errors are more likely than textualist errors to manifest themselves as failures to recognize legislative bargains that reflect special interest group and vetogate accommodations. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 239-40 (1986) (discussing the different effects of erroneous interpretation that seeks to further public purposes rather than to enforce special interest bargains). Because such groups usually can stop legislation they dislike, but not force enactment of their legislative preferences, they are unlikely to be able to force an override of a judicial interpretation to recapture the bargain they obtained by threatening to prevent legislation in the first place.

ing.[137] Nor can one expect courts to determine a "factually verifiable assessment[ ] of the legislative process" for every provision they have to interpret, as that would be cost prohibitive.[138] In contrast, however, pragmatically a court will have little problem accommodating the legislative means of ascribing meaning by adding legislative history to the set of factors they consider when interpreting statutes. Although use of legislative history adds to the effort judges must make to interpret statutes,[139] judges already know how to find relevant legislative history. In fact, use of legislative history was the predominant mode of interpretation by American courts for many decades.[140] The cost of judicial consideration of legislative history, rather than being simple procedural costs, will predominantly be error costs from improperly attributing legislative meaning to a provision based on legislative history that does not reflect the understanding of a majority of legislators or of the median legislator. This cost must be balanced against the pragmatic costs of the legislative process engaging in a probability updating analysis. Certainly courts can improve in selecting the pieces of legislative history on which to rely. But recent studies of the legislative process[141] will help in that endeavor, as will the limitation of use of legislative history to cases of legislative process failure. On the

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137. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-66 (1978) (arguing that "reasoned argument" is the essence of "forensic proceedings"); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary's exercise of power.").

138. Nourse & Schacter, *supra* note 105, at 616.

139. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 192-96 (2006) (arguing that the cost of using legislative history is significant and outweighs the likely benefit of such use, and further contending that rules that allow some consideration to limit judicial decision costs are "highly unstable" and likely to devolve into unlimited consideration of legislative history); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read Statutes in a Lower Court*, 97 CORNELL L. REV. 433, 473-76 (arguing that because of heavier caseloads and less impact on the law, lower courts should avoid time consuming consideration of legislative history). *But see* Jonathan R. Siegel, *Judicial Interpretation in the Cost-Benefit Crucible*, 92 MINN. L. REV. 387, 406-07 (2007) (questioning Vermeule's contentions about the cost of using legislative history).

140. *See* MANNING & STEPHENSON, *supra* note 132, at 127-28 (noting that use of legislative history was disfavored in the United States until about 1860, sporadic from about 1860 until 1940, and prevalent from 1940 until the textualist critique led to a noticeable reduction in the use of legislative history quite recently).

141. *E.g.*, Gluck & Bressman, *supra* note 27; Nourse & Schacter, *supra* note 105.

whole, this balance clearly favors having the courts accommodate the non-linear legislative process when the legislature is unaware that the courts would likely interpret the language differently than legislators understood it.

The balance changes, however, for statutory provisions about which legislators had a clear signal that the text might not accurately reflect the legislative understanding of the statute. First, when there is a signal that specific language of the statute might be problematic, the cost of legislative correction is, at most, comparable to that of the judiciary. Attorneys in the Office of Legislative Counsel can subject the problematic provision to the same analysis that courts perform to determine meaning, identify what might create the unintended meaning, and add language to clarify the meaning. Often, Congress need not even engage in a detailed textual analysis, given that the legislative process has already identified the ambiguous or potentially misleading nature of the text. Armed with this identification, all Congress needs to do is add clarifying language—the kind of language that currently might get inserted in legislative history. Drafting clear language, although not a trivial task, becomes easier once one identifies the precise bargain being struck and focuses on the particular provision meant to incorporate that bargain.

Second, the error costs of using legislative history are likely to be greater when Congress is aware that the understanding of a statutory provision expressed in the legislative history is likely different from the best objective reading of the provision's text. If the legislature is aware of the potential difference—in essence, of the seeming legislative process failure—and does nothing to correct it, that failure to act suggests that a correction could not get through the legislative process.[142] But in that case, a court should suspect that the legislative history fails to reflect the legislative bargain that Congress has struck. In essence, the difference between

142. The inclusion in legislative history rather than statutory text might also reflect a desire to simplify the process of obtaining the desired legislative bargain. But given that the constitutionally specified process for enacting statutes was meant to make enactment difficult, one might view the time constraints of the process as an integral part of the barriers Congress must overcome. *See* John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 198-99 (2007) ("Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.").

legislative history and statutory text does not then reflect legislative process failure. Rather, it more likely reflects that statutory text accurately communicates the legislative bargain.

There is also the possibility that the text was crafted "very broadly or very narrowly to elide disagreements over specific applications."[143] In essence, the drafters may have chosen purposively to word a bill ambiguously to facilitate its enactment.[144] In this situation the ambiguity would be known, so again there is no legislative process failure. The bargain is to make the statute ambiguous, thereby assigning to the courts or to the implementing agencies the task of resolving the ambiguity by the decoding conventions generally used by these institutions.[145]

The analysis of the costs of accommodating the different methods that legislators and courts use to attribute meaning to statutes suggests that courts should be willing to consider legislative history when faced with a true legislative process failure. In order to constitute legislative process failure, it is necessary, but not sufficient, that the understanding expressed in legislative history differs from the best reading of the language of a statute. In addition, courts should not rely on legislative history if there are indications that participants in the enactment process recognized that courts might reasonably interpret the statute differently. Furthermore, courts should limit consideration to reliable legislative history, by which I mean legislative history that is either generally accepted by participants in the legislative process as an indication of their

143. Manning, *supra* note 41, at 2409.

144. Leaving statutory text ambiguous appears to be a prevalent practice to grease the skids of bill passage. *See* Nourse & Schacter, *supra* note 105, at 576, 596 (reporting that Senate Judiciary Committee staff members unanimously saw deliberate ambiguity as a "powerful force working against statutory clarity").

145. Because the legislative bargain does not resolve the ambiguity, it would be inappropriate for a court to use legislative history to resolve the ambiguity under an intent-based approach. *But see infra* note 189 (collecting sources that argue that intentional ambiguity might be a delegation to courts to make policy or use legislative history to interpret the statute). It might, thus, be appropriate for an agency to rely on legislative history. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 525 n.5 (2009) ("The intent of the full Congress (or at least a majority of each House) is thought relevant to the interpretation of statutes, since they must be passed by the entire Congress.... It is quite irrelevant, however, to the extrastatutory influence Congress exerts over agencies of the Executive Branch, which is exerted by the congressional committees responsible for oversight and appropriations with respect to the relevant agency." (citation omitted)).

understanding of the statute, or that the court has reason to believe reflects participants' understanding for the particular statutory provision being interpreted.[146]

Those parts of the legislative history to which legislative staff pay special attention are especially reliable indicators of the legislative understanding of statutory meaning. Particularly useful are reports of committees responsible for drafting and introducing the legislation,[147] and of conference committees, which scholars and some discerning judges already recognize to be reliable indicators of the legislature's understanding of a bill.[148] Interestingly, legislative staff members ascribe special credence to colloquies between committee chairs and the ranking minority member of the committee or other legislators involved with the bill, even if those colloquies are staged.[149] This is legislative history that courts usually dismiss as unreliable.[150] But legislative staff members report that such colloquies signal agreement by both sides, or a compromise to solve a problem with the legislation.[151] As such, the colloquies may be good evidence of the median legislator's understanding, and hence a reliable indicator of legislative intent.[152]

One might object that even within the limits just described, consideration of legislative history may encourage strategic behavior to insert explanations of statutes in legislative history that could not be approved by both houses of Congress or signed by the President.[153] But such strategic manipulation of legislative history

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146. *See* Nourse, *supra* note 126, at 90-134 (delineating five principles that distinguish reliable from unreliable legislative history based on the rules of the House and Senate and norms of legislative practice).

147. Gluck & Bressman, *supra* note 27, at 977 ("By far, the types of legislative history viewed as most reliable [by congressional staff members] were committee reports and conference reports in support of the statute."). Staffers also reported committee mark-ups as reliable legislative history. *Id.* at 986.

148. *See, e.g.*, Nourse, *supra* note 126, at 92-104; *id.* at 98 n.110 (citing cases).

149. Gluck & Bressman, *supra* note 27, at 986.

150. *Id.*

151. *Id.*

152. *See supra* notes 68-72 and accompanying text (explaining how the position of the median voter may be deemed legislative intent); *cf.* Rodriguez & Weingast, *supra* note 129, at 1437-39 (advocating that courts look to agreements necessary to get pivotal legislators to vote for the legislation).

153. *See* Miranda Oshige McGowan, *Against Interpretation*, 42 SAN DIEGO L. REV. 711, 730-31 (2005) ("An Intentionalist might also agree with Justice Scalia that the practice of consulting legislative history encourages the strategic, surreptitious shaping of the legislative

would be difficult under the legislative process failure theory of interpretation because the explanation would have to be done in a manner that does not signal a potential problem with the language of the statute. Part III will show how legislative history can shed light on the likely shared meaning of a statute without necessarily alerting participants in the process that the statutory text is problematic. This can occur when some potential understanding of a statutory provision is simply overlooked. But planting a statement that instructs courts about the meaning of a provision should prompt a court to find that those involved in drafting the statute were aware of the potential problem with the statutory language. And this would undermine any finding of a process failure.[154] Simultaneously, by raising awareness of a provision, the statement will increase the likelihood that some person involved in drafting will insert a counter-statement contesting the meaning conveyed by the original statement. This action will further flag that the text is ambiguous or otherwise problematic, again resulting in courts discounting the value of legislative history under the legislative process failure approach.[155]

III. EVIDENCE OF LEGISLATIVE PROCESS FAILURE

A. The Absurdity Doctrine

Under the absurdity doctrine, courts will not read statutes in a manner that leads to an absurd outcome in any particular factual situation, even if the text of the statute is clear.[156] Instead, the

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record to favor a particular gloss on the statute."); Schacter, *supra* note 119, at 642-43 (arguing that Scalia's campaign against use of legislative history aims to discipline Congress to avoid "egregious legislative misbehavior").

154. *See supra* notes 74-75 and accompanying text (discussing why recognition of a problem with the text by those involved in drafting may signal that the problem does not reflect legislative process failure).

155. This will especially be true of the reliable pieces of legislative history, such as committee-produced legislative history, to which there will be ample opportunity for those who disagree to reply. *See* Gluck & Bressman, *supra* note 27, at 978 (noting that there are opportunities for those who support a bill but disagree with a committee report's characterization of the bill to respond to the report).

156. As Scalia stated: "[When] confronted ... with a statute which, if interpreted literally, produces an absurd ... result ... [the Court's] task is to give some alternative meaning to the [statutory text] that avoids this consequence." Green v. Bock Laundry Mach. Co., 490 U.S.

courts essentially rewrite the statute. Usually courts read the statute as not applicable to the circumstances that give rise to the absurd outcome.[157] Sometimes, however, they substitute different provisions that reflect the narrowest deviation from the text to avoid the absurd result.[158] The principle behind the absurdity doctrine is that no reasonable person would favor an absurd result, hence it cannot represent a legislative bargain.[159] Thus, the implicit assumption underlying the application of the doctrine is that the legislature did not mean to apply the statute in its literal sense to the situation facing the court. Essentially, the court infers from the absurdity of the outcome that the legislature could not have foreseen the circumstances that led to the result because if it had, it would have changed the statute to avoid the absurd result.

The absurdity doctrine is an application of a legislative process failure model in which the outcome under the statute signals the likely disparity between the legislature's understanding and the textualist derived meaning. The outcome provides the evidence that Congress could not have, and therefore did not understand the statute to operate as the text indicates it should in the particular context. Moreover, because the absurd result reflects a legislative oversight, tautologically, the legislature could not have been aware of the need to change the statutory text.

What is particularly interesting about the absurdity doctrine is textualists' willingness to use it, at least in some circumstances. Of course, in the narrowest sense, the absurdity doctrine does not violate the textualist tenet to avoid using legislative history to

504, 527 (1989) (Scalia, J., concurring); *see also* Holy Trinity Church v. United States, 143 U.S. 457, 459-60 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.").

157. *See, e.g.*, Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) (interpreting a statute that provided for inheritance by the testator's last valid will not to allow the testator's grandson to inherit after the grandson was convicted of killing the testator).

158. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 65-66, 69-73 (1994) (reading "knowingly" in the Protection of Children Against Sexual Exploitation Act to apply to the element of age to avoid absurd results, even though under a grammatical reading, "knowingly" would only modify "distribution"); *cf.* Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1068, 1070-71 (1998) (rejecting the Agency's nonliteral interpretation of the statute, even though a literal interpretion would have produced absurd results, because the Agency "may deviate no further from the statute than is needed to protect congressional intent").

159. *See* Manning, *The Absurdity Doctrine*, *supra* note 84, at 2419-21 (discussing the tension between textualism and the intent-based premises of the absurdity doctrine).

choose the meaning of a statute.[160] Nonetheless, the doctrine does depend on extrinsic reference. In particular, the doctrine relies on whether an interpretation reaches a result consistent with resolving the problem at which the legislature took aim, rather than an arbitrary outcome. Textualists might respond that absurdity is measured against prevailing social norms, and hence social context eliminates an absurd result from the most likely public meaning of the statute.[161] That is, any generally knowledgeable reader at the time of enactment would reject a literal interpretation of the statute. Nonetheless, textualist application of the doctrine creates tension because such application depends on the judge substituting her perceptions of social norms for those that underlie the outcome dictated by literal application.[162] Furthermore, invoking legislative intent often will mitigate this tension either by confirming or contradicting the judge's perception.

To illustrate this tension, consider *Green v. Bock Laundry Machine Co.*, a case in which the majority used legislative history to interpret the statute in a manner inconsistent with the clear meaning of the words, and in which Justice Scalia concurred relying on the absurdity doctrine.[163] The issue in *Bock Laundry* was the admissibility of evidence that a witness had been convicted of a felony in order to impeach the witness's credibility.[164] The relevant statutory provision, Rule 609(a) of the Federal Rules of Evidence, provided:

> General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was ... [a felony], and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect

160. *See supra* note 158 and accompanying text.

161. *See* Manning, *supra* note 41, at 2459 ("Because absurdity arises from the problem of statutory generality, judges will face many fewer occasions for even considering absurdity if they focus on the way people use language in context.").

162. One need only remember the textualists' favorite "whipping boy," *Holy Trinity Church v. United States*, a case in which the Court rejected the plain meaning of the statute as absurd. *See* 143 U.S. 457, 459-60 (1892).

163. 490 U.S. 504 (1981).

164. *Id.* at 505.

> to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.[165]

From the time the Advisory Committee to the Judicial Conference of the United States proposed the addition of this rule until its enactment, the rule went through several iterations in each house of Congress. Prior to going to conference, the House version provided for exclusion of all impeachment evidence of prior convictions except for evidence of a crime involving dishonesty or false statements.[166] The version reported out to the full chamber by the Senate Judiciary Committee would have allowed impeachment evidence of criminal defendants only for crimes involving dishonesty.[167] "[F]or other witnesses, it would have permitted prior felony evidence only if the trial judge found that probative value outweighed 'prejudicial effect against the party offering that witness.'"[168] The full Senate, however, amended its version of the bill to allow impeachment evidence of crimes of dishonesty and felonies for all witnesses.[169] The rule as finally enacted allowed admission for crimes of dishonesty, but allowed admission of felony evidence only if the court determines that the probative value of the evidence outweighs its prejudicial effect *to the defendant*.[170] The addition, in conference, of the requirement of prejudice to the defendant raised a question about whether the rule's "only if" clause applied to civil as well as criminal defendants.

The Conference Committee Report was silent about the scope of the defendants' prejudice,[171] but several members of the Conference Committee justified the provision by appealing to the special concerns of prejudice to the defendants in criminal prosecutions. The Court read these members' statements as sufficient to show congressional understanding that the exception to universal admis-

165. *Id.* at 509 (quoting FED. R. EVID. 609(a)).
166. *Id.* at 517-18.
167. *Id.* at 519.
168. *Id.*
169. *Id.* at 515-19.
170. *Id.* at 519-20.
171. The Committee Report stated that in criminal cases a defendant could introduce impeachment evidence of a prosecution witness and the prosecution could not introduce evidence of a prior felony of a defense witness. *See id.* at 520. But the Report did not state whether that same asymmetry was meant to apply in civil cases. *Id.* at 520-21.

sibility applied only for the benefit of *criminal* defendants.[172] The use of these statements alone is a thin reed on which to hang the majority's interpretation. The committee members' statements suggest that these members understood the exception to apply only in criminal cases, and that the failure to limit the exception to benefit criminal defendants was a simple oversight. But several of the members of the Conference Committee who made the statements were those who earlier had opined that the rule applied in both civil and criminal contexts. Hence they should have realized the need to limit the applicability of the exception to protect criminal defendants only. Furthermore, the Senate Judiciary Committee introduced a version of the bill explicitly protecting only criminal defendants, and the Senate as a whole rejected this version, which suggests that some on the Conference Committee were well aware that the language could be read to cover civil defendants as well. Nonetheless, what makes the majority's reading plausible is that giving a preference to defendants but not plaintiffs in civil cases seems inconsistent with the American legal tradition of an equal playing field between plaintiff and defendant in such cases.[173]

Justice Scalia, the quintessential textualist, avoided reliance on legislative history, and reasoned that a limitation on admissibility to benefit civil defendants was an absurd result.[174] Thus, his reading agreed with the majority's, albeit based simply on avoiding this result rather than on crediting legislative history. But this is a weak case for invocation of the absurdity doctrine in its pure form. Even in civil cases, there is a difference between the plaintiff, who invokes the power of the courts, and the defendant, who must submit to that power.[175] One could oppose a plaintiff's introduction of a civil defendant's prior felony conviction on the ground that, having invoked the power of the court, plaintiff's introduction abuses the court's

172. *Id.* at 521 n.26.

173. As the majority noted, "Denomination as a civil defendant or plaintiff, moreover, is often happenstance based on which party filed first or on the nature of the suit." *Id.* at 510.

174. *Id.* at 528-29 (Scalia, J., concurring).

175. Although this distinction has not been used in construction of the Federal Rules of Evidence, it influences other legal doctrines such as those relating to burden of proof on jurisdictional issues. *See generally* Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2749-50 (2007).

authority in an effort to coerce a favorable settlement. Such a position might be unusual, but it is not entirely absurd. Moreover, suppose that the Conference Committee Report included this as a reason to apply the exception to automatic admission of a felony conviction on behalf of civil defendants. Although Scalia would never explicitly rely on such a report, in the face of the report he could not plausibly maintain the position that applying the exception in civil cases is absurd.

Ultimately, although I believe that neither absurdity nor use of legislative history alone would justify the outcome in *Bock Laundry*, the legislative process failure approach to interpretation might support the outcome of the majority and Scalia. The unlikelihood of the outcome a literal reading would generate, together with the story of how the text came to read as it did, supports that the omission of the adjective "criminal" before the term "defendant" was an oversight. And such an oversight would explain why Congress did not clarify the statutory language to support the consensus understanding of the statute.

B. Scrivener's Error

A variant on absurd outcomes is the doctrine of scrivener's error.[176] Sometimes the language of a statute, although not leading to an absurd result that the legal system cannot legally tolerate, leads to a perverse result given the norms of society or the problem that the statute aims to cure. Furthermore, that result is explainable as a minor error in syntax or punctuation that might not have caught the attention of those considering the text of the statute when it was enacted. That is, there seems to be little or no reason for the statute to mean what it says literally in light of how the world operates, when a small and easily overlooked change in the text would lead to a meaning that avoids the tension with everyday behavior, or even is explainable in terms of such behavior. In such situations, a court could readily conclude that Congress almost certainly did not mean to enact the language as passed, but rather to enact the statute that incorporated the change. Legislative

176. Textualists are willing to correct scriveners' errors when the error is apparent from the text of the statute and norms of society. *See* Nelson, *supra* note 1, at 356.

history can be useful in identifying such errors, although supportive history would not be necessary under the legislative process failure approach to statutory interpretation.

Perhaps the most illuminating case of this type of legislative process failure is *United States v. Locke*.[177] That case involved the extinguishment of mining claims on federal land because the claimants had failed to comply with a statutory requirement that they file a notice of intention to hold the claim with state officials and with the Bureau of Land Management.[178] The statute required the claimants to file their notice prior to December 31 of every year after registering their claim.[179] Claimants, however, filed their notice *on* December 31.[180] The Court held that the statute was clear, and that "prior to December 31" did not mean on or prior to that date.[181] The Court reasoned that any day for filing is essentially as good as any other.[182] If the statute had said prior to September 18, for instance, few would assume that the notice could be filed on that date. Moreover, the claimant would always have at least one year from the previous year's notice to file the notice for the following year.

The problem with the Court's argument is that it ignores the fact that December 31 is a special date on our calendars, being the last day of the calendar year. If one were to ask the man on the street by when an annual task had to be completed, he is likely to respond on or before December 31.[183] The Court's literal reading of the statute, however, is truly a trap for the unwary who, because of the significance of December 31, would be apt to read the statute carelessly to

177. 471 U.S. 84 (1985).
178. *Id.* at 89-90.
179. *Id.* at 89.
180. *Id.* at 89-90.
181. *Id.* at 93.
182. *Id.* at 93-94.
183. To borrow from game theory, choosing any day of the year for renewal is a Nash equilibrium, but allowing renewal on or before December 31 is by far the most salient one. Had the statute said simply that a claim holder had to renew its claim every year, allowing renewal on or before December 31 would be the most common understanding. *See* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 55-57 (1960) (introducing the focal point concept to game theory, and illustrating it by noting that students who were told they had to meet someone the next day in New York City but not told when or where most commonly chose the clock at Grand Central Station at noon).

mean on or before the end of the calendar year.[184] I can think of no good reason why the state should prefer filing on or before December 30,[185] and in my opinion the best understanding of how the statutory language came to be is that Congress, like the unwary, did not read its own language carefully and hence did not realize it was setting this trap.

Of course, all approaches to statutory interpretation involve judgment, and others can disagree with me about the lack of reason for the "prior to" language. Given the need for judgment, as for cases involving the absurdity doctrine, legislative history could have been helpful in this case. On the one hand, consistent legislative discussion referring to the desire to have the filing done before the end of the year would support the conclusion that requiring filing before December 31 was not what Congress thought the statute required. On the other hand, virtually any mention of a reason for requiring the filing on or before December 30 would have sufficiently alerted those drafting the statute about the textual error if they really wanted the statute to require filing on or before December 31.

C. Hidden Statutory Ambiguity

Ambiguous statutory language is the most common reason courts give for invoking legislative history.[186] In doing so, they are engaging in partial legislative process failure analysis. If the language of the statute is ambiguous, and the legislature presumably did not go

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184. The Court's ultimate interpretation may have been less harsh on the unwary than my analysis suggests because, as the Court recognized, the potential for confusion in the actual case seems to have been alleviated by the fact that regulations required filing "*on or before December 30*." *Locke*, 471 U.S. at 94-95 (quoting Bureau of Land Management regulations, 43 C.F.R. § 3833.2-1(b)(1) (1984)). But even the clarity of the regulations did not prevent the Bureau of Land Management itself from mistakenly indicating in its 1978 questions and answers pamphlet that the notice had to be filed on or before December 31 of each year. *Id.* at 89-90 n.7.

185. In my discussions of *Locke*, the best possible reason I heard for writing the text as enacted was given by my colleague Rob Atkinson, who suggested that perhaps Congress did not want to make BLM workers stay in their offices until 5:00 PM on New Year's Eve. But, Bureau of Land Management regulations allowed notices to be filed by mail as long as they were postmarked on or before December 30 and received in the office by January 19 of the following year. *See* Zeppos, *supra* note 51, at 1315. The ability to file by mail undermines even Atkinson's far-fetched suggestion.

186. *See* Breyer, *supra* note 2, at 848 ("Using legislative history to help interpret unclear statutory language seems natural."); *see also supra* note 6 and accompanying text.

through a comprehensive interpretative exercise, then there is reason to doubt the interpretation that results from such an exercise. Courts reason that legislative history better indicates Congress's understanding of the language than some nonobvious resolution of ambiguous text.[187]

The assumption, however, that all ambiguity warrants looking at legislative history is problematic for two reasons. Recall that the legislative process involves vetting language with lobbyists representing interest groups—construed broadly to include agencies and the White House as well as public and special interest group representatives—committee staff, and members of individual legislators' staffs who have an interest in the legislation.[188] Even though Congress does not go through a formal probability updating process of interpretation, the fact that such a process reflects how we all generally use language means that vetting is likely to resolve unintended ambiguities. Thus, the fact that the ambiguity was not resolved most likely reflected an inability of the legislature to agree on clear language, in essence leaving the statute intentionally ambiguous. In such a situation, the legislative bargain ultimately punts the question of what the statute means to the courts or an agency, understanding that they will resolve the question using the techniques of interpretation appropriate to those institutions.[189]

Second, reliance on legislative history in the face of any ambiguity ignores the potential for manipulation by those who can influence legislative history more easily than text—perhaps outlier committee members or even congressional staff members.[190] If the ambiguity

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187. *See, e.g.*, Blum v. Stenson, 456 U.S. 886, 896 (1984); United States v. Donruss Co., 393 U.S. 297, 302-03 (1969).

188. *See supra* notes 106-10 and accompanying text.

189. *See* Gluck & Bressman, *supra* note 27, at 991 (reporting that staffers are aware of *Chevron* and understand that leaving issues textually unresolved delegates the interpretation to an agency, but reporting that such delegation often is not the reason for the ambiguity). That still leaves open the question of what constitutes appropriate techniques. *See* Elhauge, *supra* note 41, at 2173-74 (2002) (noting that intentional ambiguity might signal intent for courts to resolve an issue by making a policy choice or by applying interpretive default rules); Saul Levmore, *Ambiguous Statutes*, 77 U. CHI. L. REV. 1073, 1087-88 (2010) (intimating that intentional ambiguity can be seen as a delegation to the courts to use traditional inquiries into legislative intent to resolve the ambiguity); Manning, *supra* note 7, at 84-85 (arguing that textualists are willing to consider the purpose of a statute to resolve ambiguity, but will not use legislative history to determine that purpose).

190. *See supra* notes 40, 74-75 and accompanying text.

is known to those who are drafting language to incorporate a particular meaning into the statute, then one would expect they would clarify the language. They may fail to clarify it out of laziness or lack of time.[191] But once the ambiguity is known, the legislature would not have to perform a comprehensive interpretive analysis. It would simply need to replace the ambiguous language with text that clearly communicates the legislative understanding. The cost of changing the text to incorporate the intended meaning, therefore, is relatively cheap *if in fact that meaning can clear the legislative process*.[192] Hence, the textualist argument that Congress should clarify known ambiguities seems reasonable.

If, however, the ambiguity is hidden—that is, those within the legislative process appear unaware of an ambiguity that would be revealed by the judicial interpretive process—then the cost calculation changes. The cost of clarifying ambiguity that has remained hidden after legislative vetting is extremely great because the cost of identifying the ambiguity would be prohibitive. To identify all provisions that a court might read differently than the legislative understanding would require performing a judicial-type analysis on the entire statute, which would be prohibitively expensive.[193] Thus, reliance on legislative history rather than text to signal congressional understanding would be reasonable to resolve questions of hidden ambiguity. On the flip side, use of reliable legislative history to clarify hidden ambiguity would not impose great costs on the legislative process. Manipulating legislative history to suggest a meaning different from what the legislature would enact would require the manipulator to claim that the statutory text has a non-obvious meaning, without signaling that the text was ambiguous in the first place, which is no easy task. Even if a legislator were so canny as to assert such a meaning without explicitly acknowledging that the statute was ambiguous, others in the legislative process could easily defeat manipulation simply by noting in the legislative

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191. *See supra* text accompanying notes 74-75.

192. Many barriers exist to making these changes, such as competing legislative priorities, vetogates, filibusters, and a host of other procedural hurdles that inhere in bicameralism and presentment. But the textualist point—that the Constitution intentionally makes the legislative process difficult even for legislation that might be favored by a majority of legislators in both houses—seems an apt response to why the burden should be on Congress to amend statutory text to clarify known ambiguities. *See* Manning, *supra* note 31, at 708-09.

193. *See supra* notes 128-31 and accompanying text.

history their disagreement with the meaning given by the manipulator. That notation essentially would convert hidden ambiguity into apparent ambiguity, triggering the burden to clarify the statute or have the courts interpret it according to the probability-updating method of determining best meaning. Thus, judicial consideration of legislative history seems to impose the lowest combined enactment and error costs.

One might question whether legislative history can ever signal the meaning of a statute when ambiguity in the statute is not known to those involved in the enactment process. I agree that this is highly improbable when the legislative history directly aims to explain or clarify the meaning of a statutory provision. There are situations, however, when legislative history can clarify the meaning of a term on which the history does not focus. In particular, in explaining a legislative response to one question, the discussion in the history might manifest a universal understanding of a term on which the legislature is not focusing, but which later turns out to be important and ambiguous.

An example of a yet to be resolved statutory ambiguity that illustrates the value of the legal process failure approach to clarify hidden ambiguity involves whether section 189(a) of the Atomic Energy Act mandates formal hearings under the Administrative Procedure Act (APA) for issuance of, or renewal of, licenses for nuclear power plants.[194] Recently, the Nuclear Regulatory Commission (NRC), the successor to the Atomic Energy Commission (AEC), has advocated that section 189(a) allows it to issue power plant licenses

194. In 2004, the Nuclear Regulatory Commission (NRC) adopted a rule relaxing some of the procedural requirements it had imposed on power plant licensing hearings under section 189(a). NRC Changes to Adjudicatory Process Rule, 69 Fed. Reg. 2182 (Jan. 14, 2004) (relevant part codified at 10 C.F.R. §§ 2.1200-2.1213 (2013)). The NRC explicitly relied on its interpretation that section 189(a) did not trigger the formal hearing provisions in the APA. *Id.* at 2183; *see also id.* at 2183-85 (detailing the history of how the NRC moved from interpreting section 189(a) to requiring formal hearings to its current position). The First Circuit declined to rule on the Agency position that section 189(a) did not trigger these provisions, and instead affirmed the regulation as consistent with the requirements of sections 554, 556, and 557 of the APA. Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 348 (1st Cir. 2004) ("For years, the courts of appeals have avoided the question of whether section [189(a)] requires reactor licensing hearings to be on the record. We too decline to resolve this issue.") (citations omitted). Thus, even today—fifty-one years since relevant parts of section 189(a) were last amended—whether that section mandates formal hearings remains a potentially relevant undecided interpretive question. *See* 42 U.S.C. § 2239 (2012).

without complying with the hearing requirements specified in sections 554, 556, and 557 of the APA.[195]

When enacted in 1954, the Atomic Energy Act provided that in any licensing proceeding or rule-making proceeding involving activities of licensees, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."[196] In 1957, reacting to concerns about safety of certain types of nuclear facilities, including nuclear power plants, Congress amended section 189(a) to require a hearing for licensing these facilities.[197]

At the time, the prevailing view was that statutorily required hearings in adjudications were presumptively governed by the APA procedures specified in sections 554, 556, and 557, even without an explicit requirement that the agency decision be based on the record created.[198] In addition, the legislative history of the 1957

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195. *See Citizens Awareness Network, Inc.*, 391 F.3d at 344 ("In January of 1999, the NRC's general counsel drafted a legal memorandum concluding that the Atomic Energy Act did not require reactor licensing hearings to be on the record."). The First Circuit upheld the NRC procedures as consistent with the APA requirements for formal procedures without deciding whether they had to be formal. *Id.* at 348.

196. Atomic Energy Act of 1954, Pub. L. No. 703, § 189(a), 68 Stat. 919, 956 (prior to 1957 amendment).

197. Act of Sept. 2, 1957, Pub. L. No. 85-256, § 7, 71 Stat. 576, 579 ("The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register on each application ... for a license for a [nuclear] facility, and on any application ... for a license for a [nuclear] testing facility.") (internal quotation marks omitted).

198. *See* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42 (1947) ("It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing."). In addition, the Supreme Court had recently decided that the APA formal hearing requirements apply when the Due Process Clause requires a hearing even if the statute did not. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51 (1950). That case is instructive because, although the Supreme Court had previously held that due process required a hearing in deportation cases, there was no mention in *Wong Yang Sung* of the triggering language that the hearing be "on the record," supporting the view that when either a statute or the Constitution requires a hearing in adjudication, the hearing is to be formal. *Id.* at 52; *see* Riss & Co. v. United States, 341 U.S. 907 (1951) (per curiam) (requiring formal proceedings for a certificate of public convenience and necessity hearing before Interstate Commerce Commission). This presumption that adjudicatory hearings were to be formal was eroded by Supreme Court decisions in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224 (1973); *United States v. Alleghany Ludlum Steel Corp.*, 406 U.S. 742 (1972). *See* William Funk, Jr., *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 888-90 (2006);

amendment suggested that Congress meant for the hearings to be formal.[199] Not surprisingly, the general view, expressed consistently by the AEC immediately after these amendments, was that the statute required these hearings to be governed by the APA specified procedures.[200]

Facilities subject to the mandatory hearing requirement, however, had to obtain a permit prior to construction and a separate license after construction before commencing operation.[201] Under the APA, both agency actions are grants of licenses, which translated into such facilities having to go through two trial type hearings.[202] In 1960, the Joint Committee on Atomic Energy asked the AEC to respond to criticism that the licensing procedures were "unnecessar-

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see also Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 791 (2003) (arguing that the term hearing in a statute did not necessarily trigger APA formal procedures, but that "the APA mandated uniform procedures only where, generally speaking, such hearings were either required by explicit statutory 'on-the-record' language or courts or agencies had assumed that 'on-the-record' hearings were required"); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1047-48 (2004) (arguing that in enacting the APA, Congress intended that an agency use the APA's formal procedures when a statute called for a hearing in an adjudication).

199. *See Governmental Indemnity and Reactor Safety: Hearing Before the J. Comm. on Atomic Energy*, 85th Cong. 7 (1957) (statement of Sen. Clinton P. Anderson, Vice Chairman, J. Comm. on Atomic Energy); STAFF OF J. COMM. ON ATOMIC ENERGY, 85TH CONG., STUDY OF AEC PROCEDURES AND ORGANIZATION IN THE LICENSING OF REACTOR FACILITIES 20 (Comm. Print 1957). Senator Anderson had also expressed the need for mandatory formal hearings during debate on the 1954 Act. *See* 100 CONG. REC. 10,485 (1954). The 1954 Act, however, only required hearings on request of an interested person, whereas the 1957 Amendments incorporated Senator Anderson's preference for mandatory hearings for nuclear power reactors. *See supra* notes 196-97 and accompanying text.

200. *See* Letter from Loren K. Olson, Comm'r, U.S. Atomic Energy Comm'n, to James T. Ramey, Exec. Dir., J. Comm. on Atomic Energy (Nov. 30, 1960), *in* STAFF OF J. COMM. ON ATOMIC ENERGY, 87TH CONG., IMPROVING THE AEC REGULATORY PROCESS 580 (1961); Letter from Loren K. Olson, Comm'r, U.S. Atomic Energy Comm., to James T. Ramey, Exec. Dir., J. Comm. on Atomic Energy (Dec. 22, 1960), *in* IMPROVING THE AEC REGULATORY PROCESS, *supra*, at 588; ATOMIC ENERGY COMM'N, THE REGULATORY PROGRAM OF THE ATOMIC ENERGY COMMISSION (Feb. 1961), *in* IMPROVING THE AEC REGULATORY PROCESS, *supra*, at 409-10; *see also*, Nuclear Fuel Servs., Inc., 11 N.R.C 799, 809 & nn.7-8 (1980) (Bradford, Comm'r, dissenting) (citing documents supporting the NRC's consistent position that section 189(a) requires formal procedures).

201. *See* Classification and Description of Licenses, 10 C.F.R. §§ 50.21-.24 (1957).

202. *See generally AEC Regulatory Problems: Hearing Before the Subcomm. on Legis. of the J. Comm. on Atomic Energy*, 87th Cong. 1-2, 28-29, 38 (1962); Letter from James T. Ramey, Exec. Dir., J. Comm. on Atomic Energy, to Loren K. Olson, Comm'r, U.S. Atomic Energy Comm. (Nov. 7, 1960), *in* IMPROVING THE AEC REGULATORY PROCESS, *supra* note 200, at 575-76 (questioning the duplicative nature of the licensing and hearing process).

ily formal and judicialized."[203] Thus, in that year, Congress once again considered amendments to section 189(a).

In its initial response to the Joint Committee's request, NRC Commissioner Olson stated the AEC position that the hearings required by the 1957 amendments had to be formal.[204] The Agency contended that the procedures it used were justified because of the importance of reactor safety issues and the lack of substantial experience in reactor licensing, but indicated that "[i]t is possible that substantially less full presentation of testimony would be appropriate in some cases" after the Agency gained more experience with operation of power reactors.[205] Consultants to the Joint Committee testified in 1961 that formal hearings served little purpose in uncontested licensing proceedings. These consultants suggested that Congress change the language of section 189(a) to allow the Commission to use less formal procedures for licensing.[206] The Joint Committee rejected this change, recommending instead that the Commission use "informal procedures to the maximum extent permitted by the Administrative Procedure Act."[207] The APA, however, does not include any provision governing the adjudicatory process outside of the formal procedures specified by sections 554, 556, and 557.[208] But, these provisions do give agencies significant leeway to limit or dispense with cross examination, and for initial licensing, they further allow submission of all or part of the evidence in written form.[209] Hence, the Joint Committee statement is best read to

203. Letter from James T. Ramey, Exec. Dir., J. Comm. on Atomic Energy, to Loren K. Olson, Comm'r, U.S. Atomic Energy Comm. (Nov. 16, 1960), *in* IMPROVING THE AEC REGULATORY PROCESS, *supra* note 200, at 587.

204. Letter from Loren K. Olson, Comm'r, U.S. Atomic Energy Comm., to James T. Ramey, Exec. Dir., J. Comm. on Atomic Energy (Nov. 30, 1960), *in* IMPROVING THE AEC REGULATION PROCESS, *supra* note 200, at 580.

205. THE REGULATORY PROGRAM OF THE ATOMIC ENERGY COMMISSION, *supra* note 200, at 410.

206. *See* Memorandum from David F. Cavers & William Mitchell for J. Comm. on Atomic Energy (April 17, 1962), *in AEC Regulatory Problems*, *supra* note 202, at 57.

207. *See* H.R. REP. NO. 87-1966, at 6 (1962).

208. The only potentially relevant provisions are those in § 555, entitled *Ancillary Matters*, and these provide only limited rights, such as: the agency shall give prompt notice of the denial of any written request, 5 U.S.C. § 555(e) (2012), and a party has the right to appear in person in any agency proceeding, 5 U.S.C. § 555(b). The manner in which the agency might meet these requirements (that is any specific procedure that the agency must follow) is not specified.

209. 5 U.S.C. § 556(d) (stating that the agency may provide for exclusion of unduly repeti-

refer to the flexibility allowed by these APA sections. The only clear mention that the hearings need not be on the record came in testimony during Joint Committee Hearings in 1961 from Professor Kenneth Culp Davis, who disagreed with AEC Commissioner Olson's argument that the 1957 amendments required trial-type hearings.[210]

The proposal before Congress from the Joint Committee on Atomic Energy in 1962 was not intended to change the nature of the required hearings. Rather, the Committee bill eliminated the requirement for hearings before the Commission issued operating licenses (but not construction permits) unless a hearing was requested by an interested person.[211] Congress enacted this Joint Committee bill.[212] The assumption by virtually all who participated in the process was that the hearings required for power plants had to be formal, and the agency indicated that it would continue to read the statute to impose that requirement. The debate did not center on the issue of the formality of hearings, and there was no incentive to members of Congress to salt the legislative history on that issue. In essence, Congress focused on whether it was appropriate to eliminate the second hearing for licensing of nuclear power plants. But the consistent assumption that the statutorily required hearings

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tious evidence and must give opportunity for such cross examination as may be required for a full and true disclosure of the facts); *see* Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 350-51 (1st Cir. 2004) (finding that the NRC abbreviated reactor licensing hearings complied with § 556 of the APA).

210. *See Radiation Safety and Regulation: Hearings Before the J. Comm. on Atomic Energy*, 87th Cong. 376, 386 (1961) (statement by Kenneth Culp Davis, Professor, Univ. of Minn. School of Law).

211. S. REP. NO. 87-1677, at 7-8 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2207, 2214. The Joint Committee proposed amending section 189(a) by inserting the following in lieu of the second sentence:

> The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a [license] *construction permit* for a facility, and on any application under section 104c. for a [license] *construction permit* for a testing facility. *In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so.*

Id. at 16-17, *reprinted in* 1962 U.S.C.C.A.N. 2207 (proposing that the words in brackets be deleted and the words in italics be added to the text).

212. Act of Aug. 29, 1962, Pub. L. No. 87-615, sec. 191, § 2, 76 Stat. 409, 409.

had to be formal is telling about what Congress understood the statute to mean precisely because consideration of changing this meaning was not on the table.

D. Hidden "Clear" Meaning

As oxymoronic as it sounds, statutes may contain hidden "clear" meaning. When statutes are highly technical or complex, they can contain meaning that becomes clear only after being subject to interpretation by judicial-type probability updating. In such instances, clear meaning might not have been discovered by those involved in enactment, and legislative history might reliably indicate that those who enacted the statute had a different understanding. Despite the meaning that results from judicial-type interpretation, the legislature might well have been unaware of the need to change the language of the statute to enact the legislation that it thought it was passing.

The Court's decision in *Zuni Public School District v. Department of Education* can be read to illustrate this category of legislative process failure.[213] This case involved the Federal Impact Aid Program (FIAP), which provides federal aid to local school districts whose educational funding is adversely affected by a federal presence.[214] The statute prohibits states from cutting funding to such school districts in light of the federal aid they receive.[215] But the statute includes an exception to this prohibition on offsetting reduction in state funding when the Secretary of Education determines that the state program "equalizes expenditures" among school districts.[216] More specifically, the statute provides that a state aid program equalizes expenditures if "the amount of per-pupil expenditures made by [the local school district] with the highest such per-pupil expenditures ... [does] not exceed the amount of per-pupil expenditures made by [the local school district] with the lowest such expenditures ... by more than 25 percent."[217] Further, in comparing the expenditures of highest and lowest school districts,

213. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2006).
214. *Id.* at 84-85.
215. *Id.* at 85.
216. *Id.*
217. *Id.* (quoting 20 U.S.C. § 7709(b)(2)(A) (2000)).

the Secretary is required to "disregard [school districts] with per-pupil expenditures ... above the 95th percentile or below the 5th percentile of such expenditures [in the State]."[218]

The Secretary of Education adopted a regulation implementing the FIAP equalized spending exception that specified in detail how the Secretary compares per-pupil expenditures in the districts with the highest and lowest expenditures.[219] First, all the local school districts in a state are listed in order of the per-pupil expenditures in each district.[220] The school districts at the top of the list that contain five percent of the state's student population and the school districts at the bottom that contain 5 percent of the state's student population are essentially stricken from the list.[221] The per-pupil expenditures of the remaining top and bottom districts are then compared to see if they fall within twenty-five percent of each other.[222]

Two school districts in New Mexico challenged the application of this regulation for funding in 2000, claiming that the statute specified that the top and bottom five percent of districts should be removed before expenditures are compared, not the districts at the top and bottom with five percent of the state's student population.[223] The Court found the statute ambiguous with respect to this issue, and affirmed the regulation by invoking the *Chevron* doctrine.[224] Justice Scalia wrote a strong dissent arguing that the language of the statute was clear, and that the majority had relied on legislative history essentially to create ambiguity.[225]

The problem for the majority is that if one reads the language of the statute using the judicial approach, without considering the circumstances surrounding its enactment, it seems to require that the Secretary disregard the top and bottom five percent *of school districts*. First, the statute calls for a comparison of the top and bottom school districts, not the students getting the most and least public dollars. Hence, the provision to disregard districts at the high

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218. *Id.* at 86 (quoting 20 U.S.C. § 7709(b)(2)(B)(I) (2000)).
219. *Id.*
220. *See id.*
221. *See id.*
222. *See id.* at 86-87 (quoting 34 C.F.R. pt. 222, subpt. K, app., ¶ 1 (2006)).
223. *Id.* at 88-89.
224. *Id.* at 100.
225. *Id.* at 108-20 (Scalia, J., dissenting).

and low ends of per-pupil expenditures would seem to refer to the top and bottom five percent of the list of districts.[226] Second, because the per-pupil expenditures are averages across each school district and hence the same for each student in a district, the term "such expenditures" applies most naturally to the expenditures for each school district, not to the expenditures for the top and bottom five percent of students.[227]

The majority attempted to side-step these problems by starting its analysis with a description of how the statute came to be.[228] Justice Breyer, writing for the majority, explained that the Secretary had adopted the challenged regulation in 1976, when the statute had left the definition of the term "equalizing expenditures" to the Secretary's discretion.[229] The current version of the statute, with the specified formula for determining whether a state aid program equalizes expenditures, was sent to Congress as draft legislation in 1994, and enacted without any change relevant to the controversy before the court, and without any comment or clarification.[230] After the statute was passed, the Secretary continued to compare the districts with the highest and lowest spending as he had done before enactment, as evidenced by the fact that he was still using that approach in 2000.[231] Thus, the best understanding

226. The majority argued that the statute did not specify the distribution from which the top and bottom five percent of school districts were to be selected. But, in essence, the list for which the statute called was a list of districts, not a list of students in the district ordered by the per-pupil expenditures. *See id.* at 111-12. This undermines the majority's finding of linguistic ambiguity. *Id.* at 96-97 (majority opinion).

227. *See id.* at 113 (Scalia, J., dissenting).

228. *Id.* at 89-90 (majority opinion). Justice Stevens, who joined the majority, also wrote separately on the issue of whether clear language should necessarily control statutory interpretation:

> This happens to be a case in which the legislative history is pellucidly clear and the statutory text is difficult to fathom. Moreover, it is not a case in which I can imagine anyone accusing any Member of the Court of voting one way or another because of that Justice's policy preferences.
>
> Given the clarity of the evidence of Congress' 'intention on the precise question at issue,' I would [uphold the regulation] even I thought that the petitioners' literal reading of the statutory text was correct.

Id. at 106-07 (Stevens, J., concurring) (citations and footnotes omitted). Justice Souter also found the legislative intent clear, although he dissented on grounds that such intent cannot overcome the clear meaning of the statute. *See id.* at 123 (Souter, J., dissenting).

229. *Id.* at 90 (majority opinion).

230. *Id.* at 90-91.

231. *Id.* at 88-91.

for the amendment was that it was an attempt to codify the technical practice employed by the Secretary.

The story of how the statute came to be, however, cannot convert what was a clear statute into one that is *semantically* ambiguous. Hence for me, the majority's opinion is a thinly veiled interpretation of the statute at odds with the technical language Congress enacted. Nonetheless, I find the majority's reading of the statute to be persuasive under my legislative process failure theory. The language at issue is, by standards of usual statutes, fairly technical and not the kind with which members of Congress or the staff members typically grapple.[232] If the Secretary indicated what he understood the statute to mean, one lacking in statistical acumen most likely would not realize that the language failed to incorporate the Secretary's existing practice. There is no indication that any member of Congress, or anyone else involved in its enactment, understood the statute to change the method by which the Secretary implemented the FIAP. To the contrary, the fact that the Secretary both submitted the language that was enacted and continued to apply the previously adopted regulation is a strong indication that he thought the language was consistent with that regulation. Nor is this a situation in which legislators opined on the meaning of the statute, let alone tried to game the system to fool a court into granting them what they could not get Congress to pass. Therefore, despite the clarity of the language when considered closely using judicial tools of interpretation, this evidence almost certainly supports that legislators who voted on the bill understood it to authorize the Secretary's approach to implementing the statute. In short, the legislative process failure approach to interpretation vindicates the holding in the case.

CONCLUSION

Proponents of various theories of statutory interpretation debate the propriety of courts focusing on the subjective intent of the legislature rather than the objective meaning of text. In doing so, they fail to take sufficient account of the differences between how courts interpreting statutes assign meaning to text, and how legis-

232. *See id.* at 90.

latures enacting the text do so. Courts find meaning by engaging in something akin to probability updating of the likely meaning of text, whereas legislators use a process of vetting text among those with an interest to identify any textual problems. Legislative history plays a valuable role in the legislative process as a means of signaling the meaning of statutes to those involved in that process. For this reason, with respect to determining statutory meaning, these two institutions constitute different linguistic communities. The differences in the mechanisms each uses to assign meaning enable "legislative process failure," which occurs when those mechanisms lead to inconsistent understandings of statutory text.

The assumption of legislative supremacy requires that the courts and the legislature come to some accommodation to ensure that courts will interpret statutes in accord with the legislature's understanding of statutory meaning. That assumption, however, does not automatically translate into requiring courts to accommodate the legislative mechanism for attaching meaning. Legislative supremacy is satisfied so long as Congress knows how courts will interpret statutes and can ensure that the statutes it enacts will be interpreted as it intends. Legislative process failure theory therefore leads to the question: Which branch should accommodate the other's method of attaching meaning to statutes, and under what circumstances?

Generally, legislatures cannot engage in judicial-type inquiries into statutory meaning while drafting statutes because the cost of engaging in such statutory analysis ex ante—that is, before identification of the potential provisions that might exhibit process failure—is prohibitive. Therefore, legislative process failure generally warrants courts accommodating the legislative mechanism for ascribing meaning to statutes by considering legislative intent, which may counsel consideration of legislative history. But, once the legislature is aware of a process failure, the cost of engaging in judicial type textual inquiry becomes manageable, and the error cost of interpretation due to strategic behavior, such as manipulation of legislative meaning by a subgroup of Congress, greatly increases. Hence, in the face of such awareness, a textual approach is justified.

Finally, this Article identified several signs that statutes reflect legislative process failures—signs such as absurd interpretive

outcomes, seeming slips of the pen, hidden ambiguity, and even hidden "clear meaning"—and suggested how courts might structure their interpretive inquiries in response to these failures.