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Intentionalism's Revival

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Intentionalism’s Revival

JAMES J. BRUDNEY*

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I. INTRODUCTION

For much of the past two decades, the intentionalist approach to statutory interpretation has been on the defensive. Dating roughly from Justice Scalia’s appointment to the Supreme Court, textualist judges and scholars have seized the theoretical high ground, successfully framing the debate in both constitutional and conceptual terms.¹ Proponents of

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1. 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 14–37 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812–14 (1998); ADRIAN

intentionalism and its key interpretive resource, legislative history, have often responded from a more pragmatic than theoretical standpoint.²

At the same time, there has been an undercurrent of foundational justifications offered for intentionalism, an undercurrent that has gained strength in recent years. Some scholars have promoted the constitutional legitimacy of an intentionalist approach, grounding their claims in Congress's powers of self-organization under Article I³ or in the decentralized and specialized structure of Congress itself.⁴ Others have argued for the conceptual integrity of intentionalism by invoking the principle of constructive notice: they urge courts to identify a hierarchy of legislative history resources based on which legislative record evidence in a given setting is likely to be viewed as authoritative among reasonably attentive congressional colleagues.⁵ Advocates for an intentionalist approach have applied lessons from political science,⁶ democratic constitutionalism,⁷ analytic philosophy,⁸ and developmental psychology⁹ to help justify the existence and importance of a collective legislative purpose that can illuminate statutory meaning under the right conditions.

VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 40–79 (2006); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

2. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992); Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1920–31 (2006); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2043–44, 2057–70 (2006) (reviewing VERMEULE, *supra* note 1). See generally Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252–58 (1992).

3. See John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 542–66 (2001); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1489–1516 (2000).

4. See James J. Brudney, *Congressional Commentary on Judicial Interpretation of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26–32 (1994); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 718–27 (1992); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 264–70.

5. See generally George A. Costello, *Average Voting Members and Other “Benign Fictions”*: *The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 60–73; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990).

6. See, e.g., Tiefer, *supra* note 4, at 268 (invoking political science research on institutional role of committees as producers and suppliers of superior information that enables each chamber to function in setting of uncertainty).

7. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15–16, 85–101 (2005).

8. See Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 437–42 (2005); Tiefer, *supra* note 4, at 255–64.

9. See Solan, *supra* note 8, at 449–53.

The *Interpretive Lessons* article by Professors Boudreau, Lupia, McCubbins, and Rodriguez (referred to at times as BLM Rod)¹⁰ represents a valuable contribution to this recent intentionalist turn. Drawing on insights from communication theory, the authors analogize statutes to other forms of verbal and even nonverbal exchange that involve the initial compression and subsequent expansion of information.¹¹ Given that statutes, as written communications, invariably require some interpretive effort to unpack their meaning, certain reference points beyond the words themselves become important. For BLM Rod, a core reference point is the intent of Congress as communicator.

The authors maintain that statutes, as compressed substantive or procedural commands,¹² cannot be adequately understood without an appreciation for the compression process that generated them.¹³ Relatedly, BLM Rod contend that the decoding and elaborating of statutory commands also must be properly sensitive to the dynamics of the compression process, and they offer guidelines for courts to use when expanding the meaning of statutes in particular settings.¹⁴

This essay comments on several of the authors' major contentions. Part I explores certain implications of the article's thematic focus—that a statutory communication derives at least some of its meaning from the intent of Congress as communicator. Part I discusses how this approach may help clarify the status of legislative history as evidence of ascribed or imputed intent. In addition, Part I addresses how the authors' focus may augment the value placed on legislative history when compared to interpretive resources generated by the judicial and executive branches of federal government.

Part II examines the article's treatment of the compression and expansion procedures. It suggests that BLM Rod's view of the compression process as a relatively straightforward conversation among majority party legislators may be unduly House-centered and also may overlook other variables.

10. Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007). My shorthand reference to the four authors derives its respectful provenance through Alex Rodriguez (A-Rod), powerful interpreter of pitchers for the New York Yankees, and Francisco Rodriguez (K-Rod), fearsome interpreter of batters for the Los Angeles Angels of Anaheim.

11. *See id.* at 961–64.

12. *Id.* at 964–67.

13. *Id.* at 967–71.

14. *Id.* at 971–81.

Relevant congressional conversations often involve members of the minority party, especially in the Senate. Further, the architecture of such conversations may differ across subject matter areas more than the authors' basic model seems to contemplate. Part II also addresses the process of expansion, focusing on the authors' approach to conversations among a bill's coalition of supporting members. It suggests that BLM Rod's analyses of what motivates ardent and pivotal supporters, and of how courts should treat these two key groups when elaborating the meaning of text, may be in need of some refinement.

II. CONGRESS AS COMMUNICATOR

A. *Group Communicators and Intent*

One can point to several respects in which statutes may express the intent of their legislative creators. At the most general level, statutes set forth rules, standards, prohibitions, and entitlements that are enacted in order to channel or direct human conduct toward broadly envisioned policy consequences. Somewhat more specifically, certain statutes are aimed at the conduct of the public as a whole, while others target subsets that consist of private individuals and entities, governmental organizations, or both. Still more concretely, straightforward federal prohibitions (such as making it unlawful for employers to refuse to hire individuals "because of . . . national origin")¹⁵ or entitlements (such as authorizing individuals to sue any person "alleged to be in violation of" various environmental standards)¹⁶ often cannot be understood or applied simply through logical deduction. When construing written language that is inconclusive in a particular setting, it is appropriate to ask what the author meant to communicate.

This concept of authorial intent is relevant to understanding a communication whether the author is an individual or a group. For example, consider the issue of hiring based on national origin. Assume first that as personnel director for a business in San Diego, I tell my recruitment coordinator: "Do not hire anyone who isn't a U.S. citizen." In deciding whether *I as an individual* intended to discriminate on the basis of national origin, more context is needed. Many individuals born in other countries immigrate to the United States and become American citizens. Thus, my order is not automatically or obviously discriminatory

15. See Title VII of 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2000).

16. See Clean Water Act of 1972, 33 U.S.C. § 1365(a)(1) (2000).

against the foreign-born.¹⁷ But now assume as well that ninety-eight percent of the company's all-white workforce was born in the United States; that two-thirds of the individuals in the San Diego area qualified for and interested in my company's jobs were born in Mexico or Central America; and that half of those are lawful resident aliens, who are eligible to work for my company but are not citizens. Under these circumstances, it appears more likely that I intended to exclude job applicants based on their national origin.

Similarly, in deciding whether *a federal statute that prohibits employment discrimination* based on national origin applies to refusals to hire noncitizens, more context is needed.¹⁸ The statute does not mention citizenship at all, and on its face the word *citizen* refers to whether a person has certain rights and privileges in the U.S. political system, not whether she or her parents were born in this country. On the other hand, refusals to hire noncitizens effectively operate to exclude only persons of a different national origin. Facially neutral barriers that predictably yield such a disparate result might at least raise a presumption of unlawful conduct, calling for some kind of business justification.¹⁹ In this setting, where the semantic meaning of enacted text is subject to reasonable disagreement, it makes sense to ask what Congress might have intended when it chose to include "national origin" but not "citizenship" in its list of prohibited traits or qualities.²⁰

BLM Rod rightly insist that it is not sufficient to regard statutes as a disembodied textual product. Like other forms of communication, statutes

17. *Cf. Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92–93 (1973) (holding that employer's refusal to hire a noncitizen applicant did not constitute employment discrimination on the basis of national origin).

18. There may be intermediate levels at which determinations about intent require contextual inquiry. For instance, one might ask whether—assuming I did intend to exclude job applicants based on national origin—that intent may be ascribed to my company under some notion of vicarious liability. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775, 802–07 (1998).

19. *See generally* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

20. *See Espinoza*, 414 U.S. at 88–91 (reviewing statute's "meager" legislative history on this question and concluding that "national origin" was considered synonymous with "ancestry" and that longstanding citizenship requirement for federal employment was not viewed as conflicting with 1964 provision barring national origin discrimination); *see also* Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 61–63 (1987) (relying on legislative history to show that private enforcement actions discussed in text accompanying note 16, *supra*, were authorized only to pursue injunctive relief against those allegedly still in violation of the Act, not to seek redress for violations that are wholly past).

can be adequately understood or applied only when viewed in context, as the result of a communicative process.²¹ The intent of the communicator is an integral part of that process, even when that communicator is a group of 535 individuals acting in procedurally segmented stages over a period of up to two years. The authors do not dwell on the philosophical question of how such a large and unwieldy group can be said to possess a coherent intent, but the recent work of Professor Lawrence Solan is instructive in this regard.²²

Solan discusses how we routinely regard groups—either formally constituted or informally aggregated—as decision-making units imbued with a collective mental state.²³ We attribute emotions, beliefs, and intentions to married couples or to residents in a neighborhood as well as to members of a city council or a national legislature. Using a married couple as his example, Solan describes how a husband and wife can be “intending” to vacation at a particular resort hotel even if one spouse plans most of the details or pays the bills, and even if the two spouses anticipate that they will spend their vacation time in very different ways.²⁴ Similarly, Solan argues, we consider larger groups such as legislatures to be actors with an intent even when not every group member signs on expressly to the legislative product, or when all the bill’s details have not been worked out in advance, or when those endorsing the legislation have relatively diverse reasons for doing so.²⁵

To be sure, there are many potential groupings of individuals that do not behave as unified or coherent actors. Female spouses who live in a particular city, or state legislators from the Midwest who serve on judiciary committees, are two examples of individuals unlikely to act together on a regular or even occasional basis. As Professor Solan observes, we are inclined to regard a collection of individuals as an entity possessing a coherent intent primarily because they deliberate and

21. Some textualists contend that statutes must be viewed as a special form of written communication—both because statutes are drafted to be fully self-contained as a constitutional matter, and because any suggestion to the contrary provides incentives for members of Congress to use legislative history in strategic or opportunistic ways. BLM Rod’s response is presumably that it is simply not practical or realistic to expect Congress to insert all communicative instructions into its statutory commands, and that the authors’ conditions for sincerity can effectively screen for opportunistic legislative history.

22. See Solan, *supra* note 8; see also Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 251–62 (discussing importance of context for resolving indeterminacies in language).

23. See Solan, *supra* note 8, at 437–49.

24. See *id.* at 437–40. Solan draws here on philosopher Margaret Gilbert’s work on plural subject theory. *Id.* at 438 & nn.52–53 (quoting MARGARET GILBERT, *SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY* 41 (2000)).

25. *Id.* at 444–49.

act jointly as a unit.²⁶ This inclination to attribute a group intent applies even if the group's deliberative processes are fragmented as an organizational matter and its joint decisions are messy or complex. Congress is an apt illustration of such jointly deliberative action from both the formal and practical perspectives.

When BLM Rod emphasize the importance of heeding “the legislature’s intended meaning” or “the meaning that the legislature intended to convey,”²⁷ they are relying on the concept of attributed group intent. It makes sense to think of legislative intent as attributed or imputed rather than “actual”: Congress is very unlikely to agree on an institutional intent in formal terms. Fifty-one senators and two hundred and eighteen representatives virtually never vote to endorse legislative record statements the way they vote to approve text.²⁸ Similarly, it is rare for the House or Senate to convene members in a New England town meeting format, at which all or almost all are present to hear everything that is said about a bill before votes are taken.²⁹

Instead, group intent derives from the structural and functional realities of Congress as a representative body. Legislators effectively charge subgroups of their colleagues with the primary responsibility for drafting a text and explaining or elaborating upon its meaning. Formal subgroups like standing committees or conference committees are assigned such roles based on their subject matter and technical expertise and also their status as players continuously invested in the field. Informal subgroups, like a bipartisan coalition that negotiates a compromise, are trusted in these roles because they reflect a reassuringly broad spectrum of ideological positions. The conference committee report containing a reasoned narrative that is then reiterated in floor debate before final passage,³⁰ or the joint floor statement

26. *Id.* at 442–45.

27. Boudreau et al., *supra* note 10, at 961, 962.

28. *But see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (codifying a single legislative history statement as authoritative for helping to understand the textual provision overriding *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). Congress’s textual language in this unusual setting makes clear the background norm or default rule—members expect that unenacted legislative history *should* be valued and that ordinarily a *range of legislative record statements and exchanges* may be credited as a source of illumination.

29. House sessions in which members exercise the chamber’s power of impeachment, and Senate sessions in which impeachment trials take place, are notable exceptions. Floor debate during a foreign policy crisis may be another such exceptional circumstance.

30. *See, e.g.,* *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 655 F.2d 951, 957 (9th Cir. 1981) (relying on conference report narrative explaining meaning of Alaska Lands

explaining a deal negotiated by bill managers and ranking minority members,³¹ are ascribed to Congress as a whole. The attribution of group intent occurs because the larger group must have intended—and would have agreed if asked—that the text they approved means what their designated colleagues *said* it means.

By depicting the legislative process as a mechanism that compresses multiple sources of information into a single statutory command, the authors enlarge our understanding of how Congress can intend to communicate more than simply the final words of enacted text. At the same time, BLM Rod emphasize that Congress’s group decisional process is also a constitutive component in the Article I lawmaking enterprise.³² That emphasis deserves attention as well.

B. A Constitutionally Privileged Compression Procedure

Under our Constitution, as every law student learns,³³ Congress is authorized to develop and enact legislation, the President is charged with the authority to execute these enacted laws, and federal courts are responsible for resolving controversies that arise under the enacted and implemented statutes.³⁴ Although it is ultimately the Supreme Court’s role to construe statutory text that results in contested understandings, each of the three branches contributes contextual resources that regularly assist the courts in addressing such disputes. These branch-specific interpretive assets are legislative history, agency guidance mainly in the form of rules or adjudications, and the canons of construction.³⁵

Act, an explanation that was repeated on both House and Senate floor by conference committee members and that became the basis for Senate’s receding from its prior version of text).

31. See, e.g., Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, 629–630 (2000)); 136 CONG. REC. 25352–55 (1990) (statement of Managers, Sens. Metzenbaum, Hatch, Pryor, Heinz) (explaining in detail provisions of substitute text that followed eighteen months of hearings, committee markups, and floor debates, and that preceded overwhelming approval for the bill in both houses).

32. See Boudreau et al., *supra* note 10, at 961–62.

33. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (referring to what “every schoolchild learns” about our Constitutional system of dual sovereignty).

34. See U.S. CONST. art. I, § 1; art. II, § 3; art. III, § 2.

35. I refer here primarily to language canons and substantive canons. See generally James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12–14 (2005). Another important court-generated interpretive asset is judicial precedent and the norm of *stare decisis*. Because precedents on statutory matters are themselves often based on a court’s understanding of legislative history or on agency deference, they may be thought of as somewhat more hybrid in origin.

In recent times, a number of scholars and judges have assigned special rule of law value to the canons. They praise language canons as content-neutral gap-filling norms that enhance the clarity of enacted law,³⁶ and extol substantive canons as policy-related presumptions that signal Congress to draft with precision if it wishes to trump them.³⁷ Similarly, deference to agency decisions has received plaudits based on an assertedly special link to democratic representation. Some judges and scholars regard agencies as extensions of the President, carrying an electorally accountable pedigree that is missing from federal courts.³⁸ Unlike its interpretive resource cousins, legislative history is often disparaged, based at least in part on its politicized roots. Skeptics regard it as indeterminate and subject to manipulation,³⁹ lacking the presumptive reliability of the canons or the cohesively representative quality of an agency rule.

Ignoring for present purposes the persuasiveness of claims made on behalf of other branches' interpretive assets,⁴⁰ it is worth noting how BLM Rod's approach advocates a special role for legislative history. Not only is the lawmaking enterprise best understood as a series of legislative tasks through which meaning is compressed,⁴¹ the authors regard this extended institutional conversation as a constitutionally privileged part of Congress's legislative process. Article I of the Constitution authorizes each House to determine its own procedures for how bills are

36. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994); Scalia, *supra* note 1, at 25–27.

37. See, e.g., Eskridge & Frickey, *supra* note 36, at 68–69; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 943–45 (1992). See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 147–57 (1990).

38. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 833–34 (2001); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 865–68 (2006).

39. See Manning, *supra* note 1, at 696–706 (criticizing legislative history as indeterminate); Easterbrook, *supra* note 1, at 61 (criticizing legislative history as subject to manipulation); Scalia, *supra* note 1, at 31–36 (criticizing legislative history on both grounds).

40. For empirical perspectives skeptical of normative claims asserted on behalf of the canons and agency deference, see Brudney & Ditslear, *supra* note 35, at 77–112 (focusing on canons); Miles & Sunstein, *supra* note 38, at 824–47 (focusing on agency deference). See generally Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1979–2002 (2007).

41. See Boudreau et al., *supra* note 10, at 970–71.

introduced, discussed, modified, and approved, and also to maintain and publish a record of the proceedings that culminate in enactments.⁴² The House and Senate have structured their respective rules and practices to value some proceedings more than others, and members and their staffs participate in a resultant hierarchy of internal communications.

Perhaps the most familiar example of this hierarchy is committee reports. For over a century, standing committee recommendations that a bill be considered and approved by the full chamber have been accompanied by written reports.⁴³ Committee reports typically include a brief statement of the bill's purpose, an extended explanation of why the bill is needed to address a particular public policy problem, and a detailed description of the bill's key components. As informational and persuasive documents, these reports can play an important role for legislators and staff who are *not* committee members.

Committee reports ordinarily are published and circulated at least two calendar days in advance of legislation being taken up on the floor.⁴⁴ This allows time for members to review the reports before they are asked to vote on the bill or any amendments, and legislators from both the majority and minority have indicated that they engage in such review.⁴⁵

42. See U.S. CONST. art. I, § 5, cl. 2–3.

43. See WM. HOLMES BROWN & CHARLES W. JOHNSON, *HOUSE PRACTICE* 281 (2003) (dating House requirement from 1880); Thomas F. Broden, Jr., *Congressional Committee Reports: Their Role and History*, 33 NOTRE DAME LAW. 209, 237–38 (1958) (dating Senate majority practice from 1900). See generally WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 69 (Meridian Books 1956) (1885) (writing in 1883 that “Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work”).

44. See COMM. ON RULES AND ADMIN., *SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE*, S. DOC. NO. 107-1, R. 17, para. 5, at 17 (1st Sess. 2002). This period of two days is exclusive of Sundays and legal holidays. *Id.* See JOHN H. SULLIVAN, *CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES*, H.R. DOC. NO. 108-241, R. 13(4)(a)(1), at 623 (2d Sess. 2005) (same).

45. See, e.g., Abner J. Mikva, *Reading and Writing Statutes*, 28 S. TEX. L. REV. 181, 184 (1986) (discussing reliance on reports when a majority member of House); Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43, 46–48 (1988) (discussing the same when a minority member of Senate); *Statutory Interpretation and the Uses of Legislative History: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the Comm. on the Judiciary*, 101st Cong. 21 (1990) (statement of Judge James L. Buckley, referring to reliance when a minority member of Senate); Joan Biskupic, *Scalia Takes a Narrow View in Seeking Congress’ Will*, 48 CONG. Q. WKLY. REP. 913, 917 (1990) (summarizing Sen. Arlen Specter’s views as follows: “[M]embers of Congress are more likely to read a committee report than the bill itself. The prose of a report is easier to understand, and, because a bill usually amends an existing statute, it is impossible to follow without referring to the U.S. Code.”); see also *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 103d Cong. 223–25 (1994) (remarks of Sen. William S. Cohen,

In addition, legislative staff may rely on the reports to assist them in educating and advising their bosses about bills that are headed for the floor. By examining a committee report's presentation of historical background and policy rationale, its discussion of a bill's major and minor features, and the possible presence of minority views offering arguments against enactment, staff can develop for their principals a succinct presentation of what the legislation is really about, and why certain knowledgeable senators and representatives are supporting or opposing it.⁴⁶

This is not a contention—by BLM Rod or me—that Congress is delegating its formal lawmaking role to committees as its agents. Rather, due to the inherent ambiguities of language and the challenges of navigating a contingent political process, statutory text as drafted and voted on often cannot be self-explanatory. In that setting, Congress's designated agents fulfill a communicative function on an *ex ante* basis, one that can have substantial value for other members and their staffs. The same legislative record material also may be helpful to a post-enactment audience of agencies, regulated entities, and courts that is seeking to anticipate, avoid, or resolve controversies about statutory meaning. The material's *ex post* value, however, derives primarily from its *ex ante* function: legislative history is probative on the subject of intent insofar as it reflects the priorities, justifications, and compromises

supporting role of legislative history in discerning Congress's intent); *Nomination of David H. Souter, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 101st Cong. 130–32 (1991) (remarks of Sen. Dennis DeConcini, supporting relevance of legislative history in understanding statutory meaning).

46. As a former subcommittee counsel and staff director on the Senate Labor and Human Resources Committee from 1985–1992, I can attest to my own reliance on committee reports from other subject matter areas to help brief senators on my committee, and also to the frequency with which staff for members *not* on our committee would raise questions or arguments with me, based on what they had read in our committee's report, as they prepared memos for their bosses. Committee reports today are available electronically, making them more accessible to members and staffs. Whether reports serve as central an informational function now that so many other relevant briefing materials are accessible online (hearing testimony, party caucus presentations, interest group submissions) is an empirical question that deserves attention. See *generally* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 106 (7th ed. 2007) (describing committee reports as “directed primarily at House and Senate members” and as “the principal official means of communicating a committee decision to the entire chamber”).

that may be reasonably understood to have been part of the group's deliberative effort preceding enactment.

This perspective of assessing legislative record evidence as part of Congress's constitutionally privileged communicative process also has implications for how one values other interpretive resources. For example, recent empirical scholarship raises doubts as to whether the canons of construction play much of a role when legislative text is being drafted or debated.⁴⁷ Legislative committee counsel describe drafting statutory language as a highly contextual and intensely pressured process, one that does not readily accommodate generalized rules of construction aimed at promoting predictability.⁴⁸ From the standpoint of statutes as compressed commands, it would seem that the canons' putative virtues have not been embraced by those who formulate and present the commands themselves.

In contrast to the sidelines stance of judicially created canons, executive branch agencies are often participants in the legislative conversation, directly through committee hearing testimony and indirectly through negotiations with key congressional players. But when, as is so often the case, Congress and the White House are controlled by different parties,⁴⁹ agency interpretations following enactment may well face objection for being in conflict with what legislative history suggests the bill's supporters had in mind.⁵⁰ In short, one implication of the authors' premise about the constitutionally privileged role of communicative intent is a subtle discounting of interpretive resources produced by the two other branches. That implied critique may in turn suggest a more elevated status for legislative history, esteemed perhaps as a first among equals.

The interpretive importance ascribed to communicative intent does presuppose that a disinterested observer will be able to decipher or translate what Congress as communicator has in mind. BLM Rod are

47. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600–05 (2002) (finding that counsel involved in drafting text are aware of canons, but do not view them as an important factor in process of writing and discussing statutory language).

48. See *id.* at 590–600; see also Boudreau et al., *supra* note 10, at 983–86 (discussing how redundancy is an important part of legislative communication, mistakenly ignored or devalued by courts' use of the Whole Act Rule).

49. Between 1968 and 2008, Congress (at least one chamber) and the Presidency have been controlled by different parties 75% of the time—all years except 1977–1980, 1993–1994, and 2003–2006.

50. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586–600 (2004) (relying on legislative history for statute enacted by Democratic Congress and rejecting as “clearly wrong” agency regulation adopted under subsequent Republican President); *Dole v. United Steelworkers*, 494 U.S. 26, 36–38 (1990) (same); *Comm'ns Workers v. Beck*, 487 U.S. 735, 744–63 (1988) (relying on legislative history for statute enacted by Republican Congress and rejecting agency's settled interpretation of the statutory provision, developed under later Democratic Presidents).

sensitive to this issue, and they offer guidance on how legislative record evidence should be decoded, at both the compression and expansion stages. Those guidelines raise intriguing questions, several of which are discussed below.

III. SOME OBSERVATIONS ON COMPRESSION AND EXPANSION

A. *Accommodation and Diversity in the Compression Process*

For BLM Rod, the defining aspect of how legislative conversations in Congress contribute to an enacted statute is the virtually untrammelled power exercised by the majority party.⁵¹ Although their schematic presentation and descriptive treatment focus on the House of Representatives, the authors refer in broader terms to the majority party's wholesale dominance of the congressional process. BLM Rod are certainly correct that the majority party's control of the agenda at committee, floor, and conference stages, and its advantage in terms of staffing and other resources, enable it to exert primary influence over the tenor and content of pre-enactment communications.

At the same time, however, the minority party's role in these legislative conversations is more salient than the authors' discussion tends to suggest. A number of institutional and behavioral factors contribute to the often intricately bipartisan nature of Congress's communications process. Three factors that warrant brief attention here are the presence of supermajority barriers that must be cleared in the Senate, the majority party's need to obtain minority party support when its own caucus is divided, and the special importance that majority leaders sometimes attach to securing bipartisan agreement.

First and foremost, the House and Senate differ markedly in terms of how legislative conversations take place. In the House, a cohesive majority party can—if it prefers—develop legislation without consulting the minority at all; as a result the Speaker and minority leader may go for months without having any direct communication.⁵² By contrast, various Senate rules and customs empower small groups and even individual members with a daunting array of weapons to delay or defeat pending

51. See Boudreau et al., *supra* note 10, at 968–71, 979–80, 987.

52. See Barbara Sinclair, *The New World of U.S. Senators*, in CONGRESS RECONSIDERED 1, 13 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005); C. Lawrence Evans & Daniel Lipinski, *Obstruction and Leadership in the U.S. Senate*, in CONGRESS RECONSIDERED, *supra*, at 227, 238.

legislation. Accordingly, the Senate cannot function legislatively without regular cooperation between the majority and minority leadership, and in-depth interaction takes place on a daily basis among the leaders and their respective staffs.⁵³

Senators who belong to the minority party regularly use obstructionist procedural tactics to assist them in bargaining over the substance of legislative provisions.⁵⁴ When a bill is slated for consideration by the full Senate, minority members often invoke filibusters or the threat of filibusters to extract substantive concessions.⁵⁵ The minority also offers large numbers of amendments on the floor as a pressure tactic that at times leads to legislative compromise.⁵⁶ Similarly, because the Senate generally relies on unanimous consent agreements to schedule floor consideration in the first instance, small numbers of senators—usually from the minority party—can place “holds” on a bill and then remove the holds after negotiating to address specific legislative concerns.⁵⁷

Importantly, the ability of minority party senators to postpone or prevent bills from moving forward on the floor also may trigger anticipatory bargaining, as committee chairs and subchairs seek to avoid problems from intensely interested senators outside the committee.⁵⁸ Further, at the conference committee stage, Senate conferees can credibly resist the House version of a provision if minority party senators seem likely to place a hold on the conference report unless they prevail on the disputed language.⁵⁹ In sum, while minority party senators are hardly equal players with the majority, their access to obstructive techniques that are recognized and deeply ingrained as part of Senate culture make them regular participants on a scale not imaginable under House procedures.

A second element that enhances the role of minority party members is the prospect of legislation that divides the majority party caucus in one

53. See Sinclair, *supra* note 52, at 13; Evans & Lipinski, *supra* note 52, at 238–39.

54. The discussion that follows relies on recent contributions analyzing Senate operations, cited *supra* note 52. For similar observations and insights from earlier sources, see generally Steven S. Smith & Gerald Gamm, *The Dynamics of Party Government in Congress*, in CONGRESS RECONSIDERED 245, 263–65 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001); Norman J. Ornstein et al., *The U.S. Senate in an Era of Change*, in CONGRESS RECONSIDERED 13, 21–22 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993); Steven S. Smith, *Forces of Change in Senate Party Leadership and Organization*, in CONGRESS RECONSIDERED 259, 268–72 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993); C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE 51–52, 127–34 (1991). The tactics discussed in text accompanying notes 55 to 59 may be used to defeat legislation as well as to modify its terms—my interest here is in the latter.

55. See Sinclair, *supra* note 52, at 6–7; Evans & Lipinski, *supra* note 52, at 229–32.

56. See Sinclair, *supra* note 52, at 8–9.

57. See *id.* at 10–11; Evans & Lipinski, *supra* note 52, at 230–31.

58. See Sinclair, *supra* note 52, at 5; Evans & Lipinski, *supra* note 52, at 239.

59. See Evans & Lipinski, *supra* note 52, at 241.

or both chambers. This is especially likely in the Senate, where party discipline is not as strict, and centrist or moderate members from either party may defect from a majority legislative program. Campaign finance reform⁶⁰ and prescription drug legislation⁶¹ are recent instances where a majority in the Senate, the House, or both could be cobbled together only with participation from minority party members.⁶²

To be sure, bipartisan and crosspartisan cooperation is less frequent than it used to be, as political parties have become more ideologically cohesive on a national scale and the House Republicans were able to exert remarkably effective control of the legislative process during their recent decade of power.⁶³ Nonetheless, many major policy disagreements in our large and heterogeneous country continue to reflect differences that stem from population diversity, distribution of natural resources, proximity to the Mexican border, or other factors not as readily amenable to political party control. Legislative conversations involving such matters are likely to include meaningful participation by minority party members, apart from any residual pressures to achieve something close to a procedural consensus for scheduling and related efficiency purposes.

60. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (amending Federal Election Campaign Act); see 148 CONG. REC. 3623 (2002) (Rollcall Vote No. 54 Leg.); 58 CONG. Q. ALMANAC PLUS S-14 (2002) (60-40; R 11-38; D 48-2; I 1-0); 148 CONG. REC. 1418-19 (2002) (Roll No. 34); 58 CONG. Q. ALMANAC PLUS H-16 (2002) (240-189; R 41-176; D 198-12; I 1-1).

61. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (amending Social Security Act to provide for a prescription drug benefit under the Medicare program); see 149 CONG. REC. S15914-15 (daily ed. Nov. 25, 2003) (Rollcall Vote No. 459 Leg.); 59 CONG. Q. ALMANAC PLUS S-82 (2003) (54-44; R 42-9; D 11-35; I 1-0); 149 CONG. REC. H12295-96 (daily ed. Nov. 21, 2003) (Roll No. 669); 59 CONG. Q. ALMANAC PLUS H-204 (2003) (220-215; R 204-25; D 16-189; I 0-1).

62. See generally Lawrence C. Dodd & Bruce I. Oppenheimer, *A Decade of Republican Control: The House of Representatives, 1995-2005*, in CONGRESS RECONSIDERED, *supra* note 52, at 23, 50; Joseph Cooper & Garry Young, *Partisanship, Bipartisanship, and Crosspartisanship in Congress Since the New Deal*, in CONGRESS RECONSIDERED 246, 268-71 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 6th ed. 1997).

63. See, e.g., Dodd & Oppenheimer, *supra* note 62, at 47-51; H.W. Perry & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 645 (2004); Catherine E. Rudder, *The Politics of Taxing and Spending in Congress: Ideas, Strategy, and Policy*, in CONGRESS RECONSIDERED, *supra* note 52, at 319, 327-34. Of course, courts will continue to interpret major statutes enacted in the 1960s, 1970s, and 1980s that were developed through bipartisan negotiation.

A third factor promoting the role of minority party members is the prospect that majority legislators may attach independent value to enactment on a bipartisan basis even though the majority party can secure passage without minority party votes. This kind of judgment may reflect strategic calculations—bipartisan support may soften the Executive branch’s inclination to engage in tough bargaining or veto threats, or it may bind the political parties together on an issue that is likely to alienate a portion of the electorate.⁶⁴ Alternatively, moral considerations may be implicated—bipartisan support may help educate the country about what is the “right” thing to do from the standpoint of justice or fairness, if not obvious self-interest.⁶⁵

Finally, and apart from fluctuations in the role played by minority party members, the architecture of legislative conversations culminating in enactment also may vary based on the subject matter area being addressed by Congress. Although each set of communications among key members will have its own compression dynamic, pre-enactment discussion is likely to feature greater complexity or nuance in some areas of federal law than in others. There is reason to believe that the Supreme Court may recognize such distinctions *sub silentio* when relying on legislative history in different substantive fields.

For example, and at the risk of overgeneralizing, labor relations and employment discrimination statutes tend to feature complex concepts that are frequently codified in relatively expansive or open-ended language. Although their basic purpose is to protect the rights of employees, these statutes also typically include defenses or exceptions for certain good faith business practices by employers. The final text often reflects substantial bargaining between members from the two parties, or compromises between the House and Senate.⁶⁶

64. Bipartisan support for such strategic reasons may well occur with respect to tax reform that increases taxes to be paid by some portions of the electorate, or trade agreements that are likely to result in additional jobs in some sectors but fewer jobs in others. See, e.g., Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

65. Legislative debates about civil rights legislation or immigration reform are likely illustrations for the presence of such moral considerations. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. There may be other situations, not addressed here, where the minority party plays a more important communicative role than BLM Rod have allowed for. One such possibility is the development of omnibus legislation, in which Congress addresses a number of discrete issues through a single statute that reflects logrolling among subgroups of members.

66. See generally MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 110 (1964); Beth M. Henschen, *Judicial Use of Legislative History and Intent in Statutory Interpretation*, 10 LEGIS. STUD. Q. 353, 366 (1985). See also James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy,*

Not surprisingly, the text of these workplace protection statutes may well be accompanied by lengthy or detailed explanatory statements from the committees or individual members responsible for negotiating various language adjustments. Empirical research on Supreme Court use of legislative history suggests that the Court has long understood the relevance and value of such communications. Over a period of decades, the Justices have relied especially heavily on legislative history to assist in justifying Court decisions construing labor relations and race or sex discrimination statutes.⁶⁷

By contrast, recent federal criminal laws tend to involve less doctrinal complexity and also less dealmaking among members. Illustrative in this regard is the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Title I of which restricts access to habeas corpus relief and expedites postconviction procedures in a number of respects.⁶⁸ Drafted and approved on a fast track following the 1995 Oklahoma City bombing, AEDPA was enacted by overwhelming majorities in both Houses.⁶⁹ While AEDPA's Title I text limits postconviction rights and timetables in various ways, the accompanying legislative history communicates mainly in broad-brush and rhetorical terms.⁷⁰ The Supreme Court has applied the Title I provisions of AEDPA in over forty-five

and the Scalia Effect 34–36 (Ohio State Public Law Working Paper No. 95, 2007), available at <http://ssrn.com/abstract=1008330>.

67. See, e.g., James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 224 (2006) (reporting that from 1969 to 2006, Court majority opinions relied on legislative history in 47% of 138 race or sex discrimination statutory cases, and in 33% of 192 labor relations statutory cases); Henschen, *supra* note 66, at 360–61 (reporting that from 1950 to 1972, Court relied on legislative history in 38% of 124 labor relations statutory cases as contrasted with 15% of 97 antitrust statutory cases).

68. Pub. L. No. 104-132, 110 Stat. 1214, §§ 101–108 (1996) (codified as amended at 28 U.S.C. §§ 2244, 2253–55, 2261–66 (2000 & Supp. IV 2004)).

69. See Holly Idleson, *Terrorism Bill is Headed to President's Desk*, 54 CONG. Q. WKLY. REP. 1044 (1996). The final roll call vote included a solid majority of members from both parties. See 142 CONG. REC. 7804–05 (1996) (Rollcall Vote No. 71 Leg.); 52 CONG. Q. ALMANAC S-15 (1996) (91–8; R 51–1; D 40–7); 142 CONG. REC. 7973 (1996) (Roll No. 126); 52 CONG. Q. ALMANAC H-42 (1996) (293–133; R 188–46; D 105–86; I 0–1). As part of this broad congressional consensus, Title I of the Act was approved by the House and Senate in identical form. See H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.) (reporting on S. 735, Terrorism Prevention Act).

70. See, e.g., H.R. REP. NO. 104-23, at 8–11 (1995); H.R. REP. NO. 104-518, *supra* note 69, at 111; 141 CONG. REC. 14524–26 (1995) (statement of Sen. Hatch); 141 CONG. REC. 14654 (1995) (statement of Sen. Specter); 142 CONG. REC. 7954–55 (1996) (statement of Rep. Solomon); 142 CONG. REC. 7961 (1996) (statement of Rep. Hyde).

decisions since 1997; on only three occasions has a member of the majority invoked the Act's legislative history to help explain the Court's holding.⁷¹

The Court's exceptionally low level of reliance on AEDPA legislative history is doubtless attributable to factors besides the de minimis role of pre-enactment communications in amplifying or elaborating the meaning of text.⁷² Still, AEDPA seems fairly typical of recent federal statutes imposing severe criminal penalties or curtailing procedural options for criminals. Responding to short-term political pressures to "get tough" on crime, Congress has enacted a series of straightforwardly restrictive penal statutes.⁷³ These laws have featured broad bipartisan approval, with few if any qualifications expressed by supporters.⁷⁴ Legislative

71. See *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring); *Williams v. Taylor*, 529 U.S. 362, 399, 408 (2000) (O'Connor, J., writing for the majority); *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (Souter, J., writing for the majority); see also *Caldwell v. Quarterman*, 127 S. Ct. 431, 432 (2006) (Stevens, J., respecting denial of petition for certiorari). A list of forty-seven Supreme Court decisions construing AEDPA Title I since June 1997 is on file and available from the author.

72. Among the factors that may be at work: (i) the Court in AEDPA cases tends to state black letter law and apply it to specific facts at hand, and (ii) AEDPA supplements a long history of jurisprudence under habeas corpus provisions so that the Court has a great deal of precedent to which it refers. Many of the Supreme Court's AEDPA decisions address whether the Act's statute of limitations should be tolled for one of several reasons, or whether a state court adjudication "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000).

73. See Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93, 95, 99 (1999) (discussing enactment of mandatory sentencing provisions addressing different federal crimes on seven occasions from 1986–1996); see also Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (imposing range of special criminal and civil penalties on sex offenders).

The legislative history of recent criminal statutes is not always dominated by simple or declamatory statements from key bill supporters. See Frank O. Bowman, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 392–411 (2004) (discussing complexity of legislative history accompanying criminal provisions of 2002 Sarbanes-Oxley Act); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (discussing complexity of legislative history accompanying 1984 Sentencing Reform Act). This variation in legislative history within the criminal law field gives rise to several related questions that warrant further inquiry: (i) whether Congress generates more informative or illuminating legislative history for statutes focused on white collar criminal activity rather than on crimes of violence; (ii) whether the Supreme Court and appellate courts rely on legislative history more often when construing white collar criminal statutes than other federal criminal law provisions; and (iii) whether litigants in the criminal justice field are as likely to embrace or even refer to legislative history in their briefs as are litigants in civil rights, labor relations, tax law, or other subject matter areas.

74. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. VII, §§ 70001–02, 108 Stat. 1796, 1982–85 (codified primarily at 18

conversations that help comprise the compression process for such criminal statutes will tend to offer relatively little insight in terms of the text's policy instructions or procedural mandates beyond what is reasonably apparent from the nature and specifics of the text itself.

My discussion of the compression process has addressed issues that BLM Rod may well have concluded it was premature for them to explore. Their article does not attempt to describe in depth how certain aspects of congressional procedure or legislative substance may contribute to the development of statutory commands. Moreover, the prospect that compression dynamics vary meaningfully between House and Senate, and among different subject matter areas, creates an additional challenge for courts or agencies seeking to understand and make use of relevant legislative conversations. Yet the fact that judgments about reliability may be challenging does not mean such conversations are indeterminate or incapable of being decoded. Interpretive judgments involving dictionaries, canons of construction, and agency deference often involve close questions on which reasonable judicial minds may differ.⁷⁵ Similarly, when seeking to understand the pre-enactment dialogue among legislators, one must attend to both the narrow situational context and the applicability of broader guidelines. Under this approach, legislative history will be at times anecdotally unhelpful as to the meaning of enacted text, but there is no reason to doubt its inherent value as part of the interpretive enterprise.

B. Ardent and Pivotal Supporters in the Expansion Process

BLM Rod recognize that courts must act as discerning reviewers of legislative conversations if they are to decode statutory meaning on a

U.S.C. § 3559(c) (2000)) (providing for mandatory life imprisonment for third-time violent felons); *see* 139 CONG. REC. 27822–26, 27834 (1993) (reporting Senate introduction, discussion, and approval of provision as amendment by vote of 91–1); 140 CONG. REC. 8141 (1994) (reporting House approval of bill with “three strikes” provision by vote of 285–141); *see also* *United States v. Mackovich*, 209 F.3d 1227, 1239–40 (10th Cir. 2000) (declining to consider statute’s legislative history); *United States v. Kaluna*, 192 F.3d 1188, 1196 (9th Cir. 1999) (en banc) (finding that legislative history adds nothing of value); *United States v. Gottlieb*, 140 F.3d 865, 870–71 n.7 (10th Cir. 1998) (same).

75. *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 127–34, 139–40 (1998) (demonstrating Justices Breyer and Ginsburg differing on dictionary definition of verb “carry”); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836–37, 842–43, 845–46 (1988) (demonstrating Justices White and Kennedy differing on consequences of applying Whole Act Rule); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 712–22, 724–28 (2001) (demonstrating Justices Scalia and Stevens differing on appropriate nature and extent of deference to federal agency’s interpretation).

regular basis. The conversations that have been compressed—like human exchanges in general—are often subtly phrased, and key participants are not always entirely forthcoming. Apart from focusing on the influential majority party identity of particular speakers, the authors place special emphasis on sincerity—by which they mean whether the speaker reveals what she believes to be true, as opposed to concealing or even misrepresenting her understanding of what the text covers, or what key members agreed to, or any other aspect of the compression process.⁷⁶

As BLM Rod insightfully observe, conditions for sincerity that depend on institutional factors rather than the speaker's personal attributes tend to be more observable, and hence useful, to courts during the expansion process.⁷⁷ One such condition is the penalty for lying.⁷⁸ Members in leadership positions on a particular bill—committee chairs, floor managers, even individual senators brokering compromise language on behalf of a group of colleagues—are trusted by other members not to misstate the bill's general or specific objectives. Occasionally, deliberate misrepresentations may result in formal institutional discipline, such as loss of a leadership position.⁷⁹

More important, though, are the informal incentives against lying that exist within each chamber. Members are repeat players who typically aspire to a long-term relationship with their colleagues and the institution. The institution in turn depends upon the accuracy and adequacy of information from relevant subgroups in advancing its agenda each session. Thus, when members occupy positions of trust on a given bill or amendment, the desire to establish or preserve a reputation for fairness and honesty creates strong incentives for sincerity even during partisan disputes.⁸⁰ Further, just as certain factors encourage members not to lie when communicating as recognized agents of the larger group, congressional staff are likely to represent accurately their principals'

76. See Boudreau et al., *supra* note 10, at 974–75.

77. See *id.* at 975–76.

78. See *id.* at 976, 978. Discussion in this and the following two paragraphs draws on my prior work assessing factors that may contribute to reliable legislative history. See Brudney, *supra* note 4, at 50–51.

79. See Boudreau et al., *supra* note 10, at 978.

80. An intriguing question is whether members in a position of trust ever have incentives from their supporters to describe provisions of a bill in less than sincere ways. If one assumes *arguendo* that the immigration reform bill debated in the Senate during June 2007 actually does provide a form of amnesty for individuals who had entered the United States illegally in the past decade, emphatic leadership statements in committee reports or on the floor that “this is not an amnesty bill” might be preferred by members who support the bill for all sorts of other reasons. Any such misrepresentations could still cause reputational damage to the speakers, among other colleagues or more subtly in the Senate as a whole. Further, such misstatements could be exposed through competing information sources, as discussed in the next paragraph of text.

positions when drafting committee reports or floor statements for these trusted senators and representatives.⁸¹

A second institutionally observable condition that can promote speaker sincerity is the prospect of verification through competition. BLM Rod refer to the role of the opposition, interest groups, and the media as competing information sources.⁸² The participation of nonlegislative actors in the verification process can be especially important. Viewed collectively, agencies charged with implementing a new regulatory statute, interest groups promoting regulation, and entities to be regulated possess considerable subject matter and technical expertise as well as a diversity of policy perspectives. Their engagement in the compression process reduces the likelihood that committee chairs or other key speakers will inject explanatory statements to undermine, depart from, or misrepresent the particular meaning or broader thrust of the text.

There is more one could add regarding institutional factors affecting sincerity,⁸³ but I want to focus on one particular aspect of the authors'

81. Staff typically are recruited to work for particular committee chairs or other members, and both individual loyalty and congruence of viewpoints are important hiring considerations in that setting. Considerations of electoral accountability also encourage members to monitor staff performance so as to detect or avoid conduct that may threaten their own reputations. Such encouragement is reinforced by the prospect of media exposure for staff conduct at odds with the member's stated goals or objectives. These institutional factors do not guarantee that key committee staff will never draft report language or floor statements promoting legislative objectives in conflict with the views of their principals. But any such action by staff to further an independent agenda is likely to come to their principals' attention and result in discipline or discharge. *See generally* Christine DeGregorio, *Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides*, 28 *POLITY* 261 (1995) (concluding that members "delegate selectively, control the extent of delegation in all but the most routine tasks, and delegate mainly to staffers who have demonstrated loyalty to member[s] over a relatively long period of working together").

82. *See* Boudreau et al., *supra* note 10, at 978. Apart from legislative statements by members of the opposition, legislators who are part of the enacting coalition may contribute their own gloss on a committee report or a floor manager's statement. These comments may furnish insights just as concurring opinions sometimes assist the Court in understanding and applying its own majority decision. *See, e.g.*, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676–77 (1981) (relying on Justice Stewart's concurring opinion in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964)).

83. The authors contend that an important verification prospect stems from policymaking or substantive committees being "checked" by control committees such as the House Rules, Appropriations, and Budget Committees. Boudreau et al., *supra* note 10, at 979. Control committees may perform this checking function in some instances, but it is worth noting that many major laws affecting public policy in controversial, litigated ways have no visible price tags. Labor and civil rights laws often simply establish enforceable rights that do not require specific fiscally-related action from a

discussion—the role played by ardent and pivotal supporters of pending legislation. BLM Rod point to Title VII of the 1964 Civil Rights Act as an important instance in which pivotal legislators (pivotal), whose agreement led to an enactable compromise, secured a series of limiting amendments that left the final text more favorable to employers and business interests than the bill’s ardent supporters and managers (ardents) claimed it was.⁸⁴ Drawing on two prior articles,⁸⁵ the authors contend that (i) the relevant statements by ardents in this setting were less trustworthy than those made by pivotal, and (ii) because liberal judges relied on this untrustworthy history to help justify expansive readings of civil rights text, pivotal whose understanding was effectively ignored by the courts were less willing to participate in civil rights legislation for more than a decade thereafter.⁸⁶

The tension between ardents and pivotal raises special concerns about group intent because both sets of legislators are essential parts of the enacting coalition. Moreover, both are led by trusted agents whose statements are likely to reflect what they believe to be true, as they explain to and on behalf of their respective subgroups how the final version of text advances or protects the subgroup interests.

BLM Rod do not attempt in this article to justify their assertion that Title VII pivotal supporters made more trustworthy contributions to the compression process than did their ardent colleagues with respect to several major provisions. Although their assertion is highly contestable as an historical matter,⁸⁷ I will not join that debate here. I do, however,

control committee. Moreover, even when newly proposed statutes are subject to such controls, it is not clear whether a control committee’s relevant explanatory statements will be adequately monitored. Control committees are often less attentive to substantive elaborations that accompany the fiscal details of their bills, and committee members’ incentives for sincerity may not encourage such monitoring. *See generally* Brudney, *supra* note 4, at 94–97; Elizabeth Garrett, *Attention to Context in Statutory Interpretation: Applying the Lessons of Dynamic Statutory Interpretation to Omnibus Legislation*, ISSUES IN LEGAL SCHOLARSHIP: DYNAMIC STATUTORY INTERPRETATION, Nov. 2002, art. 1, at 6–15, <http://www.bepress.com/ils/iss3/art1>.

84. *See* Boudreau et al., *supra* note 10, at 980–81.

85. *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 (2003); Cheryl Boudreau, Mathew McCubbins & Daniel B. Rodriguez, *The Judge as a Fly on the Wall: Interpretive Lessons From the Positive Political Theory of Legislation* (San Diego Legal Studies Research Paper No. 06-12, 2005), available at <http://ssrn.com/abstract=705362>.

86. *See* Boudreau et al., *supra* note 10, at 981.

87. *Compare* Rodriguez & Weingast, *supra* note 85, at 1474–98, with ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 246–47, 318–21 (1990), CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 155–56, 184–89 (1985), David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 9, 22–26

question BLM Rod's behavioral argument that, once pivotal supporters perceive their more limiting constructions to have been rejected by reviewing courts at the expansion stage, they will resist participating in future legislative compromises addressed to this subject matter area, and substantial legislative change will therefore become much more difficult to achieve.

Preliminarily, it is worth noting that Congress embraced federal legislation protecting civil rights in the employment setting on a regular basis between the early 1970s and early 1990s. Bipartisan majorities, including moderates from both parties, enacted at least eight important statutes to prohibit aspects of employment discrimination based on race, sex, or age. Some enactments were major or watershed laws,⁸⁸ while others were more targeted fixes for a particular problem.⁸⁹ It is possible, of course, that even more antidiscrimination laws, or more sweeping versions of such laws, could have been enacted during these two decades. But given the political and institutional challenges of legislating at all on this controversial topic, and the dramatic lack of legislative success in other areas of employee protection like health care or union representation, it is difficult to conclude that frustration felt by pivotal civil rights moderates impeded legislative progress during this period.

More generally, assessing what motivates ardents and pivots over the long term involves complex calculations. BLM Rod implicitly assume that a bill's supporters—pivots and ardents—believe reviewing courts are an important if not the primary audience for their communications. It is possible that communicative intent regarding civil rights legislation is something of an outlier in this regard. In contrast to

(Bernard Grofman ed., 2000), and Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963–1964*, in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 69–74 (Robert D. Loevy ed., 1997).

88. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (race and sex discrimination); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 55, 74 (age discrimination); Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (age discrimination); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (race and sex discrimination).

89. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (sex discrimination); Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (age discrimination); Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (age discrimination); Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (sex discrimination).

many other substantive areas, most participants (members, staff, and lobbyists) are lawyers, the subject matter has been heavily litigated for decades before the Supreme Court, and there are well-articulated agendas and hot-button disagreements among highly sophisticated interest group repeat players. Pre-enactment communication on subjects like tax reform, or on other employment-related issues such as job training or worker safety, may well be less court-oriented. Incentives for ardents and pivotals in those settings may relate to how colleagues, constituents, and agencies will respond rather than to how courts will sift the communicative tea leaves years later.

Even assuming the relevance of a judicial audience for members of an enacting coalition, ardents may pay greater attention to this audience over time than do pivotals. Ardents are, by definition, deeply invested in the field and its leading issues. They seek committee assignments based on their policy-related interests, and their continuity in leadership and oversight roles makes them likely to follow closely how reviewing courts construe and implement the statutory commands that originated in their committees. On the other hand, pivotals tend to be short-term participants from outside the authorizing committee. They are ardents about one or more *other* substantive areas, and are likely to be more attentive to long-term developments in their areas of primary investment. Pivotals will still participate in legislative bargaining outside their “ardent” fields, but the rewards are more short-term in context—respect from colleagues, gratitude of constituents, attention from the media.⁹⁰ If anything, it is ardent supporters who may well care more consistently about the long-term judicial audience, and who might be encouraged to seek compromise if they believed that courts would look to their more expansive views when sorting out ambiguous language years later.

This thought experiment on long-term motives is not meant to suggest that reviewing judges should credit ardents’ communicated understandings but not pivotals’, based on which subgroup is most likely to be attentive to the ex post responses of a judicial audience. Such an approach would be excessively speculative and also unduly cynical. Rather, the key issue for courts—as BLM Rod maintained earlier—should be to assess how these legislative conversations contribute to the group’s structured deliberative processes. In examining the role of pivotals’ expressed understandings and preferences as part of the communicative exchanges

90. Pivotals are especially likely to lack a long-term perspective on the compromise legislation if they are not members of the authorizing committee. Pivotals who do serve on the authorizing committee—typically as minority party members—may have more of a long-term investment in the subject matter, but even they are likely to help craft compromise statutes on only an episodic basis.

that facilitated enactment, courts must consider what can reasonably be said to have helped induce the majority to issue its statutory command. Analyses of how future judicial responses might influence subgroups to behave differently in still later legislative endeavors are of at most attenuated value when seeking to decode the compression process.

IV. CONCLUSION

It seems appropriate to close with a caveat about the interpretive role assigned to Congress as communicator. BLM Rod do not argue that communicative intent must be the primary source of statutory meaning. In criticizing textualism for ignoring relevant and valuable information sources,⁹¹ and noninterpretivist theories for disrespecting legislative supremacy,⁹² the authors leave for another day issues of hierarchical ranking among the various competing approaches.

Congressional intent is not a panacea in the interpretive enterprise. At times, the record of legislative conversations will be silent with respect to an area of disagreement between the parties. In such circumstances, a court is likely to seek guidance or enlightenment from other sources, notably linguistic context or pragmatic consequences. Moreover, as a statute matures and its original legislative history fades further into the past, judges may properly come to view such pre-enactment history as less relevant. They are especially likely to do so when intervening sources of authority, such as Supreme Court precedent or agency rules, have arisen to clarify the meaning of enacted text.⁹³

Still, the fact that communicative intent is on occasion of limited utility should not detract from its core value. BLM Rod have argued persuasively for the central role of Congress as communicator, and the consequent relevance to statutory meaning of conversations among legislators. Considerable work remains to be done in order to shed more light on the complexities and nuances of compression dynamics, and to develop guidelines that can help inform the expansion process. Such work seems likely to yield valuable insights for enhancing and refining the intentionalist approach as that approach continues to regain influence in the community of legal and social science scholars.

91. See Boudreau et al., *supra* note 10, at 982–83.

92. See *id.* at 991.

93. See Brudney & Ditslear, *supra* note 67, at 224–25.

