UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Victoria Frances Nourse

2. **Position**: State the position for which you have been nominated.

   United States Circuit Judge for the Seventh Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: University of Wisconsin Law School
   975 Bascom Mall
   Madison, Wisconsin 53706

   [redacted]

4. **Birthplace**: State year and place of birth.

   1958; Dunedin, Florida

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1981 to 1984, University of California, Boalt Hall School of Law; J.D., 1984

   1976 to 1980, Stanford University; B.A. 1980

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2010 to present
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, D.C. 20001
Visiting Professor of Law

1993 to present
University of Wisconsin Law School
975 Bascom Mall
Madison, Wisconsin 53706
Burrus-Bascom Professor of Law (2005 – present)
Associate Professor of Law (2002 – 2005)
Assistant Professor of Law (1993 – 2002)

2008 to 2010
Emory University Law School
1301 Clifton Avenue, NW
Atlanta, Georgia 30322
LQC Lamar Professor of Law

2003
New York University School of Law
40 Washington Square South
New York, New York 10012
Visiting Professor of Law (Spring semester)

2002
Yale Law School
127 Wall Street
New Haven, Connecticut 06511
Visiting Professor of Law (Fall semester)

1996 to 1997
University of Maryland School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201
Visiting Professor of Law

1990 to 1993
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510
Counsel and Special Counsel

1988 to 1990
United States Department of Justice
Appellate Staff, Civil Division
950 Pennsylvania Ave., NW
Washington, D.C. 20530
Appellate Attorney

1987
United States Senate Committee to Investigate the Iran-Contra Affair
Hart Senate Office Building
Washington, D.C. 20510
Assistant Counsel

1985 to 1987 & Winter 1988
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
Associate

1984 to 1985
United States District Court for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007
Law Clerk to Hon. Edward Weinfeld

1984
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
Summer Associate

1983
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, D.C. 20036
Summer Associate

1982
Dorr, Cooper & Hays
50 Francisco Street
San Francisco, California 94133
Summer Associate

1980 to 1981
Center for the Study of the California Economy
132 Hamilton Avenue
Palo Alto, California 94301
Research Assistant

1980
Café Meursault (no longer in business)
651 Emerson Street
Palo Alto, California 94301
Waitress

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

   I have never served in the military. I did not register for selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   Romnes Fellowship, University of Wisconsin (grant) (2003 – 2004)
   American Council of Learned Societies Fellowship (grant) (2003 – 2004)
   Order of the Coif, U.C. Berkeley, Boalt Hall School of Law (1984)
   American Jurisprudence Award, Criminal Law (1982)
   Phi Beta Kappa, Stanford University (1980)

   For my book In Reckless Hands:

   Finalist for Oklahoma Book Award (2009)
   History Book of the Month Club Alternate Selection (2008)
   Exemplary Legal Writing: Co-Honoree (Books), *Green Bag Magazine* (Dec. 2008)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

   American Bar Association
   New York City Bar Association

10. **Bar and Court Admission**:

    a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York (First Department), 1986

There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the Southern District of New York, 1988
New York Appellate Division (First Department), 1986

I also was admitted to several courts, including the U.S. Courts of Appeal for the D.C., Fifth, Ninth, and Eleventh Circuits, under provisions for practicing government attorneys while I was employed by the Department of Justice. These memberships lapsed when I left the Department in 1990.

There has been no lapse in my Southern District of New York or New York State bar memberships.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Professional
Emory Univ. Center for the Study of Law, Politics, and Economics (2008 – 2010)
NYU Press, Contemporary Socio-Legal Problems Book Series
Editorial Board (since 2009)
Rehnquist Center on the Constitutional Structures of Government
National Board of Academic Advisors (since 2007)
Criminal Law & Philosophy, Editorial Board (since 2006)
New Criminal Law Review, Editorial Board (since 2006)
American Association of Law Schools, Member (since 1993)
University of Wisconsin, Kastenmeier Lecture Committee (since 1999)

During my time as a law professor, I have held chaired or visiting professorships at multiple universities, during which I have sometimes affiliated with academic clusters or centers of varying formality within the universities as part of my professional work. I do not specifically recall those affiliations other than those listed above.

Other
Rising Force AAU Basketball League (since 2010)
Shorewood, WI Swim Club (since 2009)
Shorewood, WI Girls Softball Association (since 2009)
St. Robert's Parish Shorewood, WI Basketball Club (since 2008)
United States Tennis Association (family members, since 2008)
Girl Scouts of Wisconsin Southeast (2006 – 2008)
FC Milwaukee Soccer Club (since 2006)
Shorewood, WI Little League Association (since 2005)
Milwaukee Bavarian Soccer Club (2004 – 2006)
Shorewood, WI Kickers Soccer Association (2002 – 2004)
Milwaukee Public Library, Shorewood, WI (since 2005)
Swiss Turners Gymnastics Team (2002 – 2008)
Milwaukee Public Museum (2002 approx.)
Milwaukee Art Museum (1998-1999, 2001-2003, 2009-2010)
Boalt Hall Alumni Association (since 1984)
Phillips Academy, Andover Alumna (since 1976)

In addition, I have made charitable contributions over the years to organizations that may consider me a member solely by virtue of those contributions. Although I have not sought to create a comprehensive list of these organizations, they include: Milwaukee Urban Day School Fund, the Milwaukee United Performing Arts Fund, United Way, Milwaukee College Prep School, Wisconsin Women's Business Initiative, Penfield Children's Center, Milwaukee Community Service Corps, UW Milwaukee Foundation (WUWM station); Shorewood Education Foundation (SEED), and the Cudahy Public Library.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of the organizations above currently discriminates or has discriminated during my membership in them on the basis of race, sex, or religion, or national origin. I have no knowledge of any past discrimination by these organizations.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

As a full-time law professor since 1993, developing scholarship to publication (along with teaching) has been my primary professional work. In addition to drawing on my cumulative list of publications, I have searched my memory, my files, and the Internet for all materials I have published. There may, however, be additional publications I have been unable to recall or identify. Copies of all listed publications are supplied.

Book:

In Reckless Hands: Skinner v. Oklahoma and the Near-Triumph of Eugenics (W.W. Norton 2008).

Major Articles and Book Chapters:

Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers, 99 GEO. L. J. __ (forthcoming 2011).

The Accidental Feminist, a chapter in Transcending the Boundaries of Law: Feminism and Legal Theory (Routledge 2011).

Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?, 95 CORNELL L. REV. 61-137 (2009) (with Prof. Greg Shaffer).

A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights, 97 CAL. L. REV. 751-799 (2009).

The Lost History of Governance and Equal Protection, 58 DUKE L. J. 955-1012 (2009) (with Sarah Maguire).

The Justice, The Governor & the Dictator, reprinted from In Reckless Hands in the Green Bag Almanac and Reader 314-337 (2009) (Exemplary Legal Writing: Books).

Violence Against Women (chapter 4), Feminist Jurisprudence: Taking Women Seriously 203-402 (co-authors Mary Becker, Cynthia Bowman, & Kim Yuracko) (3d ed. 2006) (on some versions of the casebook I am listed as a coauthor of the book, but my role was limited exclusively to this single chapter).

Toward A New Constitutional Anatomy, 56 STAN. L. REV. 835-900 (2004).

Reconceptualizing Criminal Law Defenses, 151 U. PA. L. REV. 1691-1746 (2003).

The Politics of Legislative Drafting: A Case Study, 77 N.Y.U. L. REV. 575-624 (2002) (with Prof. Jane Schacter).

Self-Defense and Subjectivity, 68 U. CHI. L. REV. 1235-1308 (2001).

The Vertical Separation of Powers, 49 DUKE L. J. 749-802 (1999).

The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law, 50 STAN. L. REV. 1435-1470 (1998).

Passion's Progress: Modern Law Reform & the Provocation Defense, 106 YALE L. J. 1331-1448 (1997).

Making Constitutional Doctrine in a Realist Age, 145 U. PA. L. REV. 1401-1457 (1997).

Toward A 'Due Foundation' for the Separation of Powers: The Federalist Papers as Political Narrative, 74 TEX. L. REV. 447-521 (1996).

Invited Submissions and Symposia Papers:

Book Review, Toward A Representational Theory of the Executive, 90 B.U. L. REV. __ (forthcoming 2010) (with John P. Figura).

Transcript: A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act, 11 GEO. J. GENDER & L. 511 (2010).

Summary, Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory? (Jan. 15, 2010), at www.legalworkshop.org (available at http://legalworkshop.org/2010/01/15/varieties-of-new-legal-realism-can-a-new-world-order-prompt-a-new-legal-theory).

After the Reasonable Man: Getting Over the Subjectivity/Objectivity Debate, 11 NEW CRIM. L. REV. 33-50 (2008) (symposium).

Equality's Future: An Introduction, 23 WIS. J. L. GENDER & SOC'Y 161-167 (2008).

Foreword: *Is It Time for A New Legal Realism?*, 2005 WIS. L. REV. 335-363 (with Profs. H. Erlanger, B. Garth, J. Larson, E. Mertz, & D. Wilkins) (symposium).

A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences, 2005 WIS. L. REV. 479-518 (my comment appears at p. 507).

Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person, 2 OHIO ST. J. CRIM. L. 361-375 (2004) (reviewing Cynthia Lee's Murder and the Reasonable Man).

Rethinking Crime Legislation: History and Harshness, 39 TULSA L. REV. 925-939 (2003-04) (symposium on the work of Prof. George Fletcher).

Hearts and Minds: Understanding the New Culpability, 6 BUFF. CRIM. L. REV. 361-388 (2002).

Law's Constitution: A Relational Critique, 17 WIS. WOMEN'S L.J. 23-56 (2002) (symposium).

"Feminism: Legal Aspects," entry to Joshua Dressler, ed. Encyclopedia of Crime and Justice 707-14 (2d ed. 2002).

Introduction, 15 WIS. WOMEN'S L. J. 255-257 (2000) (15th Anniversary issue -- new two page introduction); reprinting *Where Violence, Relationship and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 15 WIS. WOMEN'S L.J. 257-292 (2000).

The "Normal" Successes and Failures of Feminism and the Criminal Law, 75 CHI.-KENT L. REV. 951-78 (2000) (symposium).

Gideon's Muted Trumpet, 58 MD. L. REV. 1417-32 (1999) (symposium).

Book Chapter, in Violence Against Women: Law & Litigation 5-1 to 5-50 (David Frazee, ed., 1997).

Where Violence, Relationship and Equality Meet: The Violence Against Women Act's Civil Rights Remedy, 11 WIS. WOMEN'S L. J. 1-36 (1996).

Essay, The Idea of Partisanship, 11 J. L. & POL. 549-554 (Summer 1995) (symposium).

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Although I do not recall drafting any reports, memoranda, or policy statements for organizations of which I was a member, I did participate in drafting various congressional committee reports on behalf of Senators, Committees, and counsel. I have identified the following such reports, although there may be others to which I contributed that I do not recall. Copies of all reports are supplied.

The Violence Against Women Act of 1993, Senate Judiciary Committee, Report No. 103-138 (September 10, 1993) (full committee report summarizing the bill).

The Response to Rape: Detours on the Road to Equal Justice, Senate Judiciary Committee (May 1993) (majority staff report criticizing national attitudes and laws applying to rape victims).

Violence Against Women: A Week in the Life of America, Senate Judiciary Committee (Oct. 1992) (majority staff report providing a "snapshot" of violent incidents against women in America in a single week).

The Violence Against Women Act of 1991, Senate Judiciary Committee, Report No. 102-197 (Oct. 10, 1991) (full committee report summarizing the bill).

Fighting Drug Abuse: Tough Decisions for Our National Strategy, Senate Judiciary Committee (Jan. 1992) (majority staff report on national drug control strategy).

The President's Drug Strategy: Two Years Later—Is it Working?, Senate Judiciary Committee (Sept. 1991) (majority staff report on national drug control strategy).

The Violence Against Women Act of 1990, Senate Judiciary Committee Report No. 101-545 (Oct. 19, 1990) (full committee report summarizing the bill).

Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 100-216, H. Rept. No. 100-433 (Nov. 1987) (I personally drafted chapter two, although this was subject to substantial revision by others).

Refusal of Richard V. Secord to Testify, Senate Rep. No. 100-16 (March 19, 1987) (witness's Fifth Amendment rights regarding Swiss bank records).

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Statement from Senior Faculty of the University of Wisconsin Law School (Mar. 9, 2007), available at http://www.law.wisc.edu/current/In_the_Media/Senior_Faculty_Issue_Joint_State_2007-03-09.

Although I have made it my general practice not to sign petitions and public statements, I recall once signing a petition to protect Lake Michigan circulated by Wisconsin Public Interest Research Group. I do not recall the time period of the organization that solicited the support. I do not recall and have been unable to identify any other testimony or statements to a public body.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

As a full-time law professor since 1993, I have frequently given speeches or talks as part of my work teaching and developing legal scholarship. I have retained records of my major presentations over the years, and I searched those records thoroughly to prepare this list. I also searched online resources, reviewed old calendars, and consulted with various individuals and groups to produce an answer to this question that is as complete as possible, but I still may have given other presentations that I have been unable to recall or identify.

Feb. 17, 2010: Yale Law School Statutory Interpretation Colloquium (New Haven, CT). I spoke on a draft paper eventually published as *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers,* 99 GEO. L. J. ___ (forthcoming 2011). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Jan. 26, 2010: Georgetown University Law Center Faculty Works in Progress (Washington, DC). I spoke on chapters of a draft book entitled "Misunderstanding Congress: Theories of Statutory Interpretation and Their Ideas of Congress – Toward a New Realism." Draft manuscript supplied. I have no notes, transcript, or recording.

Dec. 2, 2009: Emory University Law School Works in Progress (Atlanta, GA). I discussed a draft paper eventually published as *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers,* 99 GEO. L. J. ___ (forthcoming 2011). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Nov. 6, 2009: Red Dirt Book Festival (Shawnee, OK). I discussed my book In Reckless Hands before a public audience. I have no notes or transcript of this discussion. Library officials indicate this presentation was not recorded. Book supplied in response to Question 12(a).

Oct. 30, 2009: University of Wisconsin Law School (Madison, WI). I spoke on draft chapters of a book entitled "Misunderstanding Congress: Theories of Statutory Interpretation and Their Ideas of Congress – Towards a New Realism" to a panel of legislation scholars. I have no notes, transcript, or recording. I used the same draft as for my Jan. 26, 2010 presentation, which is supplied.

Oct. 29, 2009: University of Wisconsin Law School (Madison WI). I made an informal presentation of an article to be published as *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61-137 (2009) (with Prof. Greg Shaffer). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Oct. 2, 2009: Midwest Constitutionalism Discussion Group (Madison, WI). I presented a brief draft book proposal entitled "Inventing Laissez-Faire," based on material published in *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751-99 (2009). I have no notes, transcript, or recording. Draft proposal supplied; article copy supplied in response to Question 12(a).

Aug. 31, 2009: Columbia University Law School, Guest Lecture, Legal Process Class (New York, NY). I gave a lecture on my career in the law to be published as *The Accidental Feminist*. I have no notes, transcript, or recording. Book chapter supplied in response to Question 12(a).

May 28-29, 2009: Law and Society Annual Meeting (Denver, CO). I participated on two panels, one a "Reader meet Author" panel on my book In Reckless Hands and the other on new legal realist methodologies in which I discussed ideas in my paper *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61-137 (2009) (with Prof. Greg Shaffer). I have no notes, transcript, or recording. Book and article copy supplied in response to Question 12(a).

Apr. 22, 2009: Georgetown University Law Center (Washington, DC). I participated on a panel discussing the history of the Violence Against Women Act, the transcript of which will be published as *Transcript: A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act*, 11 GEO. J. GENDER & L. 511 (2010). Transcript supplied in response to Question 12(a). Podcast available at http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=808.

Apr. 13, 2009: Marquette University Faculty Workshop (Milwaukee, WI). I discussed a draft paper eventually published as *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751-99 (2009). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Feb. 23, 2009: Queen's University Law School Faculty Workshop (Kingston, Ontario, Canada). I discussed a draft unpublished paper entitled "The Criminal Law and the Limits of the Majoritarian Anxiety." Draft supplied.

Feb. 19, 2009: Emory University, Life of the Mind University Lecture (Atlanta, GA). I gave a university lecture, *My Political Education and the Self-*

Transcending Constitution which is to be published as a book chapter, entitled *The Accidental Feminist*. Video recording available at http://www.youtube.com/watch?v=C0MaIh_-qLc. Draft manuscript supplied in response to Question 12(a).

Feb. 13, 2009: Rutgers University Law School (Newark, NJ). I gave panel remarks on the history of the Violence Against Women Act. The remarks were substantially the same as those I made on April 22, 2009. A webcast is available at http://lawevents.rutgers.edu/events/women09/; [Part Six, 38:00 – Part Seven, 9:30].

Feb. 11, 2009: Emory University, Thrower Symposium on Executive Power: New Directions for the Presidency? (Atlanta, GA). Replacing an absent speaker, I gave remarks on the separation of powers, similar to those published in *The Vertical Separation of Powers*, 49 DUKE L. J. 749-802 (1999), and *Book Review, Toward A Representational Theory of the Executive*, 90 B. U. L. REV.___ (forthcoming 2010). DVD recording of the presentation supplied.

Jan. 8, 2009: American Association of Law Schools, New Legal Topics Panel (San Diego, CA). I presented ideas published as *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61-137 (2009) (with Prof. Greg Shaffer). This event was podcast and is available at http://www.aalsweb.org/thursday/OpenSourceProgram.mp3. Article copy supplied in response to Question 12(a).

Nov. 20, 2008: All Souls College and the Oxford University Centre for Legal Theory (Oxford, UK). I discussed an unpublished paper on criminal law and democratic theory entitled "The Criminal Law and the Limits of the Majoritarian Anxiety." I used the same draft paper as for my presentation at Queen's University on Feb. 23, 2009, which is supplied. I have no notes, transcript, or recording.

Nov. 6, 2008: Emory University, Feminism and Legal Theory's 25th Anniversary (Atlanta, GA). I introduced the speakers on a panel entitled "From Women in Law to Feminist Legal Theory." Audio recording and transcript supplied.

Oct. 10, 2008: University of Wisconsin Law Faculty Ideas and Innovations Workshop (Madison, WI). I presented remarks entitled "American Legal Development: The Case of Two Lochners (or, why almost everything you know about Lochner is wrong)," eventually published as *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751-99 (2009). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Fall, 2008: Schwartz Book Store (Shorewood, WI). In my home town, I discussed my book in the fall after In Reckless Hands was released. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Aug. 27, 2008: Emory University Faculty Workshop (Atlanta, GA). I presented ideas published as *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751-99 (2009). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

May 30, 2008: Law and Society Annual Meeting - The Future of Anti-Discrimination Law Panel (Montreal, Canada). I participated in a panel discussion and gave remarks on an unpublished paper "Re-imagining Sexism and the Criminal Law: A Post-Identity Theory" (a different title was provided in the program). I have no notes, transcript, or recording. The draft paper is supplied.

Mar. 15, 2008: University of Wisconsin Law School, Working from the World Up: Equality's Future (Madison, WI). I introduced speaker Columbia law professor Patricia Williams, offered closing remarks, and presented an unpublished paper entitled "A Post-Identity History of Racial Formation" (a different title was provided in the program). Draft paper, PowerPoint, audio recording, and transcript supplied.

Dec. 14, 2007: University of Wisconsin Law School Ideas and Innovations Workshop (Madison, WI). I presented an unpublished paper entitled "After Wordplay: The Principle of the Selfish Institution and the Idea of Law as Governance." I have no notes, transcript, or recording. Draft supplied.

Nov. 30, 2007: University of Wisconsin Law School Kastenmeier Lecture (Madison, WI). I introduced Rep. Robert Kastenmeier before his remarks to the law school. A podcast of my introduction is available at http://law.wisc.edu/media/index.php?iStreamID=298. Notes for my remarks are supplied.

Nov. 16, 2007: American Society of Criminology Annual Meeting (Atlanta, GA). On an Author Meets Critic panel, I introduced Univ. of Chicago Professor Bernard Harcourt. I have no notes, transcript, or recording of my participation.

Nov. 1, 2007: University of Wisconsin Law School (Madison, WI). I gave a talk to students entitled "Presidential Power and the Unitary Executive." A podcast is available at http://law.wisc.edu/media/item/11_01_07_nourse.mp3. PowerPoint slides supplied.

Fall, 2007: University of Wisconsin Genetics Department (Madison, WI). I gave a short talk to encourage students to work in Congress to provide their

expertise on technical issues. I spoke extemporaneously and have no notes, transcript, or recording.

July 28, 2007: Law and Society Annual Meeting (Berlin, Germany). I presented on two panels, and volunteered to chair a panel on domestic violence (where I did not present a paper). I presented a paper eventually published as *After the Reasonable Man: Getting Over the Objectivity/Subjectivity Debate*, 11 NEW CRIM. L. REV. 33 (2008). Article copy supplied in response to Question 12(a). I also presented an unpublished paper titled, "The Principle of the Selfish Institution: Lessons from Law, Society, and Heuristics for New Governance." I have no notes, transcript, or recording. Copy of the draft paper is supplied.

May 5, 2007: Emory University Conference on Class and Caste in a World of Global Inequities (Atlanta, GA). I presented remarks from a paper published as *The Lost History of Governance and Equal Protection*, 58 DUKE L. J. 955-1012 (2009) (with Sarah Maguire). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Mar. 29, 2007: University of Wisconsin Legal Theory Workshop, sponsored by the economist, Neil Komesar (Madison, WI). I discussed a draft, unpublished paper entitled "The Principle of the Selfish Institution." I have no notes, transcript, or recording. Synopsis of draft paper supplied.

Jan. 24, 2007: The Ohio State Legal Theory Workshop (Columbus, OH). I discussed an unpublished paper entitled "After Wordplay: The Principle of the Selfish Institution and the Idea of Law as Governance." I have no notes, transcript, or recording. A draft of this paper is supplied in connection with my presentation at the University of Wisconsin on December 14, 2007.

Dec. 11, 2006: Emory University Law School Faculty Workshop (Atlanta, GA). I gave remarks on my then-draft book, In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Dec. 5, 2006: Northwestern University Law School Faculty Workshop (Chicago, IL). I gave remarks concerning my then-draft book, In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Nov. 7, 2006: University of Wisconsin Law Review Symposium: The 40th Anniversary of *Loving v. Virginia* (Madison, WI). I introduced this conference and gave welcoming remarks. Introductory remarks and PowerPoint slides supplied.

Apr. 24, 2006: University of Wisconsin Law School (Madison, WI) (sponsored by the student chapter of the American Constitution Society). I gave a talk on "The

Unitary Executive Theory." PowerPoint slides from my presentation supplied in connection with my presentation at the University of Wisconsin on Nov. 1, 2007.

Apr. 21-22, 2006: University of Wisconsin Law School, European Union Center for Excellence Workshop: The Rise of New Governance and the Transformation of Law (Madison, WI). I attended and participated in this roundtable but gave no formal remarks. I have no notes, transcript, or recording.

Mar. 24, 2006: American Philosophical Association Eightieth Annual Meeting, Symposium Panel: Sex, Violence, and the Criminal Law (Portland, OR). I presented an unpublished draft paper entitled "The History of the 'Unwritten Law' of Honor Killing in America" (a different title was provided in the program). I have no notes, transcript, or recording. Draft paper supplied.

Feb. 10, 2006: Institute for Constitutional History and the George Washington University Law School Faculty Workshop (Washington, DC). I gave remarks on my then-draft book, In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Nov. 16, 2005: American Bar Foundation (Chicago, IL). I gave remarks on a draft paper entitled "History, Pragmatism, and the New Legal Realism." I have no notes, transcript, or recording. Draft paper supplied.

July 8, 2005: International Congress on Law and Mental Health (Paris, FR). I moderated and chaired a panel entitled "Legal Consciousness." I have no notes, transcript or recording of this panel. I also presented a draft paper entitled "Insanity Cycles: The Regular Misunderstandings of Science and Law." Draft paper supplied.

June 24, 2005: Emory University Law School, Feminism and Legal Theory Workshop (Atlanta, GA). I gave remarks on translating social science into law entitled "Pragmatic Tools for a New Realism." Draft paper, transcript and audio recording supplied.

June 8, 2005: Wisconsin Coalition Against Sexual Assault, Training Institute (Wisconsin Dells, WI). I gave remarks entitled "VAWA: How it got its Start." I have no notes, transcript, or recording.

June 2-5, 2005: Berkshire Conference on the History of Women, Scripps College (Claremont, CA). I gave remarks on an unpublished paper entitled "The Twentieth Century History of "Honor Killing" in America." Draft paper and notes on my remarks supplied.

May 4, 2005: University of Wisconsin Alumni Association, Founders' Day Milwaukee Chapter, Performing Arts Center (Milwaukee, WI). I gave remarks on

my book In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Apr. 29, 2005: University of Wisconsin, Global Legal Studies Center, Dispute Resolution and Political Development Workshop (Madison, WI). I spoke on a panel as a specialist on American courts, legislatures and the separation of powers, presenting the ideas in the paper published as *Toward A New Constitutional Anatomy*, 56 STAN. L. REV. 835-900 (2004). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Mar. 2005: Yale Legal Theory Colloquium (New Haven, CT). I gave remarks on then-draft chapters of my book In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Feb. 18, 2005: University of Wisconsin Law School Symposium on New Legal Realism (Madison, WI). I presented an unpublished paper entitled "Beyond Legal Aesthetics." I did not retain this draft paper. Transcript and DVD of my remarks supplied.

Sept. 10-11, 2004: University of Wisconsin Law School Conference on Comparative Institutional Analysis (Madison, WI). I presented a draft paper entitled "Crime, Participation and History." Draft paper supplied. I also led a panel discussion of *Democratic Regulation and Judicial Distrust: Comparing Property Rights Institutions in the US and the UK*, by Prof. Daniel Cole. Notes of comments supplied.

July 14, 2004: University of Wisconsin Law School (Madison, WI). Recent Supreme Court Cases Series. I presented and led a discussion on *Tennessee v. Lane*. I have no notes, transcript, or recording of this informal discussion.

June 27, 2004: New Legal Realist Methods Conference (Madison, WI). I participated in a roundtable discussion on interdisciplinary approaches toward law. An edited transcript of this discussion appears in *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479-518 (my comment appears at p. 507). This article is supplied in response to Question 12(a).

April 20, 2004: Faculty works-in-progress discussion: "What's Cooking with Victoria Nourse: Skinner's Trial: A Changing Supreme Court." I have no notes, transcript, or recording.

June 27, 2003: Feminism and Legal Theory Summer Workshop (Madison, WI). I presented a paper published as *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23 (2002). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Apr. 24, 2003: Brennan Center for Justice Conversation Series (New York, NY), entitled "The Legislative History Debates: A View from the Inside." I gave an informal talk on judicial and legislative understandings of legislative history. I have no notes, transcript, or recording.

Apr. 11-12, 2003: Vanderbilt Law School Constitutional Theory Conference (Nashville, TN). I attended this roundtable conference, participated in discussions, but did not present a paper myself. I have no notes, transcript, or recording.

March 28, 2003: Yale Law School Charles Black Memorial Colloquium (New Haven, CT). I was on a panel discussing the separation of powers and Prof. Black's structural form of argument. Speaking notes supplied.

Mar. 10, 2003: NYU Law School Faculty Colloquium (New York, NY). I gave remarks on a draft paper then-titled "Rethinking the Political Theory of Criminal Law Defenses," eventually published as *Reconceptualizing Criminal Law Defenses,* 151 U. PA. L. REV. 1691-1746 (2003). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Feb. 25, 2003: Yale Legal History Forum (New Haven, CT). I presented then-draft chapters of my book In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Spring 2003: Brooklyn Law School Legal Theory Workshop (Brooklyn, NY). I gave remarks on a draft paper published as *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691-1746 (2003). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Spring 2003: University of Connecticut Law School Legal Theory Workshop (Hartford, CT). I discussed a draft paper published as *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691-1746 (2003). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Fall 2002: Yale Law School Faculty Workshop (New Haven, CT). I discussed a paper published as *Toward A New Constitutional Anatomy*, 56 STAN. L. REV. 835-900 (2004). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Fall 2002: Yale Public Interest Law Reading Group (New Haven, CT). I led the discussion of a panel entitled "Civil Liberties in a New America," where I introduced Aasma Khan of the organization Muslims Against Terrorism. I have no notes, transcript or recording of this introduction.

July 31, 2002: University of Wisconsin Alumni Foundation (Seattle, WA). I gave remarks on my book In Reckless Hands to a group of Wisconsin alumni. I have

no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Spring 2002: De Paul University Legal Theory Workshop (Chicago, IL). I gave remarks on a paper then-titled "Crime and Constitution," a draft paper published as *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691-1746 (2003). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

May 3, 2002: University of Wisconsin Law School, Law & Equality Series (Madison, WI). I gave remarks entitled "Skinner's Trial," regarding research leading to my book, In Reckless Hands. I have no notes, transcript, or recording. Book copy supplied in response to Question 12(a).

Mar. 21, 2002: University of Wisconsin Law School Works in Progress (Madison, WI). I gave remarks on a paper then-titled "Crime and Constitution," a draft paper published as *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691-1746 (2003). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Oct. 11, 2001: University of Wisconsin Law School, Board of Visitors Panel Discussion (Madison, WI). I participated in a panel discussion regarding the strategic plan and identity of the University of Wisconsin Law School. I have no notes or transcript of this discussion. Panel agenda supplied.

Oct. 5, 2001: University of Wisconsin Law School, "Feminist Theories of Relation: "In the Shadow of the Law," An Interdisciplinary Critical Dialogue on Theory (Madison, WI). I was on a panel and discussed a draft, unpublished paper entitled "The Relational Move," eventually published as *Law's Constitution: A Relational Critique*, 17 WIS. WOMEN'S L.J. 23-56 (2002). Article copy supplied in response to Question 12(a).

July 9, 2001-Aug. 10, 2001: University of Wisconsin Summer Institute Program for Foreign LLMs (Madison WI). I gave brief remarks on the basic elements of American criminal law. I have no notes, transcript, or recording; content was likely similar to remarks provided for Summer 2000 Institute event.

July 7, 2001: University of Wisconsin Law School (Madison, WI). Recent Supreme Court Cases Series. I presented and led a discussion on *Nguyen v. INS*. No draft circulated. I have no notes, transcript, or recording of this informal discussion. I have found notices about this presentation on July 31, 2001; I may have made this presentation on that date instead of or in addition to July 7.

May 3, 2001: University of Wisconsin Law School Alumni Association (Chicago, IL). I discussed my research and the law school's virtues. Speaking notes supplied.

Apr. 2001: University of Pennsylvania Legal Theory Workshop (with Prof. J. Schacter) (Philadelphia, PA). I gave remarks on a paper published as *The Politics of Legislative Drafting: A Case Study*, 77 N.Y.U. L. REV. 575-623 (2002) (with Prof. Jane Schacter). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Mar. 30, 2001: University of Iowa Legal Theory Workshop (with Prof. J. Schacter) (Iowa City, IA). I gave remarks on a paper published as *The Politics of Legislative Drafting: A Case Study*, 77 N.Y.U. L. REV. 575-623 (2002) (with Prof. Jane Schacter). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

July 10-Aug. 11, 2000: University of Wisconsin Summer Institute Program for Foreign LLMs (Madison WI). I gave brief remarks on the basic elements of American criminal law. Speaking notes supplied.

Oct. 15, 1999: University of Michigan Legal Theory Workshop (Ann Arbor, MI). I gave remarks on a paper then-titled "Killing Time," eventually published as *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235-1308 (2001). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

July 12-13, 1999: 17th Annual Summer Institute Program in U.S. Law and Legal Institutions (Madison, WI). I gave brief remarks on the basic elements of American criminal law. I have no notes, transcript, or recording; content was likely similar to remarks provided for Summer 2000 Institute event.

June 3, 1999: University of Wisconsin Law School, Methodology Working Session (Alfie Series) (Madison, WI). I discussed the methodology of a project interviewing congressional staffers on legislative drafting (with Jane Schacter). Draft notes for the meeting supplied.

May 29, 1999: Law and Society Annual Meeting: Comparative Institutional Approach to Law and Public Policy Session (Chicago, IL). I gave remarks on an unpublished paper entitled "Perpetual Misunderstandings: The Idea of Politics in Institutional Perspective." I did not retain this draft paper. I have no notes, transcript or recording.

May 18, 1999: University of Chicago Public Law Workshop (Chicago, IL). I gave remarks on a paper entitled "Of Victims and Vigilantes: Time, Gender Norms, and the Law of Criminal Defenses," eventually published as *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235-1308 (2001). Article copy supplied in response to Question 12(a).

Mar. 1999: University of Maryland Law School Symposium (Baltimore, MD). I gave a talk entitled "Gideon's Trumpet, Muted," the content of which was

eventually published as *Gideon's Muted Trumpet*, 58 MD. L. REV. 1417-32 (1999). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Nov. 30, 1998: Columbia University Legal Theory Workshop (New York, NY). I gave remarks on a paper entitled "The Disembodied Constitution: Function Talk and the Separation of Powers," eventually published as *The Vertical Separation of Powers*, 49 DUKE L. J. 749-802 (1999). I have no notes, transcript, or recording. Article copy supplied in response to Question 12(a).

Nov. 1998: NOW Legal Defense Fund (New York, NY). I gave an informal presentation of "True Men, True Women and the Fate of Gender in the Law." Draft supplied of the Oct. 21, 1998 presentation of the same paper.

Oct. 21, 1998: Villanova University Legal Theory Workshop (Philadelphia, PA). I presented a draft paper entitled "True Men, True Women and the Fate of Gender in the Law." I have no notes, transcript, or recording. Draft paper supplied.

Jan. 6, 1998: American Association of Law Schools, Remedies Section (New Orleans, LA). I gave remarks on punishment and parity. I have no notes, transcript, or recording.

Fall, 1997: University of Maryland Legal Theory Workshop (Baltimore, MD). I gave remarks on a paper published as *Passion's Progress: Modern Law Reform & the Provocation Defense*, 106 YALE L. J. 1331-1448 (1997). Article copy supplied in response to Question 12(a).

Jan. 9, 1997: American Association of Law Schools, Constitutional Law Section (Washington, DC). I participated on a panel discussion of Congress and the Constitution. The panel may have been recorded, but I have no recording and AALS was unable to locate or identify one. Notes supplied.

May 1, 1996: University of Wisconsin Law School, Institute for Legal Studies Work-in-Progress Luncheon (Madison, WI). I gave remarks on a paper draft then entitled "Passion's Progress: Lessons for Reform from an Empirical Look at the Heat-of-Passion Defense," published as *Passion's Progress: Modern Law Reform & the Provocation Defense*, 106 YALE L. J. 1331-1448 (1997). Article copy supplied in response to Question 12(a).

Feb. 29 - Mar. 3, 1996: National Women Law Students Association (Madison, WI). I discussed the Violence Against Women Act. I have no notes, transcript, or recording.

Oct. 16-17, 1995: Committee on Women and Family in the Russian Legislature, DUMA (Moscow, Russia). I participated in a panel discussion on American laws

protecting women from domestic violence. I have no notes or transcript of this discussion; local coverage in the *Semya* newspaper supplied.

Apr. 28, 1995: Connect US/Russia (Minneapolis, MN). I participated in a panel discussion with a traveling delegation of members of the Committee on Family, Women and Children of the State Duma of Russia, on the topic of federal domestic violence legislation. I have no notes, transcript, or recording.

Feb. 11, 1995: University of Virginia Law School, Journal of Law and Policy Symposium on Partisan Influence on Ethics Investigations: Context and Impact (Charlottesville, VA). I gave remarks published as *Essay, The Idea of Partisanship*, 11 J.L. & POL'Y 549-554 (1995). Transcript supplied; article copy supplied in response to Question 12(a).

1995: NYU Law School Roundtable on the Civil Rights Remedy in the Violence Against Women Act (New York, NY). I participated in a panel discussion on the civil rights remedy in the Violence Against Women Act. I have no notes, transcript, or recording.

Oct. 12, 1993: Dane County Bar Association/Lion's Club Constitution Day (Madison, WI). I gave remarks entitled "Advice and Consent: The Senate, Judicial Nominations, and the Constitution." I have no notes, transcript, or recording.

Apr. 1992: National Woman Abuse Prevention Project (Washington, DC). I gave remarks on violence against women. I have no notes, transcript, or recording.

Oct. 4, 1991: Dartmouth College Department of Philosophy (Dartmouth, NH 1992). I gave a lecture to students on the Violence Against Women Act's civil rights remedy. I have no notes, transcript, or recording.

July 18, 1991: Organization of American States, Inter-American Consultation on Women and Violence (Washington, DC). I commented on a panel on US legislation on violence against women. I have no notes, transcript, or recording.

June 24, 1991: Campus Violence Administrators (Washington, DC). I gave remarks on violence against women. I have no notes, transcript, or recording.

May 3, 1991: Princeton University Department of Philosophy and Women's Studies Center (Princeton, NJ). I gave a lecture to students and faculty on the civil rights remedy in the Violence Against Women Act. I have no notes, transcript, or recording.

May 6, 1991: National Organization for Victim Assistance, 11th Annual Forum on Victim's Rights (Washington, DC). I gave remarks on the Violence Against Women Act. I have no notes, transcript, or recording.

Apr. 20, 1991: College Democrats' National Convention (Washington, DC). I gave remarks on the Violence Against Women Act. I have no notes, transcript, or recording.

Apr. 17, 1991: Northern Virginia Women's Political Caucus (VA). I gave remarks on violence against women. I have no notes, transcript, or recording.

Feb. 21, 1991: Woman's National Democratic Club (Washington, DC). I gave remarks on the Violence Against Women Act. I have no notes, transcript, or recording.

Jan.7, 1991: B'nai B'rith Women National Executive Board (Washington, DC). I gave remarks on the Violence Against Women Act. I have no notes, transcript, or recording.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I searched my memory, my files, and the Internet to produce as complete a list as possible of all interviews I have given, but there still may be others I have been unable to recall or identify. Clips supplied for all published interviews listed without a web link.

Joe Biden: His Life, Trials, and Redemption by Jules Witcover (forthcoming October 2010).

Oklahoma Metropolitan Library System video interview; Oklahoma City, OK (Nov. 19, 2009). Taken before the Oklahoma book awards. Video available at http://youtube.com/watch?v=knIbC-1PAQw.

Oklahoma Public Radio; Shawnee, OK (Nov. 6, 2009). I did an interview on In Reckless Hands, which never aired. I have no transcript.

Emory Report; Atlanta, GA (July 6, 2009).

WAMU Radio, *Kojo Nnamdi Show;* Washington, DC (Apr. 21, 2009) (regarding Equal: Women Reshape American Law). Transcript supplied.

About Emory Law; Atlanta, GA (Apr. 20, 2009) (regarding Kojo Nnamdi interview).

Equal: Women Reshape American Law by Fred Strebeigh (published 2009) (pp. 309-444 drew on interviews with me conducted several years earlier).

WUWM Radio, *Lake Effect*; Milwaukee, WI (Oct. 20, 2008) (regarding In Reckless Hands). Available at http://www.wuwm.com/programs/lake_effect/view_le.php?articleid=565.

New Republic (Sept. 24, 2008) (quoted regarding Violence Against Women Act).

Boston Globe (July 27, 2008) (regarding In Reckless Hands).

WAMU Radio, *Diane Rehm Show*; Washington, D.C. (July 29, 2008) (regarding In Reckless Hands). Available at http://wamu.org/programs/dr/08/07/29.php#21829.

W.W. Norton Press Release, In Reckless Hands (April 2008).

Promises to Keep: On Life and Politics by Joseph Biden (published 2007) (regarding the history of the Violence Against Women Act) (no clip or transcript).

In Pursuit of Right and Justice: Edward Weinfeld as Lawyer and Judge by William E. Nelson (published 2004) (regarding the experience of clerking for Judge Weinfeld).

Gargoyle; Madison WI (Winter 1993) (Nourse hired as new faculty).

Chicago Tribune (Nov. 23, 1997) (quoted regarding 1996 law removing spousal adultery from provocation defense).

Associated Press (Feb. 28, 1995) (regarding the Violence Against Women Act). This AP story ran in the following newspapers: *Charleston Gazette, New Orleans Times Picayune, Lexington Herald-Leader, Bradenton Herald, Buffalo News, Cleveland Plain Dealer, Long Beach Press-Telegram, San Francisco Chronicle* (Feb. 28, 1995); *Charleston Daily Mail, Charleston Gazette* (May 16, 1995); *Hamilton Spectator*; Ontario, Canada (Mar. 7, 1995).

Wisconsin Week (Oct. 5, 1994) (regarding Violence Against Women Act).

Capital Times (Madison, WI) (Sept. 17, 1994) (regarding crime bill signing of the Violence Against Women Act).

Wisconsin Public Radio, *Ideas Network*; Madison, WI (June 23, 1994) (regarding the Violence Against Women Act). Audio recording supplied.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not served as a judge.

a. Approximately how many cases have you presided over that have gone to verdict or judgment? _____

i. Of these, approximately what percent were:

jury trials? ___%; bench trials ___% [total 100%]

civil proceedings? ___%; criminal proceedings? ___% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

e. Provide a list of all cases in which certiorari was requested or granted.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general

description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

b. a brief description of the asserted conflict of interest or other ground for recusal;

c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I have not served as a judge.

15. **Public Office, Political Activities and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I have not held public office. I have had no unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never held office in or rendered services to a political party. I have never been a member of, held office in, or rendered services to an election committee. I have never held a position or played a role in a political campaign, apart from occasional monetary contributions to political candidates.

16. **Legal Career:** Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

Law Clerk to U.S. District Judge Edward Weinfeld, Southern District of New York, 1984 to 1985.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never been in solo practice.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1984
Simpson, Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
Summer Associate (Law Clerk)

1985 to 1987
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019
Associate

1987
United States Senate Committee to Investigate the Iran-Contra Affair
Hart Senate Office Building
Washington, D.C. 20510
Assistant Counsel

1988 to 1990
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
Appellate Attorney

1990 to 1993
United States Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510
Counsel and Special Counsel

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

I began my legal career as a clerk to Judge Edward Weinfeld in the Southern District of New York. I moved to practice at Paul, Weiss, Rifkind, Wharton & Garrison where my principal work was on a large commercial litigation. In 1987, I was brought to Washington by the head of the firm who had been appointed Chief Counsel to the Senate Iran-Contra investigating committees, and I served that committee as an assistant counsel. I left the Senate staff in 1988 to join the United States Justice Department as an appellate attorney in the Civil Division, where I argued and briefed cases in the United States courts of appeals. In 1990, I left to become counsel to the Chairman of the Senate Judiciary Committee, where I specialized in legislative matters, most particularly anti-crime and anti-drug legislation, culminating in the Biden-Hatch Violent Crime Control and Law Enforcement Act of 1994. I began teaching law in the fall of 1993 at the University of Wisconsin, and since then have retained a chair there while visiting at other institutions including Yale, NYU, Emory, and Georgetown.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

From 1985 to 1987, I represented corporations in litigation. The principal matter was a $1 billion tax litigation in which my firm represented several major movie studios. At the behest of Alfred Youngwood (future head of the firm), I moved from the litigation department to the tax department for a very brief period in 1987, before I was asked to move to Washington by the then-head of the firm, Arthur Liman.

In 1987, I represented the United States Senate as Assistant Counsel to the Senate Committee Investigating the Iran-Contra Affair, at the behest of the Chief Counsel of the Committee, Arthur Liman, and appointed by Senators Inouye and Rudman. In that capacity, I wrote memoranda and drafted committee reports on issues relating to the Fifth Amendment, executive privilege, and did extensive document review of classified material.

From 1988 to 1990, I represented the United States government at the Justice Department, specializing in federal civil appellate litigation, arguing and briefing appeals in the D.C., Fifth, Eleventh, Ninth, and perhaps other Circuits. Issues in these cases varied widely, from emergency disaster relief to the Federal Advisory Committee Act. With the exception of a grand jury subpoena case, all my cases were civil appeals.

From 1990 to 1993, my client was the Senate Judiciary Committee and its Chairman, then-Senator Biden. I specialized in anti-crime and anti-drug legislation, culminating in the Biden-Hatch Violent Crime Control and Law Enforcement Act of 1994. Included within that bill was the Violence Against Women Act.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

All of my practice in courts (as opposed to Congress) has been in litigation, principally appellate litigation. During a two year period at the United States Department of Justice, I filed 20 principal and reply briefs in the federal courts of appeal and one brief in opposition to a writ for certiorari in the United States Supreme Court. I also argued cases in at least five if not more matters, in the D.C. Circuit (twice), Fifth, Eleventh, and Ninth Circuits. The percentage of my practice in federal courts then was 100 percent. While I was in private practice at Paul, Weiss, Rifkind, Wharton & Garrison in New York, I was listed on one brief in the Supreme Court of the United States, several in the Court of Claims (in connection with tax litigation), and on one case in the New York Appellate Division (a real estate matter).

i. Indicate the percentage of your practice in:
   1. federal courts: 98%
   2. state courts of record: 2%
   3. other courts:
   4. administrative agencies:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 98%
   2. criminal proceedings: 2%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

None. My principal legal practice was appellate. The major litigation I worked on in private practice was at the summary judgment stage or appellate briefing. All the work I did on behalf of the United States Department of Justice was at the appellate or Supreme Court level.

i. What percentage of these trials were:
   1. jury:
   2. non-jury:

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I was the associate assigned to research (and proofread) the brief in a *pro bono* matter, *Edwards v. Aguillard*. 482 U.S. 578 (1987). Louisiana sought to teach "creationism" in its public schools. Our clients prevailed; the Supreme Court held the statute unconstitutional. The brief is available at 1986 WL 727665 (U.S. Aug. 18, 1986).

At the Department of Justice, I was on the brief for the United States in Opposition to a Petition for Certiorari, in *John Does 1-4 v. United States*, No. 87-1712 (Oct. Term 1987). Copy supplied. The United States sought to subpoena records regarding a failed savings and loan. The writ was denied. In re Grand Jury Subpoena, 836 F.2d 1468, cert. denied sub nom. *Does 1-4 v. United States*, 487 U.S. 1240 (1988) (mem.).

I was a signatory on a brief amicus curiae by law professors in *United States v. Morrison*, 1999 WL 1032805 (U.S. Nov. 12, 1999). Copy supplied. Our position did not prevail. 529 U.S. 598 (2000).

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

a. the date of representation;

b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I participated in the litigation below early in my career, more than a decade and a half ago, prior to my becoming a full-time legal academic. The details I have provided are as best I have been able to reconstruct from public sources and from my records.

1. RCA Corp. v. United States, 12 Cl. Ct. 569 (Cl. Ct. 1987), *aff'd in part and vacated in part, ABC v. United States*, 851 F.2d 329 (Fed. Cir. 1988).
Court of Claims, Washington D.C. (Kozinski, C.J., succeeded by Margolis, J.)
Associate, Paul, Weiss, Wharton & Garrison, New York City

This was a complex tax litigation involving the investment tax credit (ITC) exposing our clients to a potential $1 billion in liability. The ITC was originally awarded by the IRS to our clients, several movie studios (Warner Brothers being the principal client). The then-three television networks, ABC, CBS, and NBC, sought to claim the credit for themselves. The case was litigated in the Court of Claims in Washington and involved the filing of briefs for summary judgment on statutory interpretation. I was the principal associate "translating" the tax law to the entertainment and litigation lawyers. Along with other associates, I conducted discovery, drafted motions, and portions of summary judgment briefs. Our clients prevailed in the trial court; on appeal, the judgment was vacated for a subset of pre-1972 films.

The principal lawyers at Paul Weiss with whom I worked were Alfred Youngwood (head of the tax department and later head of the firm), Tel 212-373-3080; Stuart Rabinowitz (entertainment department); and Brad Karp (present head of the firm and associate with me at the time on the case), Tel 212-373-3316. Opposing counsel for RCA and NBC were Walter C. Cliff, George Wailand, Kevin J. McKenna, and William R. Weinstein, Cahill, Gordon & Reindel, 80 Pine Street, New York, NY 10005. For ABC: Martin D. Ginsburg, Arthur Lazarus, Jr. , John T. Boese, Alan S. Kaden, and Stephen A. Mansfield, Fried, Frank, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, DC 20037. For MCA and Universal City Studios, TCF Holdings, Twentieth Century Fox Film Corporation, MGM Co.: John C. Baity and L. Anthony Joseph, Jr., Hunton & Williams, 707 East Main Street, Richmond, VA 23219. For The Coca-Cola Company, Columbia Pictures Industries, Gulf + Western Industries: William P. McClure, Geoffrey B. Lanning, and Paul Little, McClure & Trotter, 1100 Connecticut Avenue, NW, Washington, DC 20036.

2. Edwards v. Aguillard, 482 U.S. 578 (1987)
Supreme Court of the United States
Associate, Paul, Weiss, Wharton & Garrison, New York City
Representing Don Aguillard

I did legal research and provided parts of a draft brief in this establishment clause case involving the teaching of creationism in Louisiana schools. Our client prevailed, the Supreme Court striking down the law as unconstitutional. The brief is available at 1986 WL 727665 (U.S. Aug. 18, 1986).

The lead attorney on this case at Paul, Weiss was Jay Topkis, Tel 212-373-3319; Gerard Harper, Tel 212-373-3263, was principal drafter of the brief. Opposing Counsel was the Attorney General of the State of Louisiana & Wendell Bird, Esq., now of Bird & Associates, 1150 Monarch Plaza, 3414 Peachtree Rd. NE, Atlanta GA 30326, Tel (404) 264-9400.

3. Does 1-4 v. United States, 487 U.S. 1240 (1988) (mem.)
Supreme Court of the United States
Counsel for the United States, Appellate Staff, Civil Division

I drafted the brief for the United States in opposition to an application for a writ of certiorari in a case involving a criminal investigation of a failed saving and loan association. The petitioners sought to quash grand jury subpoenas based on the ground that the depositions sought were protected by a Rule 26 civil protective order. The petitioners' application for a writ of certiorari was denied.

Co-counsel was Douglas Letter, Appellate Staff, Civil Division, Tel (202) 514-3311. Opposing counsel were Paul L. Friedman & Anne D. Smith, White & Case, 1747 Pennsylvania Ave., NW, Washington, D.C. 20006, Tel (202) 872-0013.

4. Crowley Caribbean Transport, Inc. v. United States,
865 F.2d 1281 (D.C. Cir. 1989)
Counsel for the United States, Appellate Staff, Civil Division

I argued and drafted the brief on behalf of the United States supporting the right of the government to choose appropriate carriers for the provision of emergency aid relief to El Salvador after an earthquake. Certain American companies had argued that the government had violated the Cargo Preference Act when it chose non-American carriers in providing emergency disaster relief. The legal question involved a potential statutory conflict between the Cargo Preference Act and the Foreign Assistance Act. The Government prevailed.

Co-counsel at the Department of Justice was Leonard Schaitman, Appellate Staff, Civil Division, Tel (202) 514-3311. Opposing counsel were Michael Joseph, now of Blank & Rome LLP, 600 New Hampshire Ave. NW, Washington, DC, Tel 202-772-5959, and Thomas Mills, now of Winston & Strawn, 1700 K Street, NW, Washington DC 20006, Tel 202-282-5714.

5. Food Chemical News v. Young,
900 F.2d 328 (D.C. Cir. 1990)
Counsel for the United States, Appellate Staff, Civil Division

I drafted the brief on behalf of the United States, under the supervision of a more senior attorney. This case involved a significant issue of the application of the Federal Advisory Committee Act, which places limits on the ability of federal agencies to "utilize" outside advisory committees. The Court of Appeals ruled for the

government that the panel in question did not qualify as an "advisory committee" subject to the act. At the time, there were a number of these cases pending on this issue, one of which went to the Supreme Court. The decision was written by then-Judge Ruth Bader Ginsburg, on a panel with Silberman, J. and Sentelle, J.

Lead counsel on the appellate staff was Douglas Letter, Appellate Staff, Civil Division, Tel (202) 514-3311. Opposing counsel was Eleanor H. Smith, Zuckerman Spaeder LLP, 1800 M. Street, NW, Suite 1000, Washington, DC 20036, Tel (202) 778-1838.

6. *Martin Bischoff, Templeton, Ericsson & Langlet v. United States*,
No. 88-3753, 1990 WL 1400 (9th Cir. Jan. 11, 1990)
Counsel for the United States, Appellate Staff, Civil Division

I argued and drafted the brief on behalf of the United States in a case where a law firm sought to foreclose a state-created attorneys' lien against the United States. The legal question was whether the United States had waived its sovereign immunity under the federal lien foreclosure statute or the Administrative Procedure Act. The sovereign immunity argument prevailed, as did the government. The case was argued before Canby, J., Thompson, J. & Leavy, J.

Co-counsel at the Appellate Staff was Marleigh Dover, Tel (202) 514-3311. Opposing counsel were Jonathan M. Hoffman and Stephanie L. Striffler, Martin, Bischoff, Templeton, Ericsson & Langslet, 3100 First Interstate Tower, Portland, OR 97201.

7. *Johnson v. United States*, No. 89-35019, 1990 WL 125339 (9th Cir. Nov. 2, 1989)
Counsel for the United States, Appellate Staff, Civil Division

I drafted the brief in opposition to an appeal in a case involving the potential conflict between federal bankruptcy laws and the Federal Tort Claims Act (FTCA). The district court had dismissed this medical malpractice case for lack of subject matter jurisdiction. The plaintiffs appealed. The Court of Appeals affirmed the district court's opinion, ruling as the government argued that the bankruptcy laws could not toll the statute of limitations under the FTCA. The Case was decided by a panel of Browning, J., Schroeder, J. and Fletcher, J. without oral argument.

Co-counsel on the case was Robert Greenspan, Appellate Staff, Civil Division, Tel (202) 514-3311. Opposing counsel was John Hendrickson, 3105A Lakeshore Drive Suite 102, Anchorage, AK 99517.

8. *United States Office of Personnel Mgmt. v. FLRA*,
905 F.2d 430 (D.C. Cir. 1990)
Counsel for the United States, Appellate Staff, Civil Division

I crafted the argument on retaking this appeal. I drafted the brief, but left the Department before it was argued. The case challenged what appeared to be a settled rule involving the "vitally affects" test, which the D.C. Circuit had borrowed from private sector labor law and applied to public sector bargaining. The precise issue was complex, and in this case the government did not prevail because of the law of the case doctrine. The opinion was written by Sentelle, J., on a panel with Ginsburg, J., & Silberman, J. Silberman, J., dissented. The ultimate claim that the "vitally affects" test had been misread prevailed in a subsequent case involving a different dispute, 952 F.2d 1434 (D.C. Cir. 1992).

When I left to join the staff of the Senate Judiciary Committee, the case was taken over at the Department of Justice by Mark Pennak. Appellate Staff co-counsel was William Kanter, Tel (202) 514-3311. Opposing counsel was William R. Tobey, Federal Labor Relations Authority, Solicitor's Office, Room 330, 607 14th Street NW, Washington, D.C. 20424, (202) 482-6620.

9. Public Citizen Health Research Group. v. Young,
909 F.2d 546 (D.C. Cir. 1990)
Counsel for the United States, Appellate Staff, Civil Division

I drafted the brief in a case arising from Food & Drug Administration warnings concerning the intake of aspirin by children and the risk of Reye's syndrome. The case involved the award of attorneys' fees under the Equal Access to Justice Act. The government prevailed in substantial part, the case being affirmed in part, reversed in part. The district court had applied a standard less generous to the government than appropriate and had awarded fees for an inappropriate period of time. Opposing counsel was Public Citizen Health Research Group. The opinion was written by Williams, J., on a panel of Buckley, J., Williams, J. & Sentelle, J.

My co-counsels at the Department of Justice were William Kanter, Tel (202) 514-3311, and Robert K. Rasmussen, now Dean of the University of Southern California Law School, Tel (213) 740-6473. Opposing counsel was Katherine Anne Meyer, now of Meyer Glitzenstein & Crystal, 1601 Connecticut Ave., N.W., Suite 700 Washington, DC 20009, Tel (202) 588-5206.

10. Creekmore v. United States,
905 F.2d 1508 (11th Cir. 1990)
Counsel for the United States, Appellate Staff, Civil Division

I drafted the brief on behalf of the government in a federal tort action on the question of whether *res ipsa loquitor* applied to an accident involving a large NASA elevator. The government prevailed; the judgment of the district court was vacated and remanded. The opinion was written by Hill, J. on a panel of Cox, J., Hill, J., & Smith, J.

Co-counsel at the Appellate Staff was Robert S. Greenspan, Esq. (202) 514-3311. Opposing counsel was Robert Sellers Smith., Robert Sellers Smith, L.L.C., 6004 Macon Court, Huntsville, AL 35802, Tel (256) 883-6850.

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I do not lobby and have never lobbied in the past.

During my period as a staffer for the Senate Judiciary Committee, I was a senior staff advisor to then-Senator Biden. From 1991-1993, I was the chief staffer for Chairman Biden on anti-crime legislation, culminating in the most comprehensive anti-crime and anti-drug bill of the era: the Biden-Hatch Violent Crime Control and Law Enforcement Act of 1994. Included within that bill was the Biden Violence Against Women Act. My work as a staffer on that bill is recounted in a book by Fred Strebeigh, Women Reshape American Law (Norton 2009).

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Legislation
Statutory interpretation and Congress
Georgetown: 2010, Spring 2009
Emory: 2009
Wisconsin: Spring 1994, Spring 1995, Fall 1997, Fall 1998, Spring 1999, Fall 2004, Spring 2006
Maryland: 1997

Constitutional Law & History
History of the founding, separation of powers, federalism, rights
Georgetown: Spring 2010
Emory: Fall 2008, Spring 2009
Yale: Fall 2002
Wisconsin: Spring 1996, Spring 2000, Spring 2002, Spring 2006

Criminal Law
Mens rea, homicide, defenses
Emory: Spring 2008, Spring 2009
NYU: Spring 2003

Yale: Fall 2002
Wisconsin: Fall 1993 , Fall 1994 , Spring 1999 , Fall 1999 , Fall 2001 , Fall 2004 , Fall 2005
Maryland: Fall 1996, 1997

Criminal Procedure
Fourth, Fifth & Sixth Amendments
Wisconsin: Spring1994, Spring 1995, Spring 1996, Spring 2000
Maryland: Fall 1996, Fall/1997

Evidence
Federal rules of evidence
Maryland: Spring 1997, 1998

Seminars
The History of Twentieth Century Legal Thought (Wisconsin 2005)
Criminal Law and History (Wisconsin 2005)
Criminal Law and Political Theory (Wisconsin 2001)
Gender and the Law (Wisconsin 1994)

As part of my responsibilities as a tenured member of the faculty at University of Wisconsin, I have been the sponsoring professor for a Domestic Violence Clinic in several years. Although I have been listed as a co-instructor for the course, the clinic itself is taught by an adjunct faculty member; my role is to provide administrative support and academic certification.

I have supplied all syllabi that I have retained over the years for these courses.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

Under my contract with Norton Press for publication of In Reckless Hands, I am entitled to royalties based on book sales.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no commitments or agreements to pursue outside employment, with or without compensation, during my service with the court. I may consider occasional law teaching, but only if I determine that it is compatible with the duties I would assume if confirmed as a circuit judge.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

    See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

    See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

    a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

    My father-in-law, Richard D. Cudahy, is a Circuit Judge for Seventh Circuit. Although he retired by taking senior status in 1994, he has continued to render substantial service to the Court of Appeals for the Seventh Circuit. Judge Cudahy has advised me that, if I am confirmed, he will become an inactive retired judge and upon my nomination and confirmation by the U.S. Senate will no longer sit on cases for the Court of Appeals for the Seventh Circuit.

    Although I do not anticipate other conflicts as likely, I have or have recently had relationships with several entities that could in theory come before the Court. My husband is presently employed at Robert W. Baird & Co, an investment advisory firm in Milwaukee, Wisconsin. I am an employee or recently have been an employee of the University of Wisconsin, Georgetown University, and Emory University. My husband's family has a charitable foundation, the Patrick & Anna M. Cudahy foundation, which funds service organizations within Wisconsin and my husband has sat on its Board. My husband's mother established a school in inner-city Milwaukee, Urban Day School, and my husband has been the head of the Board of Trustees and remains actively involved with the school. If confirmed, I would carefully apply the recusal statutes, the relevant canons of the Code of Conduct for United States Judges, and the advice of colleagues and/or the Judicial Conference to any case involving one or more of these entities in any capacity. Whenever necessary to ensure impartiality or to avoid appearance of partiality, I would disclose ties to litigants and recuse myself as appropriate.

    b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I will handle all matters involving actual or potential conflicts of interest through the careful and diligent application of the code of Conduct for United States Judges as well as other relevant canons and statutory provisions.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I take seriously the responsibility of lawyers to serve those who are the most vulnerable and least advantaged in our society. I have sought to reflect this commitment in my research and writing: I spent seven years unearthing the lost history of a home-schooled lawyer and his destitute clients who fought the science of eugenics, bringing their case all the way to the Supreme Court of the United States.

Prior to entering academia, I engaged directly in *pro bono* legal representation. As a young law firm associate, I volunteered in Manhattan's housing court to prevent the wrongful eviction of the poor. I drafted an ethics opinion for the New York City Bar Association. I actively sought *pro bono* work on matters even when the principal task involved proofreading the briefs (see *Edwards v. Aguillard*, 482 U.S. 587 (1987) *supra*).

As a law professor, I have focused my *pro bono* work on victims of violence. I have provided advice and other support to local shelters, national organizations, students, and other academics seeking to end sexual assault and domestic violence. That advice has ranged from matters as practical as how to obtain grant funding or as sophisticated as the state of legal challenges under section 1983. From 1995 to 2000, I provided dozens of hours of advice to academics and national organizations litigating for victims of violence under the civil rights remedy of the Violence Against Women Act. In 1995, I travelled to Russia for a week to educate women on American laws and practices involving violence against women (at that time, there was one battered woman's shelter in Moscow, population 8 million). In addition, I have supervised numerous students writing papers on violence against women; sponsored courses on domestic violence by service providers; sat on dissertation committees and advised students in other departments (sociology and political science), where research is being done on violence.

Finally, my husband and I have devoted substantial money and time to support Urban Day School, an inner-city "choice" school in Milwaukee, primarily serving low-income African-American children. This school was started in the 1970s by my husband's mother, who died in her early 40s of breast cancer, and is one reason why we chose to live in Milwaukee, as opposed to Madison (72 miles away), where I have taught for more than 15 years.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is a judicial nominating commission in Wisconsin. I applied to and was interviewed by the commission. Among several others, my name was sent to Senators Kohl and Feingold. I interviewed with Senators Kohl and Feingold. On January 21, 2010, Senator Kohl telephoned me and told me that he was forwarding my name (on a list with three others) to the President on behalf of himself and Senator Feingold.

Before I applied to the Commission, given my prior employment for the Vice President, I had a conversation with the Vice President's chief counsel, concerning the position. I have had periodic communications with the Vice President's chief counsel throughout the process.

Since February 2010, I have been in contact with pre-nomination officials at the Department of Justice. On April 7, 2010, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice. On July 14, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

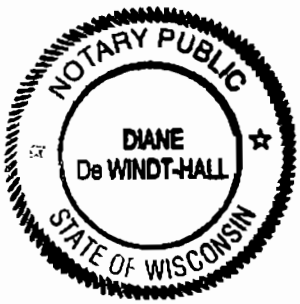
AFFIDAVIT

I, **VICTORIA FRANCES NOURSE**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

7/9/2010 (DATE)

Victoria F-T Nourse (NAME)

Personally appeared before me this 9th day of July, 2010



Diane DeWindt-Hall (NOTARY)

Diane DeWindt-Hall
My commission expires 03/09/2014
State of Wisconsin, Milwaukee County

UNIVERSITY of WISCONSIN LAW SCHOOL

January 6, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I have reviewed the Senate Questionnaire I previously filed in connection with my nomination on July 14, 2010, to be United States Circuit Judge for the Seventh Circuit. Incorporating the additional information listed below, I certify that the information contained in those documents is, to the best of my knowledge, true and accurate:

Q6. I have returned to my chair at the University of Wisconsin, having completed my visiting professorship at Georgetown University Law Center.

Q.9. I am a member of the Wisconsin Bar Association.

Q.10a. State of Wisconsin, 2010.

Q12a. New versions of articles to be published in January 2011 in the *Georgetown Law Journal* and *Boston University Law Journal* are provided as an attachment to this letter; earlier drafts were provided to the committee in July 2010.

Q12c. Nov. 19, 2010: Brooklyn Law School Statutory Interpretation Conference (Brooklyn, NY). I read a short draft paper, *Two Kinds of Plain Meaning*, which is part of the *Georgetown Law Journal* piece, a copy of which is provided as an attachment to this letter; earlier drafts were provided to the committee in July 2010.

Q.19. Legislation (Fall 2010); Constitutional History Seminar (Fall 2010). Syllabi are attached to this letter.

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire.

975 Bascom Mall, Madison, Wisconsin 53706-1399
www.law.wisc.edu
Information: 608/262-2240 Fax: 608/262-5485

I thank the Committee for its consideration of my nomination.

Sincerely,

Victoria F. Nourse

cc: The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

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

VICTORIA NOURSE*

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

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

If academic theories assume much about Congress, they also assume much about the separation of powers, typically in the form of inchoate ideas of "judicial" or "legislative" power. This Article argues that, in its original Madisonian form, the separation of powers was idealized not as a set of functional domains, but as an allocation of electoral forces driven by public representation. If that is correct, statutory interpretation must hue to textualism's original aim to embrace "ordinary, public meaning" and reject academic

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* Victoria Nourse, Visiting Professor of Law, Georgetown University Law Center; Burrus-Bascom Professor of Law, University of Wisconsin. Special thanks to Professor William Eskridge and the students in his Yale Law School statutory interpretation colloquium for reading and commenting on an earlier version of this Article. Claims made in Parts I and II have been made at colloquia at the law schools of Georgetown University, Boston University, University of Wisconsin, and Emory University. My thanks to all who participated. Conversations with Professors Philip Bobbitt, William Eskridge, Thomas Merrill, Jane Schacter, Mike Seidman, Charles Shanor, and Larry Solan have proven invaluable to this project. Specific comments on earlier drafts by Randy Barnett, Jack Beermann, Jim Brudney, Aaron Bruhl, Bill Buzbee, Eric Lane, and Gary Lawson, among others, have provoked me to think harder about the questions in this Article. Fine and timely research assistance was provided by Emory's Courtney Henderson and Georgetown's Meredith Esser. Excellent editorial advice was provided by Jack Figura, at an early stage of the process and, later, by the members of the Georgetown Law Journal. All errors are, of course, my own.

textualists' automatic resort to elite, legalist meaning. At the same time, textualists should, as a constitutional matter, embrace rather than reject legislative history. For academics, this will seem oxymoronic: scholars define textualism as a rejection of legislative history. The oxymoronic for academics is, however, the widespread practice of judges who do in fact resort to legislative history in cases of ambiguity. Implicitly, at least, the judiciary recognizes the constitutional argument for legislative history: that it serves as a check on judicial activism by forcing the judiciary to look to public, legislative meanings, rather than elite legalist meaning. Call this a "public meaning" theory of statutory interpretation based on a representational theory of the separation of powers.

INTRODUCTION

> *"Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."*
>
> —*Justice Antonin Scalia*[1]

When it comes to Congress, contemporary theories of statutory interpretation risk irony, if not contradiction. Consider textualism, the theory that judges should stop at plain meaning, blinding themselves to legislative history. One leading academic textualist describes Congress as "arbitrary," "strategic," and its processes "tortuous" and "opaque."[2] If Congress is all that, why should plain meaning ever arise? Textualists' academic opponents, purposivists, reverse the irony. They idealize Congress. As Harvard Professors Hart and Sacks famously put it, members of the legislature are "reasonable persons pursuing reasonable purposes reasonably."[3] But if Congress reasons so well, every statute should be plainly reasonable, not ambiguous enough to send the purposivist running to legislative history. Game theorists fare better, imagining Congress as a battle of political forces, but this bargain bazaar model still raises significant questions: if the bargaining is so efficient and refined, why is it so difficult to pass legislation, and why are the bargains so difficult to discover?

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[1] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997).

[2] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431–32 (2005). "Academic textualism" refers to the preference of some textualists for expert or legalist meaning. "Ordinary meaning textualism," by contrast prefers "ordinary" or "public" meaning. For a fuller discussion of this distinction, see *infra* Part I. As Judge Posner has explained in detail, *see* RICHARD A. POSNER, HOW JUDGES THINK, 204–29 (2008), judges are not law professors and are rarely influenced by academic criticism. My audience here is other law professors. This is why the term "academic textualism" refers to those in the academy who have urged this position, even if they themselves have relied upon individual judges for their claims. For the definition of legalist, as equated with conceptual and logical, *see id.* at 41 (describing the ideal legalist decision as one grounded in syllogism). For my distinction between legalist and prototypical meaning, see *infra* Part II.

[3] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William Eskridge & Phillip Frickey eds. 1994) (1958).

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

This should be more than troubling given that every case of statutory interpretation is in fact an "interbranch" encounter.[5] Theories of statutory interpretation not only imply descriptive theories of Congress, but also normative theories about how Congress should relate to other institutions, such as courts or agencies. In short, theories of statutory interpretation assume, often without any justification or articulation, theories of the separation of powers. For example, textualists, purposivists, and game theorists all agree that courts should not exercise legislative power.[6] That implies a claim about what it means to exercise legislative power. As students of the separation of powers know, the idea of "legislative power" is subject to controversy, and alone is not a theory of the separation of powers. And, yet, questions about the proper relationship of courts to Congress and agencies—questions of the separation of powers—have never been linked in any detail to theories of statutory interpretation.[7]

It is time to take a serious look at what theorists of statutory interpretation assume Congress to be, and how this ideal stacks up against the separation of powers. This Article grounds

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

[5] Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593 (1994).

[6] Even those who have critiqued simplistic views of legislative supremacy recognize that it is a widely held principle, even "intellectual boilerplate." *See, e.g.*, William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 319 GEO. L.J. 319, 319 (1992) (interrogating the notion of legislative supremacy). In my view, legislative supremacy requires a normative theory of how the branches should relate to each other and that, in turn, requires a constitutional theory of the separation of powers. *See infra* Part III.

[7] To be sure, there is wide recognition that constitutional theory should play some role. In the mid-1990s, the bicameralism and presentment clause was invoked to argue that legislative history was not "law," but has recently been reinvented as a reason to assume that statutes are finely wrought compromises reflecting bicameral structure. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1306 (2010) [hereinafter Manning, *Second-Generation*] ("[E]mphasis on bicameralism and presentment, at a minimum, puts the theory of textualism on firmer [constitutional] ground"). At the turn of the new century, scholars debated the scope of "judicial power," with no apparent resolution of the tensions between originalist Blackstonian interpretation and modern versions of anti-originalist textualism. *Compare* William Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16 & n.64 (2001) [hereinafter Manning, *Equity*]. No scholar of the separation of powers would recognize either claim as a full theory of the separation of powers, *see infra* note 230 (citing a variety of separation of powers theories), as consistent with Supreme Court precedent, *see infra* Part III, or, in my view, based on the Madisonian ideal of the separation of powers. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447 (1996).

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

Part III moves from Congress to the Constitution and the separation of powers. This Part argues that academic theories of statutory interpretation assume vague ideas about the meaning of judicial and legislative power. Textualism tends toward a "unitary" theory of the separation of powers, purposivism a "shared power" theory, and game theory adopts an eclectic mix of both. Rejecting these views, this Part argues that the separation of powers is not about unitary functions but about shifts in representation. Shifting lawmaking power from the legislature to courts creates three significant representational risks: risks of super-countermajoritarianism (that the court will embrace the meanings of a superminority rather than a majority), risks of federalism (that federal courts, which are far more nationally oriented than Congress, will apply their own views rather than those more likely to accord with those of states and localities), and risks of self-referential legalism (preferring judicial to ordinary meaning). From a constitutional perspective, the least risk to representation and the separation of powers (no doubt surprising to academics) comes from the unusual marriage of "ordinary meaning" textualism with legislative history. Of course, this will seem oxymoronic to academics because textualism in the academy defines itself in opposition to legislative history,[9] but it is quite consistent with judicial practice. More importantly, it is likely to reduce judicial activism, checking the tendency of a judge to impose his or her preferred policy position rather than that of the people's representatives.

If the job of the interpreter is to be faithful agent of his superior, and representatives are the people's agents, then ordinary, popular meaning is to be preferred unless it is clear that specialized legalist meaning should apply. A faithful agent considers every source of information about the legislatures' ordinary meaning, as game theorists have rightly insisted. This does not

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

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

mean that legislative history should be consulted to find "the intent" of a statute, but as a reference guide and a lexicon for prototypical legislative meaning. For example: instead of asking what rule the people's representatives would imagine in the application of an employment statute to a particular case (which is typically impossible to find, because the precise situation was never contemplated by the legislature), one would ask what the representatives mean by the word "labor." In a system where representation drives the separation of powers, it is the judges' job to check their own preferred set of meanings against the text and the legislative record for evidence of popular, prototypical meaning before they resort to internal legalist resources (canons, common law, and precedent). The intellectual exercise of consulting sources outside the interpreters' internal views is a "check"—a process of externalized self-discipline by which the interpreters' ideological predispositions are measured against the best information about other people's meanings. If representation is at stake in the separation of powers, and courts have a duty to police the separation of powers, judges should continue the majority practice of looking at legislative history, not only because it is a better source of ordinary meaning, but also because it advances judges' constitutional duty of absolute impartiality—their central role in the separation of powers.[10]

I. CONGRESS IS NOT A COURT

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

—Jeremy Waldron[11]

Scholars of statutory interpretation have a tendency to project their own values onto Congress and, finding Congress sorely wanting, treat it with a good deal of contempt. In part, this reflects general civic illiteracy coupled with a law school curriculum requiring no student know the basic details of how laws are made. Congress is not a court; it is high time students of statutory interpretation stopped treating it as a "junior varsity" judicial branch. To change this requires understanding three dominant institutional forces in congressional lawmaking: the electoral connection,[12] the supermajoritarian difficulty, and structure-induced ambiguity.

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

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

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

A. THE ELECTORAL CONNECTION

Let us begin with the most basic fact about the legislature: the "electoral connection."[13] There is nary a political scientist who does not believe that the electoral connection—whether viewed as a rosy aim to further the public good or a craven attempt to extract interest group rents—is Congress's most distinctive feature. The "legislature acts as the eyes, ears, and voice of the people."[14] A representative "lives and dies," as the great constitutionalist Charles Black observed, based on "what [the voters] think of him [back home]."[15] As the political scientist Richard Hall puts it, "[t]he representative from South Dakota who concentrates legislative time on South Africa, and the senator from South Carolina who takes little interest in textile tariffs, whatever their positions and whatever we may think of their actions, are not being ideal [representatives]."[16]

That "members of Congress care intensely about reelection,"[17] is a view shared by the greats of political science, from Douglas Arnold to David Mayhew, from Donald Matthews to Morris Fiorina, from Richard Fenno to John Kingdon, from Barry Weingast and Kenneth Shepsle to John Ferejohn and Matt McCubbins.[18] Those who write within different political science traditions—whether part of the great behaviorist revolution of the 1960s and 1970s, the rational choice revolution of the 1980s and 1990s, or some entirely different variant—share this assumption. Even those political scientists who find no correlation between people's views on particular issues and voting records,[19] or who insist that voters have the "haziest awareness" of

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[13] *Id.*

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

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

[16] RICHARD L. HALL, PARTICIPATION IN CONGRESS 3 (1996).

[17] R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 5 (1990).

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

[19] Even those who emphasize the relative freedom of representatives from constituency influence acknowledge that constituencies have "some influence" over policy decisions. *See, e.g.*, ROBERT A. BERNSTEIN, ELECTIONS, REPRESENTATION, AND CONGRESSIONAL VOTING BEHAVIOR: THE MYTH OF CONSTITUENCY CONTROL 104 (1989). On the failure of this kind of study to account for the intensity of preference and measure "activity" on issues of central importance to constituents, see HALL, *supra* note 16, at 58 (1996) ("[T]o the extent that a member believes that her district has an interest in an issue that comes before her, the more involved in the legislative action she is likely to become."); *id.* at 4 ("Although there are variations . . . and although constituents' interests are not the only (nor always the most important) determinant of legislative participation, the general finding that they matter holds

specific policy issues,[20] or who believe that party or ideology or public interest are significant, recognize that the electoral connection has an important role to play.[21] If nothing else, members of Congress say that it matters to them. As the renowned political scientist Douglas Arnold put it, members try to anticipate what their constituents' want—or at least what their potential opponents at election time think that their constituents want.[22]

A brief intellectual experiment illustrates how the electoral connection makes judges and legislators act and speak in ways almost sure to produce regular misunderstandings. In what follows, I attempt to "light up" (to borrow Jeremy Waldron's felicitous phrase) the differences between judges and legislators in terms of "audience"—the better to understand the vertical dynamics of the legislature. As we will see, the process is more complex; statutes are directed to multiple audiences, including courts and agencies. For parsimony's sake, let us see the point first—that, relative to judges, legislators speak openly to a different, more public audience—and then we can begin to complicate the story.

Imagine a citizen encountering the Justices of the Supreme Court and asking them to please address important public problems: health care costs, crime, and the budget deficit. Now imagine that in the weeks that follow we hear the following from the Supreme Court: "Our wives, our mothers, and our colleagues are afraid to walk in grocery store parking lots, to jog in public parks, or to ride home from work late at night in city buses. They are losing a fundamental human right—the right to be free from fear."[23] To anyone mildly conversant with the Supreme Court, there is something wrong with this picture. This does not sound like the statement of a Supreme Court Justice—for Supreme Court Justices are not supposed to respond to citizens' needs for legislation. The statement I have provided is instead from a member of Congress: former Senator, now Vice President, Joe Biden.

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

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

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true across policy domains, . . . decision-making forums, . . . and the several stages in a sequential legislative process . . . .").

[20] MAYHEW, *supra* note 12, at 40.

[21] HALL, *supra* note 16, at 60–65.

[22] ARNOLD, *supra* note 17, at 5.

[23] 136 CONG. REC. 14,564 (1990) (statement of Senator Biden).

> 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals . . . . *Buckley* cited with approval the *Automobile Workers* dissent, which argued that [section] 610 was unconstitutional.

If you guessed that this was not a senatorial statement, but a Supreme Court opinion, you would be correct. It is taken from Justice Kennedy's opinion in *Citizens United v. FEC.*[24] Notice how relatively coherent and precise the rhetoric is, and how unlikely it is that citizens or voters could make heads or tails of these statements. The Justices value precision, detail, and expert meanings. While representatives are speaking to their constituents, the Justices are speaking to their peers in the elite legal community.

For those who remain unconvinced, some solace may be had by recognizing that individual vice may yield collective virtue. As political scientist David Mayhew explains, relative to other forms of legislature, "the United States Congress is extraordinarily effective" at "voicing opinions held by significant numbers of voters back in the constituencies."[25] As Jeremy Waldron has written, statutes are "*essentially*—not just accidentally—the product of large and polyphonous assemblies."[26] It is essential to the most minimal notions of democratic consent that the minority has the opportunity to voice its opposition. Democracy's legitimacy depends upon this idea.[27] To say that the electoral connection powerfully distinguishes legislatures from courts *is not* to say that representation works, is fair, or is undistorted.[28] Members may imagine an electorate which speaks in a distinctly "upper- or lower-class accent." Representatives may be far more responsive to concentrated interest groups than large latent majorities. They may follow party dictates or pass symbolic legislation. In the name of the public good, they may reject their constituents' specific demands. The *relative* institutional point remains the same: a representative is subject to institutional constraints and incentives directly linking his actions to voters in ways unthinkable for an unelected judge.[29]

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[24] Citizens United v. Fed. Election Com'n, 130 S. Ct. 876, 902 (2010).

[25] MAYHEW, *supra* note 12, at 106.

[26] JEREMY WALDRON, LAW AND DISAGREEMENT 10 (1999).

[27] There is nothing particularly new about this idea. The cynic Machiavelli warned that the legislative "tumults that many inconsiderately damn" may yet yield good laws. *See* NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 16 (Harvey C. Mansfield & Nathan Tarcov, trans., University of Chicago Press 1996) (1513); *see also* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 105 (1861) ("Representative assemblies are often taunted by their enemies with being places of mere talk and *bavardage*. There has seldom been more misplaced derision. . . . A place where every interest and shade of opinion in the country can have its cause even passionately pleaded . . . is in itself, if it answered no other purpose, one of the most important political institutions that can exist anywhere, and one of the foremost benefits of free government."); HALL, *supra* note 16, at 238 (quoting same).

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

[29] Some might argue that state, elected judges are differently situated but, in fact, all judges, elected or not, are constrained by the structure of the institution in the sense that they are limited by the cases and controversies brought to them. They are passive entities which must await the problems that come to them on an individualized

B. THE SUPERMAJORITARIAN DIFFICULTY AND STRUCTURE-INDUCED AMBIGUITY

If I am correct about the electoral connection, then one of the most basic forces driving legislatures is different from—in fact, antithetical to—forces overtly driving courts.[30] This helps to explain resilient institutional misunderstandings. Academics tend to assume that because members of Congress are lawyers that they do and should speak in the voices of lawyers or judges. To be sure, members of Congress do not leave their law degrees at the side of the road when they enter the House or Senate chambers. But the structure of the institution plays an important role in how the individual speaks and acts, for the audience changes. It is not simply that language alone carries with it tendencies toward semantic imprecision. The structure of legislative institutions increases the likelihood and value of semantic imprecision.

Take a Senator out of the Senate chamber and ask him to appear before a court, and he will speak in the language of the expert lawyer. Put him back in the Senate and ask him to pass a budget resolution or a tax cut, and he will speak in a different voice. The institution changes the Senator's audience and, with it, his incentives. For legislators, legal ambiguity may be quite rational, not because he or she individually prefers it, but because the institution we know as Congress produces conditions demanding it—what I term "structure-induced" ambiguity.[31] If legal ambiguity is the necessary cost of passing a crucial budget resolution, rational legislators will choose legal ambiguity. From the stance of a court looking at the budget statute, this may not be virtuous, but from the position of the legislator or the public, who need a budget more than they need semantic precision, it may be both right and necessary.

The larger the drafting body, the greater the potential for structure-induced ambiguity: a court made up of 100 members would find it hard to agree upon a single opinion. But ambiguity is exacerbated in our legislative system by what I call the "supermajoritarian difficulty." No one who studies Congress thinks it easy to pass legislation.[32] It is far easier to stop than to enact legislation. There are too many steps in the process (what are frequently called "vetogates"):

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basis in case-by-case form, and are bound by law to follow precedent. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 267–68 (1994).

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

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

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

legislation must make it from assignment to a committee, from subcommittee hearing to full committee, from the House to the Rules Committee, and from debate on the Rule to debate on the House floor. It must then survive the gauntlet in the Senate, moving from subcommittee to committee to debate and potential filibuster. Finally, failure to obtain the capstone requirement—the President's signature—may necessitate a veto override.[33]

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

The supermajoritarian difficulty, when combined with the electoral connection, creates enormous pressure for statutory ambiguity. Although there are few electoral costs of ambiguity (no one ever lost an election because of imprecision), ambiguity may yield essential gains in achieving supermajority consensus. These twin pressures create enormous possibilities of misunderstanding between courts and legislatures. Courts prize interpretive virtues, "precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts."[38] Legislatures, on the other hand, prize

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[33] *See* Eskridge, *supra* note 32.

[34] U.S. CONST. art. I, § 7, cl. 2.

[35] *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2003); KREHBIEL, *supra* note 18; *see also* BRADY & VOLDEN, *supra* note 32.

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

[37] On the increasing importance of the filibuster threat, see SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 6 (1997) (quoting former Senator Charles Mathias in 1994 that the filibuster had become "far less visible but far more frequent" and "an epidemic"); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 10 (2006) ("The Senate's rules that protect unlimited debate . . . effectively require supermajorities for the passage of legislation . . . "). The practice of "holds" is in fact what a modern filibuster looks like; a "hold" can be put on any legislation by a single Senator.

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

collective and representational virtues—"action and agreement, reconciling political interests, and addressing the pragmatic needs of those affected by legislation."[39]

Consider the following example. During debates about the Violence Against Women Act, opponents claimed that the bill would cover every act of violence between a man and a woman, leading to massive numbers of cases brought to federal court.[40] To assuage opponents, the drafters decided to accept the argument—quite literally. They added bill language saying that the remedy did not cover "random acts of violence."[41] From the sponsor's perspective, they gave away nothing because the bill was never intended to cover such acts. Instead, the amendment was an attempt to defuse a political argument. There is no guarantee, however, that this language would not, in some future case, become the subject of interpretive controversy (what is a "random" crime, after all?).

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

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

> [o]ver and over again, staffers explained their choices in terms of constitutive virtues—that deliberate ambiguity was necessary to "get the bill passed," or that statutory language was drafted on the floor because a bill was "needed" by a particular senator, by the leadership, or by the public. Even staffers' reliance on lobbyists was an attempt to understand how the bill would "affect" people in the world. It was not that the staffers did not know the rules or recognize the interpretive virtues; it was that those virtues frequently were trumped by competing virtues demanded by the institutional context of the legislature. In an ideal world, the staffers seemed to say, they would aspire to both clarity and agreement, but, if there were a choice to be made, the constitutive virtues would prevail.[42]

It would be comforting to think that we could insulate statutory text from the electoral connection: congressmen could speak to voters in grand speeches and to courts in the statutory text. By and large, I suspect that members try to be as specific and lawyerly as possible. But

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[39] *Id.* at 615.

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

[41] Violence Against Women Act (VAWA), S. 11, 103rd Cong. § 302(e)(1) (1993) (excluding "random acts of violence unrelated to gender"); *see also* Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L. J. 1, 14 n.74 (1996–1997).

[42] Nourse & Schacter, *supra* note 38, at 615.

there is no "acoustic separation," as law professor Meir Dan Cohen once put it, between the call of the voter, and the call of the court.[43] We cannot put legislators in a sound-proof chamber when speaking to their constituents and then in another sound-proof room when marking up a bill. It is true that speaking to the public either directly or through other members may involve arcane legalisms as easily as vernacular speech. A debate on securities reform will proceed in lawyerly terms. But it cannot be true that statutes are written only for courts (as opposed to the people). As Justice Scalia once wisely proclaimed, it would be horrifying if, like Nero, statutes were posted "high up on the pillars, so that they could not easily be read"—so that the ordinary man could not know the laws to which he had consented to be governed.[44]

Statutes, like congressional debates, are exercises in communication between representatives and citizens (the vertical dimension) as much as between legislatures and other government branches (the horizontal dimension). There would be no purpose to a statute if it did not communicate a conduct rule to the people[45]: "do not defraud," "do not file frivolous lawsuits," "do not kill." Of course, statutes are also, to varying degrees, directions to those who would apply the statutes and thus are communications to legal experts (lawyers,[46] agencies,[47] and courts). For these reasons, statutory language is often an amalgam of the prototypical and the conceptual—"ordinary" and "legalist" meanings. In part, this is simply a function of the ways that humans use language: as Larry Solan has written, and most linguists agree, human beings use language in ways that are prototypical, by which they mean the "best example," and conceptual, by which they mean "all examples."[48] For purposes of my analysis, I define "ordinary meaning" in these terms, as searching for the "best example," while "legalist meaning" seeks a conceptual or logical extension of the term to "all examples." Ordinary meaning is important in statutory interpretation because members talk to the public, their constituents, at least as much as they act as expert legal draftsmen. Public constituencies increase members' incentives to use prototypical meanings (relative to a situation in which they were in an acoustic

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

[44] SCALIA, *supra* note 1, at 17.

[45] *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 97 (2005) (statutory text "is communicative; it is designed to establish a legal norm to which people will conform their behavior.").

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

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

[48] *See* Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2039–44 (2005).

chamber only talking to courts). And these incentives, whether we like it or not, apply *even in statutory text.*

In part this is because of the electoral connection—when members say "no highway-quotas," they are speaking to their constituents, to other representatives, or those representatives' constituents. In part this is because of the extraordinary demands upon legislators' time and the scope of the job: Congress addresses every issue under the sun, not one case at a time, case-by-base, but health care and war and disaster relief and international relations and nuclear power simultaneously, all of the time. This is exacerbated by the supermajoritarian difficulty: coalitions can be fragile and, the more fragile they are, the more likely members will embrace ambiguity to keep a bill moving because the electoral costs are low versus the electoral gain in passing an important piece of legislation.[49] In such a world, ambiguity can become rational, even virtuous.

Structure-induced ambiguity should be distinguished from other prominent claims about legislative ambiguity. First, this ambiguity hails not from linguistic vagueness, the kind one sees in common law cases about contracts and wills, but from the structure of Congress as an institution. It does not emerge simply because of what H.L.A. Hart called legislatures' "inability to anticipate."[50] Even if Congress were clairvoyant, it would still be subject to the incentives of the electoral connection and the supermajoritarian difficulty. Second, this ambiguity is not simply a function of time.[51] Dynamic theories of statutory interpretation claim that ambiguity is inevitable because of history: "[o]ver time, the gaps and ambiguities proliferate as society changes, adapts the statute, and generates new variations on the problem initially targeted by the statute."[52] But structure-induced ambiguity exists on Day Number One, immediately upon statutory enactment.[53] Finally, this ambiguity differs from game theorists' claims of "strategic ambiguity": that members of Congress act to influence how courts will interpret a statute.[54] Representatives do anticipate the actions of other elite actors; they may try mightily to influence the way in which courts or agencies interpret statutes.[55] But it is also possible, as we will see in more detail later, to exaggerate the degree to which strategic action, as opposed to congressional structure, produces ambiguity. Bargaining in legislatures is not only done horizontally—anticipating the consequences of actors next in line, like a court or an agency—but also

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[49] For a more analytic distinction between prototypical and legalist meaning, see *infra* note text accompanying notes 115–122.

[50] H.L.A. HART, THE CONCEPT OF LAW 125 (1961).

[51] *See, e.g.*, ESKRIDGE, *supra* note 4, at 9–10.

[52] *Id.*

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

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

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

vertically—anticipating how constituents will react.[56] Legislators are always talking to third parties (their constituents) and, unless those third parties are included in "the game," it is just as likely, indeed in my view far *more* likely, that the electoral connection will produce far more ambiguity than legislators' self-conscious attempts to manipulate courts.[57]

C. THE MERITS OF AN EVIDENCE-BASED APPROACH

Academic critics will reply that I have left out a vast range of political theory about median or pivotal voters, cycling theory or agenda-setting. In two senses, this is intentional. First, a good deal of political theory is just that, theory, and my aim is to rely only upon the most basic, tested, and sound evidence (hence the term "evidence-based" approach) rather than picking and choosing a more or less controversial approach from another discipline.[58] Second, my aim is orthogonal to the aim of political theory, which is to predict political or policy outcomes. My purpose is to describe the minimum *necessary* conditions for an evidence-based theory of legislative process and, through that, statutory interpretation.

As a minimalist theory, my approach builds on uncontroversial evidentiary premises. What is true of legislative history—it has a tendency to permit statutory interpreters to look out over the crowd, picking and choosing their favorite pieces of evidence—is also true of statutory interpretation theory. Textualists, as Judge Posner writes, have tended to rely upon theories that treat Congress with contempt—assuming that its decisions can never be rational, the process is highly chaotic, and majorities perpetually "cycle" according to Arrow's theorem.[59] Professor John Manning, who now seeks to distance himself from this view, admits that "early textualism's grounding in public choice theory seemed to reflect an antipathy to the legislative process or, at

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

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

[58] GERRY MACKIE, DEMOCRACY DEFENDED 156 (2003) ("The Arrow theorem is a great piece of work. . . . It is a logical exercise, it does not describe the real world."). Elsewhere I have called this "evidence-based" approach a "new realism." *See* Nourse & Shaffer, *supra* note 30.

[59] *See* POSNER, *supra* note 2, at 195, suggesting that there is a political valence to this view, that "[s]tudents of public choice, and political conservatives generally, being skeptical about the good faith of legislators, fearing the excesses of democracy, deem[] statutes unprincipled compromises."

least, had a certain 'eat your spinach' quality to it."[60] Meanwhile, academic purposivists have tended to rely upon political theory suggesting a rosy pluralist view. Neither angel nor devil theory is well supported by the evidence.

Political theory aims for something different than a theory of statutory interpretation. It aims to predict policy outcomes. On that measure, it is highly controversial precisely because it yields no factual consensus. Over the past two decades, empirical investigation has shown that interest group theory yields highly indeterminate results.[61] Neither a party driven model nor a median voter model[62] explains something as basic as why most bills pass by large bipartisan majorities[63]—something supermajoritarianism predicts.[64] Indeed, twenty years of theorizing has been devoted to showing that, despite Arrow's cycling prediction, it is theory, not fact. As Kenneth Shepsle and Barry Weingast wrote now a decade ago: "in no sense [is] there evidence that majority cycling [is] a constant companion of legislative life."[65] The "structure and process of legislative decisionmaking, once established, leads to policy choices that are structurally stable."[66]

I fully agree that the facts I have emphasized—the electoral connection, the supermajoritarian difficulty, and structure-induced ambiguity—will not predict political outcomes, for that is not my aim. My purpose is to critique legal academics' views of Congress

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[60] John F. Manning, *Second-Generation*, *supra* note 7, at 1289.

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

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

[63] *See* KREHBIEL, *supra* note 18; *see also id.* at 9 ("While U.S. parties adopt platforms in national conventions, their platforms are usually amorphous, frequently identical on many provisions, and hardly ever serve effectively as constraints during the campaign or after the election."); *id.* at 12–13 (median voter theory predicts that winning voting coalitions are "usually small . . . near minimum-majority size").

[64] As Krehbiel writes, "[c]onsider . . . all votes on final passage of laws enacted by the 102d and 103d Congresses (1991–94). The average size of the winning coalition on these 324 votes is 79 percent."). *Id.* at 6; *see also* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002, at 119–36 (2d ed. 2005) (reporting large coalitions for significant bills). Even among positive political theorists addressing legislative matters, there is dispute about the meaning or viability of Arrow's theorem. *Compare* McNollgast, *supra* note 32, at 20 & n.41 (arguing that Arrow's Theorem is too pessimistic about legislatures' ability to express reasonable preferences), *with* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–56 (1992) (defending Arrow's Theorem).

[65] Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, *in* POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 5, 7 (Kenneth A. Shepsle & Barry R. Weingast eds., 1998); *see also* Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 27 (1979) (offering a model of legislative behavior that results in "equilibrium").

[66] McNollgast, *supra* note 32, at 20.

using facts we know about Congress.[67] Some political scientists might dispute my emphasis on supermajoritarianism as too Senate-focused,[68] but bicameralism demands such a focus, as the best students of the process and the Constitution, such as John Manning, understand.[69]

II. STATUTORY INTERPRETATION THEORIES AND THEIR IDEAS OF CONGRESS

> *"The legislative process is inertial, legislative capacity limited, the legislative agenda crowded."*
>
> —*Judge Richard Posner*[70]

Measured by features identified in Part II, three of our most prominent academic theories of statutory interpretation—textualism, purposivism, and game theory[71]—misunderstand Congress. Each fails to account for the electoral connection, the supermajoritarian difficulty, and structure-induced ambiguity.

A. TEXTUALISM

In 1987, Justice Scalia gave an extremely influential set of lectures in which he set forth a doctrine of statutory interpretation known as the "new textualism."[72] Since the Founding, statutory text has always been the starting place for theories of statutory interpretation, but Justice Scalia's "new textualism" placed text at center stage. As Bill Eskridge explains: "Scalia's main point is that a statutory text's apparent plain meaning must be the alpha and the omega in a judge's interpretation of the statute."[73] Although traditional practice typically allowed judges to consider multiple factors, including legislative history and the statute's purposes, textualists narrowed the range of permissible evidence in statutory matters to the text. "Legislative history

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[67] KREHBIEL, *supra* note 18, at 8–16 (arguing that median voter theory, party-driven and conditional party theories, Arrow's Theorem, and stability-inducing theories do not explain either the sizes of majority coalitions or gridlock).

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

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

[70] POSNER, *supra* note 2, at 201.

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

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

[73] William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998).

should not even be consulted to confirm the apparent meaning of a statutory text."[74] If a law is within the text, "end of case," the judge should go no further.[75]

Scalia's theory influenced a generation of legal scholars, including myself. There are many grounds on which I stand firmly with him. Judges must be restrained, they must engage in strictly impartial interpretation. I tell my students: "read the text, read the text, read the text."[76] And I firmly agree that "ordinary meaning" is theoretically important and even essential given Congress's structure and incentives. As Jonathan Molot has explained, "we have all become textualists."[77] And, this despite that the theory has not had the kind of radical effect its academic proponents might have hoped: the Supreme Court majority and the courts of appeals have rejected a ban on legislative history.[78]

My concern is not with Justice Scalia's brief and wonderful essay, but with the vast literature it has spawned. It has yielded literally thousands of pages and erudite exchanges, many of which stand as the great intellectual battles of our day. Textualism has garnered sophisticated academic proponents, such as Harvard's John Manning and Adrian Vermeule, who have sought to move the theory in particular directions and to gain support in other literatures, including political science. And, because of its sophisticated academic proponents, it is increasingly taught as the gold standard to law students. Lawyers love rules and here is a simple rule: "when construing statutes, consider the text, the whole text, and nothing but the text. Period."[79] The academic theory of this seemingly simple rule, however, is not simple; it is increasingly complex and has suggested to some academics that judges should go so far as to embrace absurd results if the text so demands.[80] And because its academic proponents decline to honor "congressional

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

[75] SCALIA, *supra* note 1, at 20.

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

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

[78] For a compilation of the empirical evidence, *see* Grundfest & Pritchett, *supra* note 54, at 684. For more recent studies, see James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 128–31 (2008) (surveying use of legislative history in tax and employment cases); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771–811 (2010) (surveying use of modified textualist interpretive methodologies among state courts of last resort); Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call To Read Unclear Statutes Narrowly*, 53 SMU L. Rev. 121, 123 (2000) ("As we survey decisions across the country, we observe little that has changed in the way that courts interpret statutes. In short, the Supreme Court, other federal courts, and state courts throughout the country continue to use legislative history to interpret statutes."); *but see*, Merrill, *supra* note 9, at 364 (finding a rise in textualism in the Supreme Court as compared to the 1980s, but concluding that only two Justices, Justice Scalia and Justice Thomas, are committed to the anti-legislative history program).

[79] Eskridge, *supra* note 73, at 1514.

[80] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) (considering this position).

intent," it has yielded some determined, yet conservative, judicial opponents: Judge Posner calls its more radical manifestations the "autistic" theory of interpretation, for example. [81]

Let us turn to an example: *Church of the Holy Trinity*[82] figures prominently in academic textualist theory.[83] The question in *Holy Trinity* was whether a minister who contracted to serve a New York church fell within a statute aimed to prevent large scale importation of immigrant laborers. In fact, the case is an easy target because it makes the textualists' point at the outset. As the Supreme Court explained: "It must be conceded that the act of the [church] is within the letter of the section," the statute applying not only to "labor or service," but "labor or service *of any kind.*"[84] To top it off, the Court noted that the statute exempted singers, lecturers, and domestics and thus "strengthen[ed] the idea that every other kind of labor and service," came within the law.[85] Having noted all these textual arguments for covering the good rector, the Court ignored them, reading the statute to exclude him, relying on the rule that any plain reading of the statute was so "broad" as to

> reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.[86]

Thus, a statute whose "intention" was to prevent mass importation of manual laborers, not brain-toilers,[87] should not cover the rector. For textualists' *Holy Trinity* is Holy Tragedy—its reference to intention is dead wrong and the case should have been decided based on "the letter of the statute."[88] Labor means all labor and that is the end of the matter.

1. Textualism's Janus-Faced Image of Congress

Emerging from textualism's scholarly elaboration is what I will call a devil/angel view of Congress, with heavy emphasis on the devil. Academic textualisms' most ardent supporters are

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[81] POSNER, *supra* note 2, at 194.

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

[83] Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1845–50 (1998); *see also* SCALIA, *supra* note 1, at 18–22; Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity, *Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 905–08 (2000); Eskridge, *supra* note 73, at 1517–19.

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

[85] *Id.* at 459.

[86] *Id.* at 472.

[87] *Id.* at 463.

[88] SCALIA, *supra* note 1, at 18–22; Vermeule, *supra* note 83, at 1845–50; *see also* Eskridge, *supra* note 73, at 1517–19.

resolutely pessimistic (if not contemptuous) about the legislative process. Here are some of the adjectives one scholar has used in describing the legislative process: "intricate," "opaque," "awkward," "complex," "cumbersome," "highly intricate," "strategic[]," "arbitrary," "nonsubstantive," and "tortuous"—and this in a single, short article.[89] In fairness, "second generation textualism" has been kinder and gentler to Congress.[90] Whether first or second generation, however, academic textualists still hold out hope that the theory will somehow discipline Congress to write better statutes.[91] Overtly, or perhaps secretly, textualists dream of Congress as the expert wordsmith, the veritable green-eye-shaded scrivener, but see only a crass, unprincipled deal-maker.

If the devil view were correct—if congressional action were truly chaotic—then it is doubtful that what came out of the legislative chamber (the words of the statute) would be any less "intricate," "opaque," "awkward," "complex," "cumbersome," "highly intricate," "strategic[]," "arbitrary," "nonsubstantive," and "tortuous" than academic textualism describes.[92] The devil view simply goes too far, and should go too far even for honest textualists. Given their view of Congress, textualists must take either one of two positions: they must either concede that Congress is plain on some occasions (in which case they will have to explain the variation between the "chaotic" Congress and the "plain meaning" Congress), or they have to take the position that the plain meaning is never plain meaning from Congress, but *plain meaning conferred upon the statute by judges who determine what is plain and what is not.* As the judicious member of the Federalist Society, Professor Thomas Merrill has written: "In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning."[93]

If Congress cannot provide plain meaning, then it follows that the only body capable of conferring plain meaning is the court (or perhaps an agency). Here, however, we have come full circle. Academic textualists' fear that, by looking at legislative history, courts will exert their own will. Textualists' views of Congress suggest precisely the opposite: by asserting that ambiguous meaning is plain, judges are exerting their own will.[94] Honest textualists must answer the critic, like Professor Merrill, who says that the "judicial activism" may be in finding meaning plain when,[95] as textualists themselves concede, in "99.99 percent of issues of construction

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[89] Manning, *supra* note 2, at 431, 438 ("tortuous"); *id.* at 423, 430 n.34, 431, 444 n.84, 450 ("opaque"); *id.* at 424, 429 n.30, 430, 438 n.64, 448 n.96, 450 ("complex"); *id.* at 423, 426 n.23, 431 ("cumbersome"); *id.* at 432 & n.43 ("strategic"); *id.* at 431, 432 n.43, 443 & n.80 ("arbitrary"); *id.* at 420, 425, 445 ("awkward"); *id.* at 431, 432 ("nonsubstantive").

[90] *See* John F. Manning, *Second-Generation*, *supra* note 7, at 1315 ("Second-generation textualism seems to embrace the legislative process, with all its foibles.").

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

[92] *See supra* note 89.

[93] Merrill, *supra* note 9, at 372.

[94] Mikva & Lane, *supra* note 78, at 137 ("[Justice Scalia] seems to frequently argue despite what seems to be evident ambiguity that a statute is clear.").

[95] Mikva and Lane argue that there is a political tilt to textualism—that it "is directed at limiting statutory scope rather than expanding it." Mikva & Lane, *supra* note 78, at 123; *see also* FRANK B. CROSS, THE THEORY AND

reaching the courts, there *is* no legislative intent."[96]

Some advocates of the "devil" view of Congress ground their theory in sophisticated, but controversial, and increasingly dated, political science. They argue that legislative intent is impossible because there can be no stable majoritarian set of preferences. "Many legal scholars have expressed skepticism on the grounds that majority rule decision-making is chaotic" based on the Arrow Impossibility Theorem, a theory that makes democracy impossible.[97] As Professor Manning explains, "[i]nvoking the economic and game-theoretic insights of public choice theory, textualists thus emphasize that laws frequently reflect whatever bargain competing interest groups could strike rather than the fully principled policy judgment of a single-minded majority."[98]

For reasons we have already seen,[99] not only are "second generation textualists" moving away from this view, but the underlying ideas are under much greater scrutiny by political scientists and lawyers today.[100] The theory simply proves too much: if democracy were never possible, how could one explain the Civil Rights Acts or tax cuts or Social Security or the Clinton balanced budget? Without being able to prove *variation*—an impossibility if democracy "never" happens—such theories do not withstand even the most basic standards of predictive, empirical social science. Even if these theories were correct, however, they would still pose a problem: Where does statutory plain meaning come from, if it must emerge from such a process? And if statutory plain meaning does not reflect democracy, then why does it deserve judicial deference?

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

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PRACTICE OF STATUTORY INTERPRETATION 27–57, 163 (2009) (arguing that Judge Easterbrook's *Statutes' Domains* approach, 50 U. CHI. L. REV. 533 (1983), is openly anti-regulation because it constricts statutes' reach by interpreting them to only cover matters spoken to by the text). In fact, as I argue below, there is nothing terribly libertarian about textualism as a matter of logical necessity; in *Holy Trinity*, for example, the regulatory scheme was *expanded* from the baseline prototypical meaning of manual labor.

[96] SCALIA, *supra* note 1, at 32 (emphasis in original).

[97] McNollgast, *supra* note 32, at 3. On the pervasive and unfortunate influence of cycling theory within political science, see MACKIE, *supra* note 58, at 72–157.

[98] Manning, *supra* note 2, at 431.

[99] *See supra* section I.C.

[100] Even before the economic collapse and his recantation of some portions of law and economics, one of its founders, Judge Posner, wrote that he believed that the "economic approach to legislation" was "incomplete" and he disagreed with those who had "pushed the economic interest-group line hard." Richard A. Posner, *Legislation and Its Intepretation: A Primer*, 68 NEB. L. REV. 431, 434 (1989). More recent work by positive political theorists has questioned some of the premises of strict application of economic assumptions to the political world. *See, e.g.*, John Ferejohn, *Practical Institutionalism, in* RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE 72, 73–74 (Shapiro et al. eds., 2006) (rejecting basic economic assumption that preferences are exogenous to institutions). Even the work in political science on structure-induced equilibria shows the power of institutions to "correct" the more extreme predictions of Arrovian Theory. Shepsle & Weingast, *supra* note 65, at 22.

been approved by two houses and the President.[101] Put bluntly, both text and legislative history may be chaotic, but text has greater constitutional legitimacy.[102] Again, this argument goes too far: legitimate chaos may be legitimate, but it still is chaos. Taken to its extreme, the bicameralism argument would give legitimacy to a list of random zeros and ones, as long as the list was issued by the Senate and House and signed by the President. There is nothing about bicameralism that selects out "text" as opposed to "votes." The bicameralism argument could confer legitimacy on gibberish or absurdity.[103]

Now let us turn to the "angel" ideal: academic textualists criticize Congress in the hope this will induce legislators to write clearer statutes.[104] Visions of an expert scrivener dance in textualists' heads. But remember the electoral connection. Can one really imagine citizens protesting on the steps of the Capitol with signs reading, "Vote 'No' on lack of precision!" or "He forgot the dictionary!"? We can with little worry of exaggerating assert that no congressman ever lost a single vote because of a failure of semantic precision. Academic textualists admire exactitude, consult dictionaries, and embrace the common law. Professor Merrill has aptly described the attitude:

> The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute. This exercise places a great premium on cleverness. In one case the outcome turns on the placement of a comma, in another on the inconsistency between a comma and rules of grammar, in a third on the conflict between quotation marks and the language of the text. One day arguments must be advanced in support of broad dictionary definitions; the next day in support of narrow dictionary definitions.[105]

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

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[101] U.S. CONST. art. I, § 7, cl. 2.

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

[103] Manning, *supra* note 80 (considering this question).

[104] *See* Schacter, *supra* note 5, at 644–45.

[105] Merrill, *supra* note 9, at 372.

analysts (not to mention those who work in Congress),[106] it haunts lawyerly discourse about statutory interpretation. As Professors Sunstein and Vermeule have written, statutory interpretation theorists, as a general rule, work "with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters, such as agencies and legislatures."[107] In part, this is to be expected: legal education privileges courts mightily. Recently, the academy has come to emphasize administrative law as an antidote to judiciocentrism, but legislation courses remain heavily outnumbered, and few experts in statutory interpretation have any experience in congressional lawmaking.[108] Whether intentionally or not, the textualists' dreamed scrivener image looks a lot more like an image of the *judiciary*—a kind of junior varsity court—than of Congress.

2. Two Kinds of Plain Meaning

Textualism cares little for the institutional feature that most distinguishes Congress from courts: the "electoral connection." As I have explained earlier,[109] in both text and history, the Congress is speaking to multiple audiences—to the people as well as the courts. What, however, are we to take from this view? What if we were to look at statutes as laws to be interpreted in terms of "prototypical" or public meaning?

Consider, for example, *Holy Trinity* itself.[110] What was the meaning of "labor or service of any kind" to the average person on the street when the act was passed in the late nineteenth century? I wager that the prototypical meaning would be manual labor. As the linguist and law professor Larry Solan has argued, ordinary meaning is prototypical meaning, meaning which picks the "best example" rather than "all examples," or the conceptual or logical extension of the term.[111] Such meaning identifies the best example, not the peripheral one. In 1884 and 1885, when the bill was debated, the prototypical case of a laborer was a miner or a railroad worker, not a minister. Contemporary dictionaries support this view: "[t]he first definition of the term 'labor' listed in the 1879 and 1886 editions of Webster's Dictionary was 'Physical toil or bodily exertion . . . .'"[112] As the *Holy Trinity* Court explained in defense of its prototypical approach,

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[106] Nourse & Schacter, *supra* note 38, at 614–15.

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

[108] For an empirical study showing this, see Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 702 (2009) ("On the most prestigious law faculties, only 5 percent of professors have worked for a legislative institution—local, state, federal or international.").

[109] *See supra* section I.A.

[110] *Church of the Holy Trinity*, 143 U.S. 457 (1892); *see supra* notes 82–87 and accompanying text.

[111] Solan, *supra* note 48, at 2041–42.

[112] Eskridge, *supra* note 73, at 1518. Most of the debate about the statute in *Holy Trinity* concerned the question of forced, slave-labor type arrangements (not to mention nativist rants about low-quality immigration) in the coal, railroad, and glass-blowing industries, all of which assume "manual labor" as the law's prototypical object (the best

"the whole history and life of the country"[113] rebelled at the notion that this law, aimed at "importing laborers as we import horses and cattle," could cover the voluntary passage of a minister.[114] Textualists like Professor Vermeule, however, find a different, and obvious, plain meaning: what I will call "legalist" meaning (borrowing from Professor Vermeule among others).[115] He abstracts from the core and considers all logical possibilities within the concept of a laborer. Where prototypical meaning looks for the "best example," legalist meaning looks for all examples, examples that by definition push the law toward fringe or peripheral meanings.[116] Labor means labor, according to the academic textualist, and that includes the minister.

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example). If we were to view legislative history as a trial record, it would be clear error to believe that most representatives were using the term labor in the sense that would cover the good rector. *See* 15 CONG. REC. 5349–71 (1884) (House debate and passage); 15 CONG. REC. 6057–67 (1884) (Senate postponement of bill to next session). It is true, as Vermeule has shown, that there was some debate on the scope of the legalist term "labor," by both supporters and opponents. Adrian Vermeule, *supra* note 83, at 1845–50 (1998). One of the reactions to such objections, however, suggests the tension between popular and legalist meaning (which was apparent in the debate itself): when questioned whether the bill would cover Lord & Taylor bringing a clerk back from abroad, Rep. O'Neill replied,

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

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

[113] *Church of the Holy Trinity*, 143 U.S. at 472. *Holy Trinity* is typically known as an "absurdity" case. I make no claim here about whether its reference to the Blackstonian term "spirit" is worthy of revival or make any claim about judicial use of the "absurdity" canon. I do note that one way of thinking about absurdity is to view it as arising when there is a strong conflict between legalist meaning (all workers) and prototypical meaning (manual labor or service). Compare, for example, standard examples of absurdity: "blood-letting" (prototypical meaning: fight; legalist meaning: any bloodletting including by a surgeon); "prison escape" (prototypical meaning: escape to flout law; legalist meaning: any escape even if to escape fire).

[114] 16 CONG. REC. 1782 (1885) (statement of Sen. Platt).

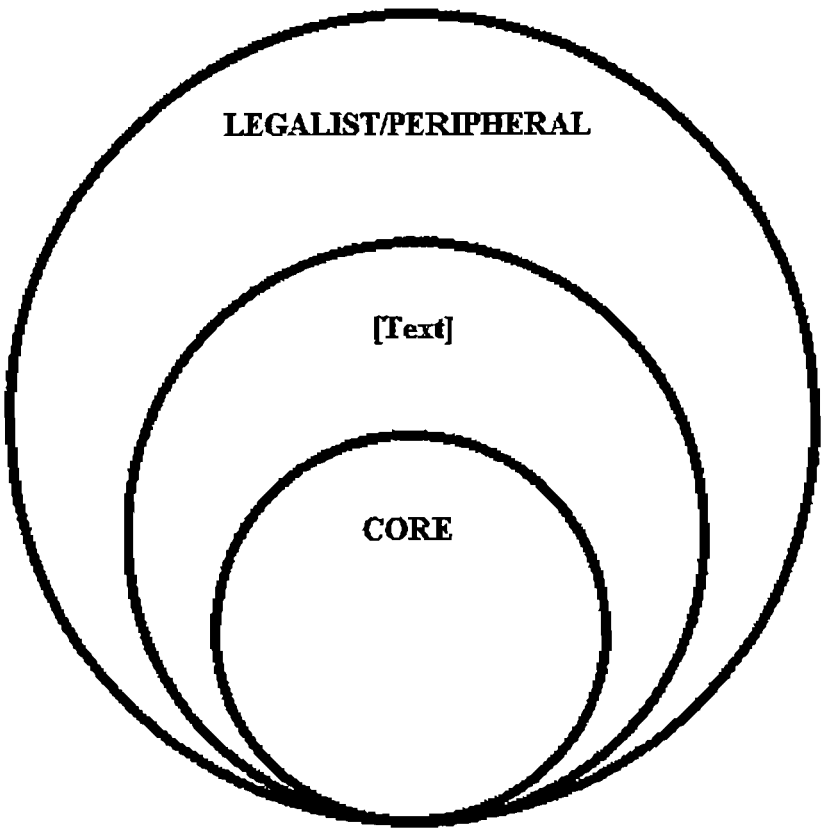
[115] *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 2–3 (2009); *see also* Posner, *supra* note 2, at 41.

[116] There is an analogy here, as well, to H.L.A. Hart's famous distinction between core and penumbral meaning. *See* DAVID LYONS, MORAL ASPECTS OF LEGAL THEORY 84–85 (1993).

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

One can conceive of the way in which legalist meaning may expand the range of the statute in the following diagram[117]:

Figure 1. Legalist Meaning



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

> And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter.[118]

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

[118] ESKRIDGE, *supra* note 4, at 4 (quoting reporter's commentary on Eyston v. Studd, (1574) 75 Eng. Rep. 688 (K.B.) 695.

Here, the kernel represents prototypical "sense" while the shell represents the legalist "letter of the law." Early American courts expressed a similar idea, quoting the latin phrase, "qui haeret in litera, haeret in cortice": "he who sticks to the letter of the law will only stick to its bark."[119]

Academic textualists are quite open that they are looking for expert, and thus peripheral, legalist meaning. Professor Manning writes that "textualists seek out technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers."[120] The focus on expert (as opposed to prototypical) meaning is enforced by the tendency to see text as semantics. As Professor Jonathan Molot explains, textualists tend to see "words written on a piece of paper, rather than as a collective effort by elected representatives to govern on behalf of their constituents."[121] This tendency to detach text from any larger conversation between the public and its representatives reflects the lawyerly aim to solve logical puzzles.[122]

Indeed, this tendency to prefer legalist, peripheral meaning reflects two important aspects of textual theory. Generally, academic textualism advertises itself as a "restrained" view of statutory interpretation, relative to "intentionalism" or "purposivism." Although textualists claim that they, unlike purposivists, do not "add" meaning to text, in fact, they do. They may reject legislative history, but they are perfectly willing to add lawyerly meanings, taken from past precedents, canons of construction, and the common law. The implied preference for specialized meanings speaks loudest in textualists' affection for the "common law" baseline. As Professor Manning explains: "Textualists assign common-law terms their full array of common-law connotations; they supplement otherwise unqualified tests with settled common-law practices."[123] The common law is the province of the courts, not of the public or legislature. I doubt that even a committed textualist, if asked, would suggest that legislators were, as a matter of empirical fact, expert in matters of common law meaning. To be sure, legislators are lawyers, but the common law tends to be the province of academics and judges, not the average practicing lawyer who has neither the time nor the inclination to peruse Blackstone.

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

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[119] Church v. Thomson, 1 Kirby 98, 98 (Conn. Super. Ct. 1786); Olin v. Chipman, 2 Tyl. 148, 148 (Vt. 1802); Miller's Lessee v. Holt, 1 Tenn. 111, 116 (Tenn. Super. L. & Eq. 1799); Commonwealth v. Andrews, 2 Mass. (1 Tyng) 14, 30 (1806); Sumner v. Williams, 8 Mass. (1 Tyng) 162, 183 (1811); *see also* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 210 (Kenneth P. Winkler ed., Hackett 1996) (1689) ("[D]oes it not often happen, that a man of an ordinary capacity, very well understands a text, or a law, that he reads, till he consults an [expert] expositor . . . [who] makes the words signify either nothing at all, or what he pleases.") Special thanks to Asher Steinberg, Georgetown University Law School Class of 2011, for discovering this kernel of wisdom in dozens of nineteenth century cases.

[120] Manning, *supra* note 2, at 434–35.

[121] Molot, *supra* note 77, at 48.

[122] Merrill, *supra* note 9, at 372.

[123] Manning, *supra* note 2, at 435.

> [F]irst, find the *ordinary meaning* of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the *ordinary* one applies. If not—and especially if a good reason for the *ordinary meaning* appears plain—we apply that ordinary meaning. [124]

I could not agree more. There is reason to wonder, however, whether "ordinary" meaning is too often equated with expert or specialized meaning. Law professor and linguist Larry Solan has suggested, for example, that judges are not consistent on this score, sometimes applying prototypical meaning and other times applying legalist or peripheral meaning.[125] In one recent study, the author found that "when Justice Scalia says plain meaning, he refers to something different than 'ordinary meaning.' 'Plain meaning' usually refers to a *specialized* but accepted meaning of a term . . . ."[126] In another empirical study, the political scientist Frank Cross found that "[o]verall, the plain meaning standard seems ideologically manipulable and incapable of constraining preferences to provide greater consensus."[127] A more recent study, conducted by Ward Farnsworth, Dustin Guzior, and Anup Mulani, concluded that "ordinary meaning" has a tendency to reduce ideological bias relative to plain meaning, because the interpreter is required to imagine a meaning other than what is already plain to him or her.[128]

Herein lies a deep and important ambiguity, even inconsistency, within textualist theory. Textualism, for all its affection for "plainness," is in fact ambiguous on precisely the type of meanings it will apply.[129] While some textualists tend to emphasize "expert" meaning and semantic content, others rightly emphasize "ordinary" meaning. Indeed, some textualists are quick, even within a single article, to refer to ordinary meaning and specialized meaning as if there were no difference between the two.[130] Perhaps academic textualists are assuming that the

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[124] Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphases added). In the constitutional context, he is even more insistent, *see* District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning.'").

[125] *See* Solan, *supra* note 48, at 2046–47.

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

[127] CROSS, *supra* note 95, at 166.

[128] Respondents were more likely to agree that "ordinary readers would disagree about the correct reading" of a statute than that "the statute, as applied to [the] facts, is ambiguous"; furthermore, ideological bias more greatly influenced responses to the "ambiguous" question than the "ordinary readers" question. *See* Ward Farnsworth, Dustin F. Guzior & Anup Mulani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation* 6, 8–12 (Univ. of Chicago Public Law Working Paper No. 280, Boston Univ. Sch. of Law Working Paper No. 09-50, 2009), *available at* http://ssrn.com/abstract=1441860. Farnsworth, Guzior and Mulani usefully distinguish between plain meaning (an "internal view") and "ordinary meaning" (external).

[129] *See* Molot, *supra* note 77, at 36 ("[S]o long as textualism is on the attack . . . little attention is devoted to the interpretive methodology textualism offers to replace strong purposivism and on variations within the textualism movement.").

[130] *See, e.g.*, Vermeule, *supra* note 83, at 1852–53.

average citizen is a lawyer—something I am quite sure the voting public would find odd, if not offensive. But perhaps that helps to explain empirical work showing that Congress has a greater tendency to "override" plain meaning decisions rather than decisions deferential to legislative history.[131]

Academic textualism has no theory of when it should apply expert meaning and when it should apply public, or prototypical, meaning.[132] It either assumes that prototypical and legalist/peripheral meanings are the same, or prefers expert meaning without defending that choice. Sophisticated textualists like Professor Manning sometimes bow to what they call the relevant "interpretive community," but they appear to define that community not as the people, but as expert lawyers. [133] Shifting the inquiry to a "relevant community" has the important virtue of noticing that there is an audience for statutes, but it raises its own ambiguities: how are we to determine the relevant audience?

Finally, and perhaps most importantly, academic textualism ignores "structure-induced ambiguity." Textualists have a tendency to view ambiguity as a deliberate legislative failure: Congress could have been clear, but chose not to be. Indeed, textualists are fond of talking about how legislatures spend time manipulating courts into particular interpretations—a position I find exaggerated, if one accepts the overriding power of the electoral connection.[134] Just imagine our putative Representative going home to claim, "I manipulated more courts than any other representative in Congress," rather than "I voted for war" or "I voted for tax cuts." Would such a position gain him many votes and, if it would not, why are we assuming that it is a common, as opposed to an unusual, phenomenon. The bottom line: academic textualism waxes ambivalent on the issue of ambiguity. A theory that assumes Congress's chaotic nature should make ambiguity the norm: how, then, can it insist that there are plain meanings?

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[131] *See* FRANK CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 82–83 (2009) (summarizing this evidence and relying on Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 909–10 (2000)), William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 350 tbl.8 (1991), and Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 446 (1992).

[132] Note that there is no logical connection between public or prototypical meaning and Congress; Congress may use terms in legalist or prototypical fashion. Congress, for example, may mean for the term "utilize" to cover all cases of use (the legalist and conceptual meaning), or it may mean for the term "utilize" to cover only particular cases involving presidential transitions. *See* Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 452–54 (1989).

[133] *See* Manning, *Equity*, *supra* note 7, at 16 & n.64 (2001) ("Textualists believe that legislation supposes that legislators and judges are part of a common social and linguistic community, with shared conventions for communication. Accordingly, they argue that a faithful agent's job is to decode legislative instructions according to the common social and linguistic conventions shared by the relevant community."). *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338–54 (1980).

[134] Textualists are not alone in this claim, which arises frequently in game theory analyses of statutory interpretation. *See* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1442–43 (2003).

B. PURPOSIVISM

If the "new textualism" has captured the imagination of a scholarly generation, this was not always the case. For much of the twentieth century, courts agreed that they should interpret statutes by looking for congressional "intent." In the post-war era, a new consensus called "purposivism" developed. Rather than focus on intent, Harvard's "legal process" school urged lawyers to look for the "purposes" of a statute: "Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can . . . ."[135] Legal process advocates had no problem with finding the purpose of the statute in the legislative history.

Return to *Holy Trinity*.[136] The purposivist looks at the text and finds it ambiguous. There are two possible meanings of laborer: laborer might mean "all workers" or laborer might mean "manual laborer" (as dictionaries of the time suggest). Given that ambiguity, the purposivist then looks to legislative history to find the purpose of the statute. According to the court, the legislative history showed that Congress's core purpose was to cover large scale operations in which corporations imported cheap immigrant labor for mining or other industrial operations—not ministers.[137] Thus, the purposivist is likely to proclaim *Holy Trinity* correctly decided.

Prominent academics have rightly criticized this view. As law professors Adrian Vermeule, Bill Eskridge, and Carol Chomsky all show, the Court barely scratched the surface of the legislative history.[138] Professor Vermeule cites legislative history suggesting that bill proponents and opponents alike thought the bill was drafted too broadly; some representatives and Senators noted that the bill might cover the high as well as the low class laborer.[139] Professor Chomsky rejects that view based on a review of all the legislative history, arguing that such comments were relatively rare, compared to the vast amount of discussion concerning manual labor and the proponents' avowed aim to ban large-scale slave labor operations.[140] These scholars' disagreement tends to highlight the textualists' concern (a real one) that it is simply too difficult to try to read the minds of legislatures by mining legislative history to find a singular intent or purpose.

1. Purposivism's Rosy Image of Congress

Now, let us unearth the purposivists' view of Congress. Purposivists tend to have a rosy view of Congress, as their critics have often noted. Harvard professors Hart and Sacks wrote that

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[135] HART & SACKS, *supra* note 3, at 1374.

[136] *Church of the Holy Trinity*, 143 U.S. 457 (1892).

[137] *Id.* at 463–64.

[138] *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity, *Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 905–08 (2000); Eskridge, *supra* note 73, at 1517–19; Vermeule, *supra* note 83.

[139] *See* Vermeule, *supra* note 83, at 1850–51.

[140] *See* Chomsky, *supra* note 138, at 923.

courts should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[141] Few students of Congress, and certainly no political scientist, would venture to embrace such a view. Like the purposivists' critics, I believe that this view is far too rosy—even if taken as a normative ideal rather than a descriptive matter (what Congress "should" be as opposed to what it "is"). Congress can only "be" that which its institutional incentives—principally its electoral connections—allow it to be; to idealize Congress simply opens up purposivism to attack as a theory of statutory interpretation more romance than law.

This is not to say that purposivism, as a theory of statutory interpretation, is wrong; it is to say that it shares more with academic textualism than might be supposed. Purposivists' attachment to a rosy view of Congress is unrealistic and just as self-referential as the textualists' "junior varsity" court approach. The truth is that "reasonable persons acting reasonably" describes judicial, not legislative, virtues: "precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts."[142] Courts prize reasonableness; they look at law as if it were serving a rational policy (as opposed to "position-taking" or symbolic action, as a political scientist might). In a sense this is not surprising, because it is a feature of most institutions. Institutions tend to think themselves and tend to project their own values onto other institutions in ways that can often create conflict.[143] Purposivists and textualists in the academy not surprisingly project the virtues of the academy—typically those defined by courts—onto Congress, both trying mightily to turn legislative institutions into courts.

A sophisticated purposivist does not need this view of Congress to defend her statutory interpretation approach; indeed, to the extent that purposivists recognize ambiguity, they should be far more willing to adopt a more realistic view of Congress. After all, as I noted, there is a tension between believing Congress to be so reasonable and purposivism as statutory interpretation: if Congress were so reasonable, wouldn't purposivism be unnecessary? All statutes would be plain and consistent with their purposes.

2. Purposivism As a Theory of Deference

If purposivists are willing to acknowledge ambiguity, then it might make far more sense to jettison the "rosy" Hart and Sacks theory. In fact, there is reason to believe that purposivists' attachment to the rosy view may well be something other than it first appears. Purposivists claim they want to honor the law-making or policy-making capacities of the legislature; under this view, it is far more judicially restrained to defer to Congress than simply to make up a meaning based on fictions about the legislative process. One way of looking at the "rosy legislature" claim then is not as a description of Congress so much as a description of a principle of *deference to Congress*—a principle that few, even textualists, are prepared to reject. To the extent purposivism's view of Congress is really a theory of deference to Congress, it declares a

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[141] HART & SACKS, *supra* note 3, at 1378.

[142] Nourse & Schacter, *supra* note 38, at 615.

[143] *See generally* Nourse & Shaffer, *supra* note 30, at 85 (discussing claims that claimed that new legal realism should focus on institutional forces); Victoria F. Nourse, *A Tale of Two* Lochners, 97 CALIF. L. REV. 751, 757 (2009) (discussing background arguments).

principle with which no theory of statutory interpretation openly quarrels. In fact, it is quite consistent with one of the few truisms of constitutional law, which is that deference to the political branches is not just wise, but, on statutory matters, constitutionally commanded.[144]

Another, related, way to look at the "rosy" view is that it is not so much a theory of Congress as a theory of courts as the "faithful agent" of Congress, precisely the goal averred by academic textualists. This is related to the "deference" point made above as it suggests less a view of Congress *simpliciter* than of the *relationship* between the court and Congress. As law professor Bill Eskridge puts it, good agents serve their principals' ends by filling in gaps and responding to real and sometimes changing circumstances. If told to collect all the ashtrays in the building, the faithful agent does not pull the ashtray off the wall.[145] In fact, in any reasonable "agency" relationship, we affirmatively do not want the agent to pull the ashtray off the wall. It is quite possible, however, to adhere to this idea of a faithful agent—a quite sensible one—without adopting a "rosy" view of Congress.

Let us return to *Holy Trinity*. What if purposivists were to proceed on something less than a rosy account of the legislative history? The vast majority of the legislative history (pages upon pages) assumes manual labor as the object of the bill, but there are moments when this is questioned, both in the House and in the Senate. Let us assume that members of these bodies were not acting as reasonable persons acting reasonably (as judicial actors would), but as legislators trying to accommodate their constituents under pressure to reach widespread agreement. How might this have occurred? We know that the bill's supporters were happy with an amendment that would have limited the bill to "manual" laborers (this is not only consistent with their general purpose of limiting massive slave-labor immigration but also with the committee report cited by the Supreme Court).[146] We also know that, at the least, post hoc, Congress passed a bill to exclude ministers (so there were eventually enough votes for a minister-exclusion).[147] Assume, however, that when the bill was first introduced, those who opposed the bill were afraid to oppose it openly—who could condone slave labor contracts in an era that still remembered the call of "free labor"?[148] Instead, some manufacturing interests chose to oppose the bill by claiming it was poorly drafted and overbroad, even unconstitutional.[149]

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

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

[146] *Church of the Holy Trinity*, 143 U.S. at 464–65 (quoting H.R. Rep. No. 48-444 (1884), *reprinted in* 15 CONG. REC. 6059 (H. Comm. on Labor Rep. on H.R. 2550 and H.R. 3313)); *see also* Vermeule, *supra* note 83, at 1843–44.

[147] *See* Act of Mar. 3, 1891, ch. 551, § 5, 26 Stat. at 1085; *see also* Vermeule, *supra* note 83, at 1841–42 & n.38.

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

[149] *See* Vermeule, *supra* note 83, at 1846–47. The claim of constitutionality is almost impossible for moderns to see unless they are aware of the history of equal protection, which was much more vibrant in the late nineteenth century and went by the name of "class legislation." Class legislation was an argument that the legislature had exercised improper selectivity, singling out a particular group for harsher treatment than others; its most famous nineteenth century example is *Barbier v. Connelly*, 113 U.S. 27 (1885), which preceded *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), in addressing discrimination against the Chinese. The trigger for "class legislation" arguments was not

Assume further that ambiguity was the price of passage, because, in fact, manufacturing interests wanted to make labor appear silly and uneducated, and labor supporters did not care much about the precise language because their constituents cared more about their wages than semantic precision. We will never know whether this story is true or not; we can only speculate that ambiguity may have been the price opponents demanded for the Act's passage.[150] Given the difficulty in passing the Act, despite a broad coalition of nativists, labor, and small manufacturers, precision in drafting may have appeared, to some, a small price to pay.[151] As one supporter claimed:

> *Never mind about these hair-splitting technicalities with reference to the bill; . . .* remedy any defects that you believe to exist in it. *If we all had to run as constitutional lawyers, few of us would get elected [laughter]*, and remember that what the workingmen ask you to do for them is simply that this Congress shall give, so far as it can, protection to them against this infamous contract system.[152]

There is nothing terribly rosy about this picture but it is not one that purposivists need reject. A purposivist can readily accept this account without claiming that legislators do in fact, or should act, as reasonable persons acting reasonably all of the time, or at least they must bracket that claim by urging "reasonableness to the perceived electorate." In fact, purposivists who cling to the rosy vision are really taking the much more radical position of Professor Cass Sunstein, who argues for a small-r republican theory of statutory interpretation.[153] Sunstein claims that courts should treat Congress's true role as that of grand deliberator.[154] Again, any evidence-based view calls the rosy republican ideal into question.[155] For example, is the "no-compromise-

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substantive due process, as some have argued, *see* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993), but statutory exemptions. This is why adding exemptions to the bill might have appeared to pose a constitutional problem. V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 972, 987 (2009).

[150] Bargaining theorists would tend to say that, in such a situation, the "deal" should be honored and the language interpreted broadly, because that was the price of bill passage. Even if we knew this to be true (which we do not know), it should not result in a legalist or peripheral interpretation of the statutory term "labor." As game theory posits, the price of the deal cannot be measured by those who were inveterate opponents. And there is significant evidence that the legalist interpretation was adopted by the opponents of the bill because they could not openly oppose the bill on the merits. Indeed, applying bargaining theory in this way can easily elevate a loser's claim into winner's status. *See infra* section II.C.

[151] The suit was ultimately brought by a railroad financier. *See* Chomsky, *supra* note 138, at 910 ("John Stewart Kennedy, a prominent banker, financier, and railroad director").

[152] *Id.* at 927 (emphases added) (quoting 15 CONG. REC. 5358 (1884) (statement of Rep. O'Neill)).

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

[154] Sunstein, *supra* note 153, at 1539 (claiming that the first principle of liberal republicanism is "deliberation in government").

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

compromise" we saw earlier, [156] where one side concedes a point that they are not trying to make (no "random" violence, no "highway quotas") really a form of deliberation? It seems far more like "no" deliberation. To be sure, the idea that Congress never deliberates is grossly overdrawn. I personally can think of many cases in which Congress truly did debate questions, when members were on the floor, on questions of the exclusionary rule, or habeas corpus reform; indeed, as legislative scholars know, there are inspiring examples such as the debate over congressional authorization for the first Gulf War.[157] But the question of debate evades the dominant structural incentive at play: the electoral connection. It is certainly true that, in some cases, the electoral connection will drive serious debate, but sometimes it will drive precisely the opposite: no debate.

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

In my view, purposivism does not fare well as a theory of Congress but it may make sense as a gesture toward something entirely different; indeed, as I noted before, it may be that textualism and purposivism share more than is typically acknowledged. Like other theories of interpretation, purposivism has little regard for the electoral connection. This tells us that sometimes statutory language is directed to the people; it is used in a prototypical, vernacular as opposed to a legalist sense. Given this problem, one way of rehabilitating purposivism would be reform it in light of the "electoral connection." One would not ask what the purpose of the statute was in the abstract but what the purpose was to the "ordinary person" on the street, and the first stop in that process would be to look for the text's prototypical meaning. As prominent textualists have argued, the text is often the best indication of purpose.[158] Just as we have we have seen that there may be two kinds of plain meaning, there may be two kinds of purpose—prototypical purpose (the core purpose) and peripheral or legalist notions of purpose (all purposes).

One of the most powerful critiques of purposivism has been that it tends to "extend" the domain of statutes: as Judge Easterbrook once wrote, because purpose will be more general, it will tend to extend the law's meaning.[159] But as this analysis of *Holy Trinity* shows, if purpose is redefined as prototypical meaning, then precisely the opposite may be true. The textual meaning, according to academic textualists, like Professor Vermeule, is clear and argues for including the rector. But, if this is right, this version of textualism (the legalist, extensive, kind) *expands* the reach of the prototypical meaning of the statute. Prototypical purpose, by contrast, would in fact *narrow* the reach of the statute to "manual" laborers, relative to legalist meaning (all laborers). Purpose, then, is not the only form of statutory interpretation that has the potential to expand the scope of statutes; and text does not necessarily narrow the scope of the statutes. As Judge Posner

[156] *See supra* section I.B. (discussing the Violence Against Women Act).

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

[158] Manning, *Second-Generation*, *supra* note 7, at 1316-17 (quoting Justice Scalia).

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

has explained: "Literal interpretations can be astonishingly broad."[160] There is a linguistic reason for this: "The extension of a statement commonly exceeds its intended scope because well-understood qualifications are understood rather than expressed. Suppose you asked a druggist for something to help you sleep and he gave you a sledgehammer?"[161]

Although some have criticized prototypical meaning as inherently conservative, it carries no necessary political valence. The average exemplary meaning is likely, in fact, to change more rapidly than would legalist meaning, because it is subject to changes in ordinary usage and the influence of social context. [162] Of course, prototypical meaning is no panacea. Because it is more "public"—more beholden to the "ordinary person's" meaning—it raises risks. Its vices include that, in many cases, Congress intends something a good deal more technical. When Congress legislates about the proper pleading standard in securities actions, it is not looking for what the average man on the street thinks of *scienter*; it debates actively the difference between the expert legal standards available in the Ninth and Second Circuits.[163] Indeed, one of the great problems in statutory interpretation can be in determining whether Congress used a term in a prototypical or legalist sense. For example, in the famous *Bock Laundry* case, when Congress used the term "defendant" in a federal evidentiary rule, it appeared to use the prototypical meaning of the word—criminal defendant—but use of the term yielded absurdity or potential unconstitutionality when the expert meaning was applied—criminal *or* civil defendant.[164] Finally, and perhaps most importantly, as we will see in Part III, prototypical meaning, as a method of statutory interpretation alone, may entrench bias (had the statute in *Holy Trinity* applied to a particular "race," it would have relied upon the extensive prototypical meaning of that term in the late nineteenth century).

If purposivism can be reconstructed to reduce the risks of statutory extension (applicable as well to legalist textualism), it is also true that purposivism's theory of Congress can be revisited. There is nothing preventing purposivists from jettisoning the Hart and Sacks rosy view of Congress; indeed, it would only serve to strengthen some aspects of the theory. If one begins with the idea that statutes are likely to be ambiguous, one must go somewhere to resolve that

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[160] POSNER, *supra* note 2, at 200.

[161] *Id.* at 200. I make no claim that legalist meaning always expands meaning, only that it *can* expand meaning. As a general rule if we define prototypical meaning as the "best" example and legalist as "all examples," the general tendency will in fact be for legalist meaning to be more expansive than prototypical meaning. I do not foreclose the possibility, and my argument does not depend upon the claim, that there may be no cases in which the opposite might occur, in which prototypical meaning might expand legalist meaning. Moreover, in some cases, expansion or contraction may depend upon which piece of a text is pulled out of the statute to consider. For example, consider *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). There, the term "utilize" might seem to cover the American Bar Association if "utilize" is considered in both its prototypical (best example) and legalist (all examples), senses. But the case looks quite different, in my view, if we consider the question as one of the prototypical "advisory committee." This question of which piece of "text" one chooses to focus upon may in fact be central to the interpretation.

[162] *See* VERMEULE, *supra* note 8, at 46–49.

[163] *See* Grundfest & Pritchett, *supra* note 54, at 652–53.

[164] Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989).

ambiguity. Purposivists, unlike textualists, urge that ambiguities should be resolved by looking at evidence produced by a popular body (legislative history). That aspect of purposivism would only be strengthened by an "evidence-based" view of Congress, and a search for prototypical meaning or core purpose.

C. GAME THEORY

In recent years, a number of scholars have brought game theory to the study of legislation. Bill Eskridge and John Ferejohn led the theoretical charge with a masterful analysis of the court-congress-president game.[165] More recently, law professor Daniel Rodriguez teamed up with eminent Harvard political scientist Barry Weingast to apply the insights of game theory to interpret specific statutes,[166] following seminal articles by McNollgast[167] and others on the positive political theory of statutory interpretation.[168] Game theory aims to use bargaining theory to "recast" the deal struck by Congress.[169] In one sense, this is not new; judges and statutory theorists have suggested "imaginative reconstruction" for years.[170] Such an approach, for example, was once famously embraced by Judge Learned Hand, and has been advocated by Judge Posner.[171] Game theory provides a richer analytic veneer, adding a new vocabulary of "cheap talk," "costly concessions," and "signaling."

1. Game Theory as Orthogonal to Academic Textualism

Although textualists often cite game theorists as allies,[172] the theories are quite distinct, even orthogonal. Whereas textualists reject intentionalism and legislative history, many game theorists

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[165] *See* Eskridge & Ferejohn, *supra* note 53.

[166] *See* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. L. REV. 1207 (2007) [hereinafter Rodriguez & Weingast, *Paradox*]; Rodriguez & Weingast, *supra* note 134.

[167] Note that "McNollgast" is a nickname collectively adopted by three authors: Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast.

[168] *See* John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992); McNollgast, *supra* note 32, at 3; McNollgast, *supra* note 55; McNollgast, *The Theory of Interpretive Canon and Legislative Behavior*, 12 INT'L REV. L. & ECON. 235 (1992).

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

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

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

[172] When textualists cite positive political theorists as allies, they are typically citing to that strain of positive political theory which Gerry Mackie calls the "irrationalist" thesis, following William Riker's work on Arrow's Theorem. *See* MACKIE, *supra* note 58, at 23, 156.

embrace both.[173] They are often quite ready to delve into the legislative history; indeed, their aim is to create a more "scientific" intentionalism. Rather than picking out one's friends at a schmoozy cocktail party, to paraphrase the famous Levanthal quip, game theorists aim to create a scientific theory of "legislative rhetoric" weeding out unreliable from reliable legislative history.

As McNollgast put it over a decade ago, "ascertaining legislative intent requires separating the meaningless actions (or signals) of participants in the legislative process from the consequential signals that are likely to reveal information about the coalition's intentions."[174] Cheap talk is defined as "communication that is costless for the speaker to make and that is unverifiable and therefore untrustworthy" and costly signaling is defined as "communication where the speaker pays a price for inaccuracies."[175] Costly signals can be trusted, cheap talk cannot. For example, in *Holy Trinity*, the original committee report supporting a "manual labor" interpretation would be rejected as cheap talk,[176] because the authors anticipated that the bill would not pass—there was no actual legislative "cost" to making such a statement in a committee document.

Curiously, game theory relies in significant part on a *legal*, as opposed to a *political*, theory of legislation. Statutes are contracts: "Both formalize bargains among actors with diverse and partially conflicting interests."[177] As in contract law, "the role of the courts is to fill in the gaps in legislation by interpreting the intentions of the law's enacting coalition."[178] Just as a court finds the "actual agreement" of contractual parties, game theory aspires to find the "original intent" of legislation.[179] The contractual analogy explains why McNollgast rejects academic textualists' distaste for legislative history: "One cannot argue that a contract between two parties does not embody their mutual agreement because both parties delegated the negotiation to their lawyers and then signed it after only superficial perusal of its contents."[180] In the end, McNollgast rejects textualism's willingness to blind itself to relevant information: "Theoretically well-grounded interpretations of legislative signals will produce better information than poorly grounded readings of the history or than a decision to ignore all of the history because some of it is uninformative."[181]

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[173] There is some difference on this issue among positive political theorists. *See, e.g.*, Shepsle, *supra* note 64.

[174] McNollgast, *supra* note 32, at 7.

[175] Rodriguez & Weingast, *Paradox*, *supra* note 166, at 1220.

[176] *See supra* note 146 and accompanying text.

[177] McNollgast, *supra* note 32, at 9.

[178] *See Id.*

[179] *Id.* at 5.

[180] *Id.* at 11 n.23.

[181] *Id.* at 25.

2. Game Theory's Bargain Bazaar Image of Congress

Given its emphasis on contract, it is not surprising that game theorists' idea of Congress is neither devil nor angel, but something akin to the efficient marketplace. In an early paper, McNollgast made clear that the analogy to contract was based on the "economic approach to the law of contracts," which "evaluates legal regimes according to their efficiency."[182] Legal rules increasing the cost of negotiation were disfavored; common law rules were viewed as efficient to the extent that they furthered the purposes of the contracting parties.[183] Similarly, rules of statutory construction should be created to increase efficiency: "Viewed in the light of contract law, the purpose of canons of statutory interpretation is to facilitate legislative agreements and thereby advance the efficiency of the legislative process."[184] This, they contended, could be accomplished by scouring the legislative history to find the moderate coalition necessary for bill passage: "Consequently, if statutory interpretation is guided by the principle of honoring the spirit of the legislative bargain, it must not focus only on the preferences of the ardent supporters, but also *on the accommodations that were necessary to gain the support of the moderates.*"[185]

As we have seen with respect to textualism and purposivism, there is reason to believe that this "contract" theory of Congress fails to accord with our two basic principles: the electoral connection and the supermajoritarian difficulty. Unlike businessmen who are contracting, legislators are speaking to their constituents as much as each other. The contract analogy fails to take into account what evidence-based theory predicts: that in Congress, there may be *no contract*. Sophisticated game theorists know that signals to third parties may be crucial to the game, but game theoretic analyses of legislative history have tended to ignore the vertical dimension. Like textualism and purposivism, this approach focuses on the horizontal relationship between courts and congress, not congress and its electoral audience. Moreover, as we will see, however sophisticated game theory appears, it can fail—at least in particular applications—to consider basics such as the supermajoritarian difficulty.

Consider Rodriguez and Weingast's analysis of the Tower Amendment to the 1964 Civil Rights Act. Their argument proceeds as follows: Everyone knows that the 1964 Civil Rights Act was the product of congressional compromise between the Humphrey majority and the Dirksen moderates.[186] Relying only on Senator Humphrey "winner's history," they argue, "devalues the pivotal role of moderate legislators whose assent is essential to reaching a bargain that can achieve majority (and, because of the filibuster, super-majority) support."[187] Rodriguez and Weingast explain:

> For example, speeches made at the introduction of legislation are ordinarily cheap talk. This stage occurs before any of the legislative compromises necessary to

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[182] McNollgast, *supra* note 55, at 708.

[183] *See id.*

[184] *Id.* at 710.

[185] *Id.* at 711–12.

[186] Rodriguez & Weingast, *supra* note 134, at 1427.

[187] Rodriguez & Weingast, *Paradox*, *supra* note 166, at 1215, 1218.

> pass the act and, therefore, cannot reflect the critical compromise provisions in the final act. . . .
>
> In contrast, discussions on the floor of the legislative chamber that focus on the meaning of critical compromises offered in amendments are costly signals. Because they risk losing the votes of the moderates, ardent supporters pay a large price for attempts to downplay or inaccurately describe the compromise during floor debates preceding acceptance of the compromise.[188]

There is much to commend in this passage. Bill supporters do wax lofty: We will end child "poverty in America," "rid the airwaves of poisonous political advertisements," or "end violence in our time." This is cheap talk. So, too, game theory recognizes what courts often do not: the dangers of "loser's" history. Just as ardent supporters are likely to engage in lofty rhetoric in support of a bill, ardent opponents are likely to engage in lofty rhetoric expanding the bill's limits, or narrowing its scope. McNollgast is clear on this point: "Members who voted against the legislation in key votes, who filed minority reports against the legislation in committee, and who offered rejected amendments to kill or gut the legislation should be regarded as outside the enacting coalition, even if they voted in favor of the bill on final passage."[189] There is much to admire in this, relative to the tendency of lawyers to slice and dice the congressional record, without any thought to whether opponents or supporters are worthy of quoting. The question, however, remains whether the theory is strong enough to provide us with a scientific intentionalism.

Putting aside any larger claims about the theory for the moment, let us take one of Rodriguez and Weingast's specific examples, the statute underlying the *Griggs* case involving employee testing.[190] Senator Tower offered an amendment to the 1964 Civil Rights Act, making explicit the power of companies to test employees. The conventional story is that Senator Tower was particularly concerned about overruling an Illinois employment decision, *Motorola*, which struck down testing because of the "disadvantaged" background of those taking the test (an extreme form of disparate impact theory which would have virtually eliminated testing and which no Senator supported).[191] Tower's first amendment encountered resistance because it applied to all "professionally developed ability tests" which determine whether employees are "suitable."[192] In theory, as opponents suggested, this could mean "any test." (One imagines

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[188] *Id.* at 1220–21.

[189] McNollgast, *supra* note 32, at 21.

[190] Rodriguez & Weingast, *supra* note 134, at 1501–10 (discussing Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971)). Note that this analysis does not necessarily apply to any of the other examples used by Rodriquez and Weingast.

[191] *See* 110 CONG. REC. 13,492–94 (1964) (statement of Sen. Tower) (discussing Myart v. Motorola, Inc., No. 63C-127 (Ill. Fair Employment Practices Comm'n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662-64 (1964)); *see also* Rodriguez & Weingast, *supra* note 134, at 1505–06.

[192] The first Tower Amendment was offered post-cloture on June 11, 1964. 110 CONG. REC. 13,492 (1964) (amendment No. 606). Its language is quoted in full *infra* note 208.

giving the MCAT to janitors.) The amendment failed to pass.[193] Later on, Senator Tower offered another version of the amendment and Senator Humphrey, manager of the bill, conceded to the new version.[194] This, Rodriguez and Weingast call a "costly signal."[195] Based on this, Rodriguez and Weingast argue that the Tower Amendment should be given a broad interpretation and that *Griggs* was incorrectly decided.[196] Tower said "any professionally developed ability test,"[197] and the *Griggs* majority deferred to the EEOC's rule that testing had to be "job-related."[198] According to Rodriguez and Weingast, the Dirksen amendments were "pivotal" to the success of the bill; these included the Tower Amendment, and it should be given its full meaning, which the *Griggs* Court did not do.[199] My argument is not with their conclusion, but with the application of this particular analysis with respect to this particular amendment.

3. Game Theory and the Supermajoritarian Difficulty

As I have indicated, in many ways, game theory is far more finely attuned to congressional action than are either purposivism or textualism. But however sophisticated in theory, there is reason to believe game theory analysis can yield flawed results if it does not pay sufficient attention to the particular institutional realities that help to shape the deal. As we have seen in Part I, ambiguity may be institutionally rational, a product of the electoral connection plus the supermajoritarian difficulty. As the political scientist Keith Krehbiel has made clear, and firsthand accounts of the legislature corroborate, getting to sixty votes is central to any bargain in the Senate.[200] Game theorists are correct that the majority seeks moderate votes clustered around a pivot; the crucial pivot, however, is cloture. Senators willing to resist cloture may demand

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[193] Rodriguez & Weingast, *supra* note 134, at 1506 ("Tower's first amendment was defeated on a roll call vote, 38 to 49.").

[194] 110 CONG. REC. 13,724 (1964) (amendment No. 952); *see also* Rodriguez & Weingast, *supra* note 134, at 1506.

[195] *Rodriguez & Weingast*, *supra* note 134, at 1506.

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

[197] *See infra* note 208.

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

[199] *Rodriguez & Weingast*, *supra* note 134, at 1508 ("The fact that a majority of the Senate voted in favor of the amendment makes the supporters' position—essentially the position that . . . would prevail later in *Griggs*—precarious."). Rodriguez & Weingast also emphasize that even though there was no recorded vote on the second Tower Amendment, it would have included "the thirty-eight who made up the group supporting the first Tower amendment," and that this number was sufficient to prevent cloture. *See id.* at 1507. Note in regard to the last claim that, once cloture has been invoked, which it had been by June 11, moderates had no power to filibuster again.

[200] *See* KREHBIEL, *supra* note 18, at 13, 101; *see also* BRADY & VOLDEN, *supra* note 32, at 1, 15, 156.

changes to the bill as a price for their vote.[201] So, in the Civil Rights Act, H.R. 7152, the original bill before the Senate *was not the bill* considered after cloture. Instead, there was a "substitute" bill (styled as an amendment but which strikes out the entire original bill). A substitute representing the basic negotiations—the Mansfield-Dirksen substitute—was Dirksen's price for cloture (which then required sixty seven votes).[202] There is nothing unusual about this procedure; it is almost sure to happen to any bill with salient or controversial provisions, although the vote threshold has been reduced.

Given this process, one has to be concerned about Rodriguez and Weingast's analysis of the Tower Amendment. They claim, for example, that the Tower Amendment should be respected as essential to moderate pivotal legislators.[203] Senator Tower was not a moderate legislator but a serious opponent who fought and voted against the bill, which even Rodriguez and Weingast acknowledge.[204] If McNollgast is right, then Tower's statements about the scope of the bill amount to "cheap talk." In particular, his discussion of *Motorola* in connection with the first Tower Amendment (which never passed), should be viewed with skepticism, rather than embraced with enthusiasm.[205]

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[201] This is too simplistic a calculus, as the concessions extorted may be completely unrelated to the bill in question or even the text. As we will see below, one of the problems with "contract" based models is that there is no guarantee that bargaining occurs on questions of text at all, or whether the bargaining occurs across bills, nominations or any other legislative matter. *See infra* text accompanying notes 215–221.

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

[203] Rodriguez & Weingast, *supra* note 134, at 1504 ("[M]oderate legislators worried that section 703(h) would nonetheless be read by courts to outlaw employments tests. Senator Tower's introduction of an amendment after the presentation of the Clark-Case memorandum provides the best evidence of this concern among the moderates."). If "pivotal legislators" were not convinced by the Clark-Case memorandum and required a testing amendment to approve of the bill, it would have been included in the Dirksen-Mansfield substitute.

[204] *Id.* at 1504 (linking Senator Tower to pivotal moderate legislators); *cf. id.* at 1507 (recognizing that Tower was an "ardent opponent of the Act."), *id.* at 1508 (recognizing that "Tower and his ardent-opponent colleagues would vote against the Civil Rights Act"). Because of this, Rodriguez and Weingast claim that Humphrey's "costly concession" to the Tower Amendment had to be directed to moderates. No doubt Humphrey's staff had been negotiating with moderates, but it is also true that the moderates were not empowered to filibuster, after cloture had been invoked.

[205] Rodriguez and Weingast take the conventional view that the *Motorola* decision was a proxy for "disparate impact" analysis rejected by Tower, conceded by Humphrey, and then wrongly accepted by the *Griggs* court. *See id.* at 1501–09. In fact, as Bill Eskridge has argued, the idea that "disparate impact" was in the minds of the legislators in 1964 is highly anachronistic. The concept simply did not exist. *See* ESKRIDGE, *supra* note 4, at 74 ("[T]he legal world was stunned by the Supreme Court's unanimous adoption of a disparate impact approach in *Griggs* . . . .").

Much more importantly, this particular application of game theory violates the supermajoritarian principle. The Tower Amendment could not have been the price of cloture, even if it had been offered by Dirksen, a moderate. In the Senate's supermajoritarian world, whether or not the opposition will filibuster is the essence of the deal. Whether any particular post-cloture amendment fails is irrelevant because the pivot has been obtained: the minority has conceded a closing of debate. Given that it has already taken a supermajority to reach this point and that, once cloture is invoked, everything that happens after cloture is subject to stand-alone majoritarian votes.[206] Tower's amendment was a post-cloture amendment and, therefore, was outside the price Dirksen, and the moderates, were forced to pay to move forward. By definition, post-cloture amendments cannot be the price of a bill *in toto*.[207]

The first Tower Amendment[208] was broader and included language that would have allowed businesses to test for "suitability."[209] That term, of course, might invite discrimination if it

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There is also no indication from the record itself, other than the discussion about *Motorola*, with which all Senators disagreed, that the parties were actually arguing about the concept in the ways that we understand it today. Lawyers tend to read into the discussion the present of the bill, rather than its inchoate past. Both sides agreed that *Motorola* went too far before the second Tower Amendment was accepted. But *Motorola* cannot be equated with disparate impact because disparate impact is rebuttable evidence of discrimination whereas *Motorola* created a per se rule. Nor can *Motorola* be equated with *Griggs*: the EEOC's "job-related" rule attempted to eliminate the most egregious forms of abuse. *See id.*

[206] Senate rules require that all post-cloture amendments must be filed before the cloture vote. *See* John G. Stewart, *Thoughts on the Civil Rights Bill*, *in* THE CIVIL RIGHTS ACT OF 1964, *supra* note 202, at 143 ("Once cloture has been invoked, only those amendments which have been 'presented and read' [prior to the cloture vote] qualify for consideration . . . .").

[207] To be sure, when the Civil Rights Act of 1964 was passed, it was still possible to "filibuster" by amendment, but there is no indication, nor argument by Rodriquez and Weingast, that this is their claim. In fact, any thought there would be such a filibuster, was soon put to rest in the actual bill. Stewart, *supra* note 202.

[208] Rodriguez & Weingast, *supra* note 134, at 1506. The first amendment provided as follows:

> On page 35, after line 20, insert the following new subsection:
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give *any professionally developed* ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—
>
> (1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or
>
> (2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.

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

included tests based on "customer appeal." This is precisely what the opponents of the first Tower Amendment claimed—that it would permit intentional discrimination.[210] The second Tower Amendment, to which the majority agreed, did not include the "suitability" language; Tower had to make a "costly concession," narrowing his provision. The amendment also added language, barring the use of tests "designed, intended or *used*" to discriminate. Again, these were concessions Tower made to those who argued that his amendment would permit intentional discrimination.

Humphrey and the majority also had to make a concession, albeit one that prompted legal ambiguity. First, there is the obvious ambiguity of the term "used" to discriminate, which presumably was meant to include something in addition to "intentional" discrimination. Second, and more importantly, the majority had to include a special sentence on testing that the bill managers thought redundant. Bill supporters believed that the first sentence in subsection (h) covered the testing issue by allowing "bona fide" merit systems. Senator Humphrey insisted that the first Tower Amendment was unnecessary.[211] When asked why, Senator Miller responded that

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

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

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

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

[209] In *Motorola*, a hearing examiner in Illinois ruled that a general ability test in considering applicants for assembly line jobs was discriminatory on the theory that the test was unfair to "culturally deprived and disadvantaged persons." *See* Myart v. Motorola, Inc., No. 63C-127 (Ill. Fair Employment Practices Comm'n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662-64 (1964).

[210] *See, e.g.*, 110 Cong. Rec. 13,503–04 (1964) (statement of Sen. Case) ("Discrimination could actually exist under the guise of compliance with the statute.").

[211] *Id.* at 13, 504 (statement of Sen. Humphrey) ("These tests are legal. They do not need to be legalized a second time. . . . That is why I said I did not think the proposed new language was necessary."); *see also id.* at 13,504 (statement of Sen. Case) ("I object to the amendment suggested by the Senator from Texas because, first, it is unnecessary . . . . The amendment is unnecessary"). Mr. Miller asked the managers whether the right to give tests was already authorized under subparagraph (h) of the then extant bill: "I believe that during the development of the amendment [the substitute amendment], the question of its not being an unfair labor practice for an employer to

the bona fide merit provisions covered legitimate testing so that the only thing the amendment might do was to encourage illegitimate testing.[212] If the majority believed that the testing amendment was redundant, there is no reason why it should not have agreed to it on the theory that it was giving nothing away. As we have seen in Part I—to keep a bill moving, there is always an incentive to logroll language—to add language that satisfies a particular Senator's electoral needs but may yet risk redundancy or ambiguity. Any lawyer worth his salt might have looked at the actual language and told the majority that "adding" the language as it did would create legal ambiguity, but it was the end of what has been dubbed "the longest debate"[213] on an excruciatingly important bill.[214] Post-cloture amendments are likely to be sloppier than the language of the substitute (which tends to be more carefully crafted).

Now, this kind of critique does not apply to all applications of game theory but it does raise some of the problems with a superficial reading of legislative bargains. First, this particular analysis raises questions about whether the analysis is consistent with central game theory tenets because Tower was an opponent of the bill. Second, it ignores the supermajoritarian difficulty: a post-cloture amendment is by definition not the price of cloture. Third, and most importantly, it provokes the question whether game theory assumes what it needs to prove. Remember our first principle of an evidence-based theory: the electoral connection. If the electoral connection makes ambiguity rational, then one must begin to question one of the principal assumptions of game theory—that statutes are contracts and legislatures are markets. Game theory assumes that there was a deal when evidence-based theory suggests there are often no deals but, instead, false compromises, rational ambiguities, and logrolling redundancies.

4. When a Deal Is Not a Deal

Like purposivism and textualism, deal reconstruction is predominantly horizontalist, paying little attention to constituency talk or what some game theorists call "audience costs." As game theorists and political scientists Nolan McCarty and Tim Groseclose explained in a sophisticated model of presidential–congressional relations, "[a]lmost all models of bargaining ignore the

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provide for the furnishing of employment [testing] pursuant to a bona fide . . . merit system . . . was discussed." *Id.* Senator Humphrey replied that this was indeed covered by subparagraph (h). *See id.*

[212] *See id.*

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

[214] The first sentence in section (h) addresses bona fide merit systems. *See* 42 U.S.C. § 2000e-2(h) (2006). The second sentence is the testing provision. *See id.* Because the second sentence does not contain the term "bona fide"; one standard lawyerly inference is that this qualification was not intended, even if supporters like Mr. Miller, *see supra* note 211, seemed to believe testing was already covered under the bona fide provisions. On another reading, however, the sentences should be read in harmony: why should one want to permit non-bona fide testing if one wanted to bar non-bona fide merit systems? Even Senator Tower admitted during the debate on the first Tower Amendment that his amendment would not sanction discriminatory tests. *See* 110 CONG. REC. 13,492 (1964). Moreover, unlike the first sentence, which explicitly bars "bona fide" systems intended to discrimination, the second sentence provides that testing may not be "used" to discriminate. *See* 42 U.S.C. § 2000e-2(h) (2006). Special thanks to President Reagan's former Chair of the Equal Employment Opportunity Commission, Professor Charles Shanor, for affirming that this interpretation is consistent with the EEOC's understanding.

possibility that the two primary negotiators want to send signals to a third party."[215] Political scientists studying international affairs, such as James Fearon, have known for some time that game theory must take into account what are termed "audience costs," by which they mean costs to the domestic audience of particular position-taking in international conflicts.[216] Remember Mayhew's cacophonous Congress: Senators are speaking to their constituents in these matters as much as to their congressional opponents.[217] It is entirely possible that the dealmakers are not talking to each other at all. Instead, they are talking to their constituents—and it is the "cost to constituents" driving the bargain. Analyses of cheap talk and signaling focus on parties in the horizontal court-President-Congress dimension.[218] But if signaling is also intended to satisfy the electoral, third-party connection, the cost-calculus may well overemphasize the "costs" of horizontal signals.

Reconsider a game theory analysis of the Tower Amendment if we include the electoral connection. Rodriquez and Weingast assume that moderates' concessions should be given more weight by courts. But what if the moderate's concessions were not in fact concessions? As we have seen, Senator Humphrey and others believed the Tower Amendment was redundant.[219] Given their audience of bill supporters, they had every reason to emphasize redundancy. So, too, Senator Tower may well have cared little about whether his amendment was repetitive or at least ambiguously so. Redundant or not, he could claim that his amendment served business interests by permitting testing. Like ships passing in the night, Senators Humphrey and Case (opponents of the amendment) may have believed that they were giving nothing, except "political cover"—whatever cost in clarity was far outweighed by an amendment that specifically barred intentional as well as "use" discrimination in testing (whatever that meant). In short, what game theory sees as a significant cost from a horizontal perspective, may disappear from a vertical one (the electoral audience).

Game theory's failure to incorporate audience costs is not a small, technical objection, it is a theoretical one. There is every reason to believe, for example, that the vertical, electoral connection will trump horizontal ambiguity costs. To be sure, legislators have an interest in making a bill effective, so in theory they should want courts to interpret the bill to make it work. Timing, however, makes it likely that the vertical is likely to trump this horizontal concern. A representative's electoral fate depends upon the claim that she has done something; a court may undo that, but the judicial intervention is most likely to be long after the election. For example, the Violence Against Women Act's civil rights remedy was passed in 1994 but was not found unconstitutional until six years later (three House electoral cycles).[220] Moreover, even if the Court rules against the representative, that might not yield electoral costs; it might simply add to

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[215] Groseclose & McCarty, *supra* note 56, at 101.

[216] *See* Fearon, *supra* note 56, at 577.

[217] MAYHEW, *supra* note 12, at 106.

[218] *See* Rodriguez & Weingast, *supra* note 134, at 1526–29.

[219] *See supra* note 211.

[220] *See supra* note 57.

the salience and importance of the position-taking of the representative. More people might vote for her precisely because the Court rejected her position.

The theoretical problem is more than specification of the game; the theoretical problem lies in assuming that deals can be *understood outside a particular institutional structure*. Game theory assumes a contract is a contract: a deal is a deal, whether it exists in business, the international arena, or a legislature. Put in other words, it fails to appreciate that an institution may change the nature of the bargaining. As Professor John Ferejohn (a savvy political theorist) has explained, the idea of what he calls "separability"—the notion that preferences are exogenous to institutions—is radical and "likely to be wrong."[221] Without understanding how institutions change the game, game theory risks becoming a self-fulfilling prophecy. If you accept that there is a contract, then it follows that the contract should be honored, but there is every reason to believe, from an evidence-based perspective that this is too simple an understanding of congressional bargaining—that what looks like a deal may be no deal at all (or at least a different deal than one perceived by a court based on text alone).

One can fairly ask whether game theorists are mistaken in their basic assumption that statutes are in all ways like contracts. In fact, statutes are more like elections. They are winner-take-all. When a court applies the law it does not interpret it based on the voting strength underlying the bill. A law is given the same interpretation whether the vote was close or not, 99-to-1 or 61-to-39. If game theory assumes that there is a deal when there is not, reconstructing that deal in favor of the "moderating coalition" will give the moderating coalition more power in court than it had in Congress. And, if that is the case, it raises strong questions of counter-majoritarianism and judicial activism, which are deeply exacerbated by the ability of small filibustering minorities to effectively oppose any significant bill. We know that bills are difficult to pass because the Senate's structure allows a minority to block passage. If that is right, a game theoretic focus on moderate concessions risks exacerbating the supermajoritarian difficulty. If, in a true majoritarian (fifty-one vote) system (which we know because of Senate structure the possibility that the majority coalition actually represents a minority of persons), there were sufficient votes to pass the bill without the filibustering-induced moderate coalition, then giving strength to the coalition that got the bill to sixty may reproduce the effects of a filibuster rule within judicial statutory interpretation. In such a case, one's rule of statutory interpretation may turn a small opposition minority in Congress into a judicially created majority.

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

"Nothing that is human escapes statutory interest."

—Bill Eskridge[222]

If I am correct about Congress, then one must worry about what all theories of statutory interpretation worry about—judicial lawmaking. Of course that worry is not simply a question of so-called "judicial activism," but a question about power and the relationship between judicial power and legislative power. Scholars like Professor Jerry Mashaw have argued for some time

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[221] Ferejohn, *supra* note 100, at 74.

[222] WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 8 (1994).

that statutory interpretation theories must be constitutional theories.[223] Professor Manning agrees: "[I]t is difficult to avoid the relevance of the constitutional structure in evaluating methods of statutory interpretation."[224] Mashaw and Manning are right: at least implicitly the claim of activism or judicial lawmaking is an assertion by one department of the constitutional powers of another. That is a question of the separation of powers, a constitutional question. Although some statutory interpretation scholarship has referred to the nature of judicial power or the bicameralism and presentment clause, no scholar has attempted to provide a theory of statutory interpretation grounded in a full-blown theory of the separation of powers.[225]

This question should be more important not only in the abstract but because many ideas of Congress now most powerful in the statutory interpretation literature implicitly acknowledge the existence of gaps or ambiguity in statutes. Textualists' chaos theory implies vast gaps. Purposivists assume that courts will partner in filling gaps. So, even if one rejects the theory I propounded in Part I, one should at least consider the risk that interpreters will improperly exercise lawmaking power when they should be more restrained. That in turn should make more urgent the question of what power "lawmaking" is and how that power should be exercised.

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

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

That theories of statutory interpretation have not been grounded in a theory of the separation of powers should be more surprising because, in fact, just as theories of statutory interpretation assume a theory of Congress, they also assume a theory of the separation of powers. In this Part,

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[223] Mashaw, *supra* note 153, at 1686.

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

[225] A claim based on the separation of powers is different from a claim that "structure" in some way supports a particular theory of statutory interpretation. *See infra* note 268 (discussing John Manning's claims about why structure militates against purposivism).

I set forth those theories and critique them. I offer an alternate way of conceiving of the separation of powers, grounded in the *Federalist Papers*, and based on the representational texts of the Constitution, a theory I have elaborated elsewhere at some length.[226] As applied, that theory supports a "public meaning" approach toward statutory interpretation, one which demands that courts not blind themselves to legislative history as evidence of ordinary or public meaning.

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

As constitutional scholars know, there are two primary theories of the separation of powers: one which is dubbed "formalis" and the other dubbed "functionalist." The formalist seeks to draw bright lines separating the departments and generally resists innovations in government structure. The functionalist is far more tolerant of departmental overlap and is less resistant to structural change. The formalist invokes functional labels ("the executive power") as terms with enormous significance, prizing precise descriptive separation; the functionalist relies, like the formalist, on the idea of function (separating out powers in terms of kinds), but acknowledges that the Constitution's text provides for both separated and shared powers.[227] The Supreme Court has adopted neither theory, but shifts back and forth between each.[228]

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

As we have seen, academic textualism eagerly embraces elite lawyerly meanings. It relies upon the common law to fill legislative gaps. In this sense, textualism asserts, or at least assumes, a *formal and unitary theory of the* separation of powers. If a court must fill a gap in a statute, it should use judicial, not legislative, meanings (canons, common law, precedent). This is reinforced by the textualists' injunction not to look at legislative history. If one is a formalist in the separation of powers, one imagines (counterfactually) that the constitutional text creates functionally pure categories. This explains statutory interpretation scholars' battles about the meaning of "judicial power."[229] It also explains textualists' embrace of the bicameralism and presentment clause: that clause only applies if there is "lawmaking" power at issue.

Very few scholars of the separation of powers would recognize either of these implicit claims as a theory of the separation of powers. Neither has been adopted by the Supreme Court,

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

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

[228] *Compare* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) *and* Bowsher v. Synar, 478 U.S. 714 (1986), *with* Mistretta v. United States, 488 U.S. 361 (1989) *and* Morrison v. Olson, 487 U.S. 654 (1988).

[229] *See* Eskridge, *supra* note 7; Manning, *Equity*, *supra* note 7.

nor scholars, as a theory of the separation of powers.[230] We have three departments, not one; any theory of the separation of powers must explain their relationship. Perhaps more importantly, any attempt to define judicial or legislative power apart from the separation of powers is deeply anti-originalist, for neither the members of the Constitutional Convention nor the constitutional ratifiers viewed the departments as in the least separable. Indeed, they spent most of their time arguing about how the departments should be related to one another, and whether one would be too "dependent" on the other.[231] Madison rejected "parchment barrier" solutions such as the textual injunction in the Massachusetts constitution to "separate" the departments[232] because these textual provisions had failed in practice in state constitutions long before the Constitutional Convention.[233] One need not scour a lengthy history for this, just read the *Federalist Papers* sequentially from No. 46 through No. 51.

As I have written elsewhere, on structural matters "I am "decidedly conservative" and "deeply reverent" of the Founders plan.[234] From this perspective, I worry about a false essentialism in the separation of powers. The Constitution's text does not create separate departments along functional lines. The President's veto power is under Article I, not II, as "legislative power"; the Congress's power to adjudicate impeachments is under Article II, not Article III.[235] More importantly, the text upon which formalists typically rely—the Vesting Clauses[236]— does little real constitutional work. The first sentences of the Vesting Clauses (which set forth the adjectives "legislative," "judicial," "executive") can be cut from the Constitution and absolutely nothing happens: as I have demonstrated at length elsewhere, the Supreme Court still sits, the Congress is elected, and the President still has the veto power.[237] As Madison predicted, it is the representational provisions of the Constitution—the ones that create voting and electoral connections, and through them, appointment powers—that drive the

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[230] For some sophisticated theories, see Rebecca L. Brown, *supra* note 227, at 1514–17, 1529–31 (arguing that separation of powers disputes involve important questions of individual rights); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994) (emphasizing the checks and balances between the President and Congress); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1256 (1988) (arguing that "the Constitution circumscribes the power of the branches by limiting the ways each can act"); Peter L. Strauss, *supra* note 227, at 522 ("[C]ourts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government"); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 228 (explaining a "minimal" conception of the separation of powers); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989) (emphasizing a rule of law approach that minimizes conflicts of interest).

[231] *See* Nourse, *Anatomy*, *supra* note 226; Nourse, *Vertical*, *supra* note 226.

[232] *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting).

[233] Nourse, *supra* note 7, at 474, 486, 495.

[234] Nourse, *Anatomy*, *supra* note 226 at 900.

[235] See U.S. Const. arts. I, § 7, II § 4.

[236] *See* U.S. CONST. arts. I, § 1, II, § 1, III § 1.

[237] *See* Nourse, *Anatomy*, *supra* note 226 at 839; *see also* Nourse, *Vertical*, *supra* note 226, at 761–68 (demonstrating how changes in vertical relationships can change horizontal structure).

separation of powers, by aligning the incentives of the "man" with the constitutional rights of the "place."[238]

Grand structural principles cannot be reduced to mere adjectives.[239] Doing so can encourage gross abuses of power. We have seen recently that an excessively devotional attachment to adjectives like "executive" as in "executive power," may result in abuses of power.[240] Adjectival formalism in the executive sphere has led to admissions from its proponents that "unitary" theories can lead to aggrandizement of power.[241] Serious separation of powers risks—infidelity to the text, emptiness, or aggrandizement—can all be seen in academic textualism as a theory of statutory interpretation. Interpreters who rely upon legalist as opposed to ordinary meaning risk expanding the domain of statutes to accord with judicial rather than popular will. So, too, academic textualism's theory of bicameralism (as we saw above) risks legitimizing an empty list of zeros and ones as long as it was passed by both Houses of Congresses, and would—if applied across-the-board—bar judges from relying on judicial canons or common law and might even require them to affirmatively embrace absurd results (so as to properly chastise Congress for its failures of precision).[242]

Critics will claim I have been too quick to reject the formalists' affection for bicameralism. It is one thing to argue that legislative history should not be viewed as "law," because it has not passed the House and the Senate. It is another to assert that the bicameralism clause is irrelevant in matters of the separation of powers. In cases like *INS v. Chadha*,[243] for example, the Supreme Court has explicitly relied upon the bicameralism clause to strike down the one-house legislative veto.[244] *Chadha* was correct to strike down the one-house veto as unconstitutional, but its reliance on the bicameralism clause raises serious questions, for that clause does not stand alone, but depends upon an assertion of "legislative power." The majority's definition of "legislative power," was so broad as to cover vast amounts of activity uncontroversially carried out by executive agencies. Taken to its logical conclusion, *Chadha*'s "bicameralism" argument renders executive agency rule-making violative of the Constitution.[245] More importantly, it puts us back

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[238] THE FEDERALIST NO. 51, at 337 (James Madison or Alexander Hamilton) (Cosimo ed. 2006).

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

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

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

[242] Manning, *supra* note 80.

[243] Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

[244] *See id.* at 951.

[245] The emphasis here should be placed on "executive agencies." There is nothing in this argument that depends upon the controversy about independent agencies (a controversy I find overblown). As a realistic matter, a President can fire the heads of independent agencies if he has a good reason. This has proven little barrier to a unified executive department as an administrative matter; this is, however, a far different claim than one that the President

at square one, for it requires that we define precisely what we mean by "legislative" or "lawmaking" power. As critics of *Chadha* rightly note,[246] even members of the Supreme Court could not agree upon the proper "function" being performed, a necessary precondition to invoking the bicameralism clause (if, as Justice Powell believed,[247] the action was adjudication, bicameralism would be irrelevant).

2. Purposivism As a Functionalist Theory of Separation of Powers

Unlike textualism, purposivism is far more comfortable with power sharing arrangements. The purposivists' view of the legislature as acting reasonably is a fiction, but it is a fiction based on the hope of judicial–legislative interaction. As Bill Eskridge has explicated it, the role of the court under the Hart and Sacks purposivist model is to act as a "relational agent."[248] That of course is a theory of power sharing between Congress and the courts, albeit one that was never explained by Hart and Sacks themselves, much less grounded in the Constitution. Eskridge, who has done far more along these lines than most, is not terribly worried about courts "making law" or the principle of "legislative supremacy."[249] And the reason he is not worried about courts making law is that he is assuming a functional theory of the separation of powers—that the Constitution enjoins the departments to share power as well as to separate it.

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

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

Game theory adopts assumptions that appear to coincide with both formalist and functional models. Like textualists, game theorists are attached to a common law, legalistic idea of statutory interpretation: laws are like contracts. To the extent that game theorists are implicitly assuming that statutory interpretation should be a form of contract law, they imagine the interbranch encounter as governed by judicial values alone. On the other hand, to the extent that game theory seeks to reconstruct legislative bargains, it aims toward a greater "partnership" role, suggesting the relational agent of the purposivist. In this sense, game theory appears to assume the risks of

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has "unitary" powers in all matters, such as war. *See* Victoria F. Nourse & John P. Figura, Book Review, *Toward a Representational Theory of the Executive*, 90 B.U. L. Rev. (forthcoming Jan. 2011).

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

[247] *Chadha*, 462 U.S. at 964 (Powell, J., concurring).

[248] Eskridge, *supra* note 6, at 321.

[249] *Id.* at 322.

both formalism and functionalism. In fact, as I will argue shortly, I believe game theory may reduce the risks of purposivism and textualism, as long as it gives up the assumption that statutes are always finely wrought compromises, in short that statutes are in fact like contracts without regard to the institutional forces shaping that contract.

B. A REPRESENTATIONAL THEORY OF THE SEPARATION OF POWERS

Elsewhere, I have argued that separation of powers disputes have little to do with fights over adjectives like "executive" or "judicial" (or at least these fights are unresolvable at the margins).[250] The question is not whether we can properly assign a functional label: even the Supreme Court finds this extremely difficult to do.[251] The question is how shifting power affects power-defined-as-representation. The representational approach "asks whether and how the shifting of tasks among government players affects 'who' will decide,"[252] where the "who" is the people, represented by state, district and nation. Power is thus defined as the power of the people organized in "constituencies creating the departments."[253] In such a world, "the risks are not descriptive impurities, but structural incentives likely to change political relationships between the governed and their governors."[254]

A simple historical example shows how this approach is both consistent with the text and with originalism.[255] Imagine if the Constitution was enacted as some suggested at the Constitutional Convention: the House of Representatives would elect the members of the Senate; the President would have no veto; and Congress could appoint important members of the Executive Branch. Similar proposals were considered but rejected in 1787.[256] Under this constitution, the Congress is still legislating and the President is still executing (indeed, we have purified the President's power by eliminating the Article I veto "legislative" power). *No functional changes have occurred, but power has shifted radically.* Under this constitution, the House would be more powerful than the Senate; the Congress would be more powerful than the President (he would have no veto); and the Congress would take over the Executive Branch,

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[250] *See* Nourse, *Anatomy*, *supra* note 226; Nourse, *Vertical*, *supra* note 226. I am not the only scholar to eschew this exercise. *See* Merrill, *supra* note 230.

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

[252] Nourse, *Vertical*, *supra* note 226, at 759.

[253] *Id.*

[254] *Id.*

[255] *See* Nourse, *Anatomy*, *supra* note 226; Nourse, *Vertical*, *supra* note 226.

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

creating the functional equivalent of a one-department government. There would be no separation of powers not because functions had been "mixed," but because political relationships (who has control over whom) had changed. With those shifts in relationship, one can also see which constituencies will gain power under such a system. Under this hypothetical Constitution, the House will dominate, which means that local constituencies will have power over both state constituencies and national ones. (The Constitutional Convention specifically rejected this kind of constitution because it was similar to that of many states in which power led to a "legislative vortex" as Madison put it.)[257]

There is nothing atextual about a representational approach. The Constitution's text shows us that "the departments are created by various political relationships—by voting, by representation, by appointment."[258] It is those relationships that shift real power. This should be more obvious: "shifting the war power to the Supreme Court shifts political relationships as well as tasks."[259] But the unstated danger lies in the political relationship: such a shift significantly weakens the people's power to decide whether to go to war. A representational approach toward the separation of powers "seeks to identify constitutional harm in something more than the transcendental" quantity or quality—in something "more than 'too much' power, 'balance' disrupted, or 'functions mixed.'"[260] It

> posits that the constitutional danger in shifting functions lies in . . . empowering some constituencies at the expense of others. Under this view, the problem with sending the war decision to the Court is not the bad descriptive fit between war and judicial function but . . . —that the Court will go to war without the people.[261]

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

To have an adequate theory of the separation of powers under traditional views, one would have to have a theory of "judicial" power, a theory of "legislative" power, and a theory of their proper relationship. If I am correct that efforts to apply functional labels are misconceived, then how does one consider this problem from a representational angle? What one should worry about is whose influence has potentially shifted—the risk to constituencies driving the internal separation of powers. Under such a view, if you shift power from Congress to courts, you shift

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[257] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (Max Farrand ed., rev. ed. 1966) (statement of James Madison of Virginia, July 17, 1787).

[258] Nourse, *Vertical*, *supra* note 226, at 758.

[259] *Id.*

[260] *Id.* at 759.

[261] *Id.*

power from a state and local constituency to no constituency; if you shift power from Congress to an agency, you shift power from a state and local constituency to a national constituency.

Now let us assume that we are worried about shifting "lawmaking" powers to the court when they are asked to fill gaps in statutory interpretation. That means we are worried about a shift from a political department (the Congress) to a non-political department (the federal courts), from a department that has a strong electoral connection to one with no overt electoral connection. Let us call this the "judicial aggrandizement risk"—that courts will simply decide using their own judicial views, without regard to the people.[262] Second, shifting power from the Congress to the court shifts power from a body representing states and localities (Congress) to one that is, if anything, a nationally oriented institution (the federal courts). Let us call this the "federalism risk." Finally, shifting powers from a supermajoritarian body to a body with no representation, imposes a risk that a court will impose a meaning of statutory losers rather than winners and, given the structure of the senate—a supermajority of the population (call this the "super-countermajoritarian" risk). Although I have stated these as risks, there is nothing fortuitous about them—these risks mirror the foundation built in Part I, a foundation grounded in the Constitution's provisions for representation and bicameralism.[263]

Return to *Holy Trinity* to see how this representational analysis might be applied.[264] The first risk is that the court will apply its own preferred meaning rather than Congress's meaning—a risk that the court will not be a faithful agent. Enter our earlier distinction between legalist and ordinary meaning. A court applying legalist meaning without even considering ordinary meaning would, in my opinion, risk violating the separation of powers. Legalist meaning raises the risk of judicial aggrandizement of power—preferring the courts' meaning (canons, common law) to the people's meaning (representatives' meaning). After all, not even academic textualists dispute the proposition that the legislature is the "superior" of the court and, that the court, under principles of legislative supremacy, must defer to its power. If this is right, then academic theorists must stop assuming that elite judicial meanings should apply and start considering that popular, prototypical meaning should be a starting presumption, and that this is not a matter of abstract choice, or semantics, but constitutional restraint. This not simply a theoretical point; it has consequences: an insistence on "ordinary meaning," in *Holy Trinity* would in my opinion support the Supreme Court's decision, based on the prototypical meanings of the day.

Judicial aggrandizement is not the only constitutional risk arising from gap-filling in statutory interpretation. Federalism is also a risk. Every time a federal court interprets a statute, it risks imposing a nationally appointed body's view on those of an institution far more directly connected to state and local entities (the Congress). The statute in *Holy Trinity* pitted large interstate enterprises, like railroads (who wanted to import labor in mass quantities), against small manufacturers and laboring men, groups far more likely to have local state-based ties. Courts should be more wary of the potential for this pro-nationalist bias. Federalism supports the

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

[263] As John Manning has written, even without the filibuster, bicameralism and presentment impose "an effective supermajority requirement for legislation" which gives "political minorities . . . extraordinary power to block legislation or . . . to insist upon compromise." John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L. J. 1663, 1701, 1718 (2004).

[264] *Church of the Holy Trinity*, 143 U.S. 457 (1892).

claims of those who argue that courts should defer to legislative meaning, including legislative history. This may help to explain why it is that deference to agency decisions has resulted in what should be decried by federalists as a pro-nationalist bias: as Bill Eskridge has shown, and this theory predicts, *Chevron* deference to agencies increases the degree to which national law will preempt state law.[265]

Finally, there is the risk of super-countermajoritarianism—that the court will impose the meaning not of the majority, but a small minority, even while it cloaks that meaning in the garb of "legislative intent." This is a particularly grave risk in cases where courts attempt to reconstruct deals or pick and choose from the legislative record "moderate" or "loser's" history (rather than using legislative history as a lexicon—as a source of ordinary or legalist usage).[266] To apply legalist meaning in *Holy Trinity* (all laborers) raises the risk of counter-majoritarianism. Why should the arguments of the railroad financiers opposing the bill count as "the" meaning of the legislation? Or why should we assume that Senator Tower's understanding of his amendment merits deference when he opposed the 1964 Civil Rights Act?[267] This differs from a simple risk of legalism because it disguises as a majority view that which contravenes the views of a potential superminority. Surely, courts in statutory interpretation cases, if they are to be faithful agents, are to be faithful agents of the majority, not a tiny but committed set of opponents to the bill![268]

One might argue that I have stressed issues of judicial deference without emphasizing ways in which the judiciary should in fact "check" the excesses of legislative power. Indeed, one way of thinking of academic textualism is that, to the extent it aims to discipline the legislature into writing clearer statutes, it asks the judiciary to "check" the legislature. As I have indicated above,

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[265] *See, e.g.*, Eskridge, *supra* note 32, at 1443–44.

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

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

[268] Professor Manning seems to suggest that supermajoritarianism and bicameralism argue for precisely the opposite result. *See* Manning, *Second-Generation, supra* note 7, at 1315 ("If the constitutionally or legislatively prescribed rules of procedure give minorities and preference outliers a disproportionate voice in the legislative process, the judge's job is to give effect to those procedures by enforcing a clear but awkwardly written text."). Under Manning's view, features like bicameralism and supermajoritarianism force compromise and courts should not undermine that incentive. John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1650–51 (2001). There are three problems with this view-from-structure: (1) courts don't create the incentive to compromise, it is demanded by the constitution *ex ante*; (2) given the strength of the internal incentive, no external force like a court ruling or rule of statutory interpretation is likely to change it (Senators don't sit around reading slip sheets; horizontal communication between the departments is weak and full of noise except in the most politically salient cases); (3) courts that sought to perfect this vision of structure in statutory interpretation, risk reconstructing the position of a legislator who *opposed the statute*. Surely the constitution does not require that courts interpret statutes *against the majority will*, or to exacerbate the already supermajoritarian character of the Congress. Game theory certainly does not support this, nor in my opinion does the Constitution. The only way to tell whether there was in fact a "deal" that can be reconstructed is to look at legislative history and then to remember that, as textualists rightly claim, it is unlikely to resolve the interpretive issue before the Court.

as a descriptive matter, I think this "disciplining" idea verges on the fanciful: as Adrian Vermeule has shown, courts do not have the institutional capacity to discipline themselves to send a consistent enough message to Congress to change its behavior.[269] More importantly, there are no votes in semantic precision, and thus no incentive for the representative to listen to the routine signals of courts, even if the occasional highly salient case may receive legislative attention.

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

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

We may now assess the three theories of statutory interpretation we have seen in Part II—textualism, purposivism, and game theory—from the perspective of the separation of powers. It turns out that the rule that almost all academic purists reject, but which prevails in most federal courts, is the one most likely to reduce constitutional risks. Put in other words, none of the pure academic theories can lay claim to reducing these risks as well as the academically-oxymoronic position linking ordinary meaning textualism with legislative history.

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

If one cares about judicial activism, and the separation of powers, one must care about judges deferring to the legislature. The reason we have a separation of powers is that no man, no judge, no President, no legislator, may be a "judge in his own cause."[270] As Professors Farnsworth, Guzior, and Mulani have shown, once interpreters are asked to take an "external" view, one which considers "ordinary" meaning (as opposed to legalist meaning), then they are

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[269] *See* VERMEULE, *supra* note 8.

[270] Nourse, *supra* note 7, at 470–71.

more likely to check their ideological biases at the door.[271] This does not mean that judges or scholars must rummage through the legislative history. The congressional record is not an appellate opinion. Reviewing the legislative record under this view would be an attempt to look for evidence of ordinary meaning. In *Holy Trinity*, reviewing the entire legislative record (not slicing and dicing it up into one-shot exchanges) offers clear and convincing evidence that manual labor was by far the most common meaning used to debate the statute.[272] This meaning cannot be used to trump the text, but here it supports the prototypical "ordinary" meaning of dictionaries of the day, not to mention the Supreme Court's actual result, without invoking either vague legislative spirits or claims of absurdity.

Ordinary meaning is, of course, only a starting point. As humans, legislators use language in both prototypical and legalist senses. In cases involving courts' own procedures, the risk of legalism may be minimal. Indeed, in such cases, one might even assume that Congress has delegated to the courts the authority to interpret the law consistent with the courts' own precedents. Examples here are evidentiary rules such as those at issue in *Bock Laundry*,[273] or the standard for *scienter* in securities actions. In fact, legalist meaning may be quite appropriate if it is clear that Congress has used prototypical meaning in ways that oppress. One would want, presumably, to identify the risk and then show why it was warranted to run. For example, a court might argue that the use of popular racial terms used in the debate on the Holy Trinity statute runs contrary to what the Constitution enjoins in other venues and, for that reason, a legalist meaning should prevail.

Game theory has important insights for those who adopt a version of this approach known as "imaginative reconstruction." Game theorists are right that loser's history cannot be "the" meaning of the statute. Imaginative reconstruction, however, cannot adopt game theory wholesale without significant modifications. First, it must, as its most sophisticated proponents acknowledge, include audience costs (or the vertical bargain), or it will construct an imaginary contract. More importantly, it cannot assume that there is a deal when there is not. If it does, it risks aggravating the difficulty it identifies (relying on loser's history, or constructing it out of thin air). Second, assuming, for example, that any particular word in a statute is the result of a deal ignores the best evidence (if any) of a deal—the legislative history. Even assuming that the legislative record is unclear, or repeats the ambiguity of the statute, consulting it first (at a minimum as a lexicon),[274] provides better information, and greater checking power for judicial activism, than blinding oneself to it.

To the extent purposivism is willing to look to legislative history, it like imaginative reconstruction, reduces some separation of powers risks but, in the end, may do no better than other theories at minimizing judicial activism and deferring to majoritarian will. Game theory at least has a concept of the difference between winners and losers, between deferring to a congressional majority as opposed to a minority. Purposivism aims to defer, but does not have the understanding or sophistication of imaginative reconstruction much less game theory. Like

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[271] Farnsworth et al., *supra* note 128.

[272] *See supra* section II.B.

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

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

academic textualists who occasionally try their hand at legislative history, purposivists slice and dice the legislative record as if it were a judicial opinion, which it most definitely is not. In this sense, academics' versions of purposivism can yield just as serious countermajoritarian risks as academic textualism: if loser's history is seen as having precisely the same weight as the record as a whole, purposivism can be as counter-majoritarian as a narrow, legalist textualism. To the extent that purposivism relies on losers' purposes, it raises the potential to increase federalism risks and to impose judicially activist meanings.

Of all the theories, however, it is legalist, academic textualism that poses the most serious separation of powers risks. Literalist, legalist, meanings, as Judge Posner has wisely insisted, can be as broad as handing over a sledgehammer for a sleep aid. Legalist textualism (imposing boundary, peripheral meanings) raises the greatest risk, relative to other approaches, because it refuses to check the judiciary's most likely biases toward legalist meaning—either with ordinary meaning or with legislative history. It refuses to look outside a judicial world to even try to defer to its constitutional superior, the legislature, for which it exudes a considerable amount of "eat your spinach" contempt (as textualists now admit). This in turn aggravates federalism risks by potentially supplanting state and local meaning with nationalist meanings, and anti-majoritarian risks, by potentially "deferring" to superminorities, not majorities. Only if academic textualists were to use legislative history to check the risks of judicial activism, before imposing judicially created meanings from canons or common law, would they properly respect the separation of powers. Of course, this would mean, to these academics, that they were no longer textualists, a purist proposition with which the judiciary, including the Supreme Court, has respectfully disagreed.

CONCLUSION

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

BOOK REVIEW

TOWARD A REPRESENTATIONAL THEORY OF THE EXECUTIVE

THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH

By Steven G. Calabresi* & Christopher S. Yoo.**
New Haven, Connecticut: Yale University Press, 2008.
Pp. xiii, 544. $60.00.

*Reviewed by Victoria F. Nourse*** & John P. Figura****

INTRODUCTION

In 1994, Northwestern University Professor Steven Calabresi defended the

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unitary executive theory from charges that it would lead to an imperial presidency.[1] Not so, wrote Calabresi; the power arising from the Article II Vesting Clause was not a regal power but merely executive power; after all, it excluded powers allocated to other branches.[2] The executive power was simply "the power to supervise and control all subordinate executive officials exercising executive power conferred explicitly by either the Constitution or a valid statute."[3] Then came the torture memos, Guantanamo Bay, and what one Harvard Law professor and former aide to President George W. Bush has called "the Terror Presidency."[4] Rightly or wrongly, the unitary executive theory has become publicly synonymous with executive overreach and assertions of absolute presidential power.

The Unitary Executive: Presidential Power from Washington to Bush is an attempt to remedy the harm done to the unitary theory's reputation.[5] As the authors explain:

> [T]he cost of the bad legal advice that [President George W. Bush] received [from John Yoo, author of the controversial torture memos,] is that Bush has discredited the theory of the unitary executive by associating it not with presidential authority to remove and direct subordinate executive officials but with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess.[6]

The book grows out of a project predating the George W. Bush era: a series of articles tracing a history of unitarian practice and belief by each president since George Washington.[7] Instead of using the unitary theory as the Bush

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[1] Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1392-93 (1994) (using the Vesting Clauses to defend the unitary executive).

[2] *Id.*

[3] Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1177 n.119 (1992).

[4] *See generally* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) (describing the author's experience as head of the Justice Department's Office of Legal Counsel during the Bush administration).

[5] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 429 (2008).

[6] *Id.*

[7] *See* Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005) ("[This article] examine[s] the presidencies during the fourth half-century of our constitutional history to see the views expressed by presidents from Harry Truman through George W. Bush regarding the scope of the president's power to execute the law."); Christopher S. Yoo et al., *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 7 (2004) ("[This article] examine[s] the views of the presidencies during the third half-century of our constitutional history, beginning with Benjamin Harrison and ending with Franklin Delano Roosevelt."); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 667-68 (2003) (examining the presidencies in the nation's second half-century, from Martin Van Buren's to Grover Cleveland's); Steven G. Calabresi

lawyers did – to justify a plenary foreign affairs power[8] – Calabresi and Yoo seek to reinvigorate what they now call the "classic"[9] or "Reagan era"[10] theory: president as implementer-in-chief, charged with "control[ling] the execution of the laws by subordinates"[11] through powers of supervision and removal.[12] The book invites readers to take a fresh look at the theory. Is *The Unitary Executive* a compelling explanation of presidential power? What is the relationship between the purportedly more moderate claims now asserted by Calabresi and Yoo and the more extreme claims of absolute power from which Republicans and Democrats alike now seek distance? In this Article, we aim to clarify the multiple meanings of the "unitary executive," and suggest that the authors' "classic" view provides neither clarification nor real moderation. To analyze the authors' claims, we use a representational theory of the separation of powers, which we believe is more consistent with the whole constitutional text and the Supreme Court's most recent statement on this issue.[13]

In Part I of this review, we consider, and reject, the authors' central claims: that American presidents have been consistently unitarian and that this alleged historical consensus could achieve constitutional significance through Justice Frankfurter's conception of inter-branch acquiescence.[14] In Part II, we argue that the authors' history depends upon a constitutional misreading. The text of the Constitution – the whole text – provides little support for an absolutist view of presidential power. Part III develops a theory of executive power grounded in the separation of powers. Our theory rejects standard liberal and conservative views and insists instead upon the central place of representation, consistent with the constitutional texts that create representation. A representational approach warns against a theory of executive power that fails to appreciate the structural incentives of those who run the branches – incentives that even the Founders understood would lead men to aggrandize

& Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1459 (1997) ("This Article will examine the development of the unitary executive over the course of the first fifty years of our constitutional history [from President George Washington through President Andrew Jackson,] focussing [sic] especially on the events surrounding President Andrew Jackson's removal of Treasury Secretary William J. Duane.").

[8] CALABRESI & YOO, *supra* note 5, at 18-21.

[9] *Id.* at 16.

[10] *Id.* at 428.

[11] *Id.* at 19.

[12] *Id.* at 419.

[13] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 08-861, slip op. at 16-17, 33, 561 U.S. __ (June 28, 2010) (explaining that separation of powers includes "a diffusion of accountability" and that the President must have the power to remove officials who help execute the laws in order to be fully accountable to the electorate).

[14] CALABRESI & YOO, *supra* note 5, at 28, 36, 431.

power.[15] Finally, in Part IV, we apply this analysis to Calabresi and Yoo's claim that the "classic" unitary executive theory's focus on the removal power – the President's ability to remove his subordinates – is a moderate thesis.[16] Lurking behind this claim is the often repeated, and we believe immoderate, theory that all independent agencies are unconstitutional.[17] We explain that, from a representational perspective, not all removal questions are alike. Calabresi and Yoo's unitary analysis is incapable of distinguishing between two very different kinds of removal: legislative removal vetoes and good faith removals. The former may cause potentially dramatic shifts in representation and are constitutionally suspect. The latter are not. Good faith removal clauses may operate as simple limits on the abuse of political power (firing persons for no reason at all). In the end, our argument – like much of the Court's reasoning in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[18] – seeks to move separation of powers analysis beyond functional essentialism toward a more effective representational view.

I. THE NEW HISTORY OF *THE UNITARY EXECUTIVE*

The Unitary Executive is a history, but a history written with the avowed aim of encouraging future presidents to assert aggressive claims of executive power.[19] In an unorthodox move, the authors put aside the textualist Vesting Clause thesis on which the unitary theory has long been premised,[20] instead adopting – at least for the purposes of this project – what they describe as the Burkean, common-law constitutional perspective implicit in antiunitarian

[15] *See* Victoria Nourse, *The Vertical Separation of Powers*, 49 Duke L.J. 749, 759-60 (1999) [hereinafter Nourse, *Vertical Separation*] (explaining that the Founders recognized the importance of personal incentives in structuring political power); V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 846-49 (2004) [hereinafter Nourse, *Constitutional Anatomy*] (discussing the Founders' concern with understanding and balancing governmental power and the incentives it creates).

[16] CALABRESI & YOO, *supra* note 5, at 20-21.

[17] *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 581-82 (1994).

[18] *Free Enter. Fund*, No. 08-861, slip. op. at 16-17, 20, 33, 561 U.S. __ (discussing the important role of the people in the structure of the United States government).

[19] CALABRESI & YOO, *supra* note 5, at 8 ("In developing our argument that presidents have always appreciated the vital importance of the removal power, we intend to set the stage for several legal claims that presidents may want to make in resisting congressional efforts to curtail either the removal power or the parallel presidential power to issue binding orders to executive branch subordinates.").

[20] *See id.* at 14-15 (stating that the unitary theory is grounded in the text of the Constitution); Calabresi & Rhodes, *supra* note 3, at 1165 (explaining the unitary theory's basis in the Vesting Clause of Article II); *see also* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) (coining the term "Vesting Clause Thesis").

scholarship.[21] From this stance, they craft a defensive claim, based on an idea posed by Justice Frankfurter in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence:[22]

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[23]

This idea merges with the authors' conception of departmentalism, under which a separation-of-powers question is not settled until there is a long-standing practice by one branch in the face of acquiescence by the other two branches.[24] To foreclose a unitary argument, therefore, one would have to show a pattern and practice of acquiescence: "Only if there has been presidential acquiescence in a departure from the unitary executive could such a practice justifiably be regarded as an established part of the structure of our government."[25]

The Unitary Executive moves methodically through each presidential administration in United States history. Each president receives a passing grade on the authors' unitarian scale.[26] To Calabresi & Yoo, the accumulated nonacquiescence of every presidential administration in history demonstrates that, "contrary to the misconceptions of many antiunitarians, *no* systematic, unbroken, longstanding practice exists of presidential acquiescence to congressionally imposed limitations on the president's sole power to execute the laws and remove subordinate officials."[27] Or, more broadly, "[t]his book shows that all of our nation's presidents have believed in the theory of the unitary executive."[28]

A. *A Not-Quite-Unitary History*

Unfortunately, Calabresi and Yoo claim far more from their history than the facts they collect show. At the core of the unitary theory is the idea that *all* executive power is vested in the President – that the President must have complete control over the executive branch and all power deemed

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[21] CALABRESI & YOO, *supra* note 5, at 15.

[22] 343 U.S. 579 (1952).

[23] *Id.* at 610-11 (Frankfurter, J., concurring).

[24] CALABRESI & YOO, *supra* note 5, at 417.

[25] *Id.* at 27.

[26] *E.g.*, *id.* at 399 ("Although there is always room for disagreement as to the substance of Clinton's policies, in retrospect his commitment to the unitariness of the executive branch cannot be gainsaid.").

[27] *Id.* at 28.

[28] *Id.* at 4.

"executive."[29] This idea forces the conclusion that more specific powers, such as the removal power, must also be vested in the President.[30] To fail to embrace this essentialist view, then, is to be nonunitarian.

Despite their claim that all presidents have been unitarian, Calabresi and Yoo do not attempt to show that all presidents have made such categorical claims. They conclude the book with a recap of assertions of executive power, arranged roughly in descending order of historical frequency:

> [E]very single president in American history has . . . insist[ed] on the president's constitutional power to remove and direct subordinates . . . . [P]residents have issued executive orders, proclamations, and signing statements that go back to the beginnings of our history. Many presidents . . . have defended departmentalism . . . . In addition, a large number of presidents have challenged the constitutionality of the legislative veto.[31]

As this passage shows, the authors claim unitariness on the basis of *partial* assertions of power – often the removal power.[32] Presidents will of course defend their powers, but nothing indicates that these presidents entertained the modern unitarian claim that the President must have *all* powers that a unitarian would consider "executive." Nonetheless, the authors issue sweeping conclusions for each president. We read that "Washington emerged as . . . a strong advocate of executive unitariness;"[33] that "[b]y the time Jefferson had completed his two terms in office, he was as enthusiastic and committed an advocate of the unitary executive as has ever walked the earth;"[34] that "[i]t is difficult to imagine how someone could outdo Madison in consistently and vigorously defending the unitary executive;"[35] and so on.

Although the authors claim to be talking about the seemingly arcane and mild removal power, they recount facts moving far beyond it. We read that Washington commandeered state militias to quell rebellions,[36] Adams "us[ed] military force for law enforcement purposes,"[37] Jefferson purchased Louisiana,[38] Monroe issued a major foreign policy proclamation,[39] Jackson thwarted the Bank of the United States,[40] McKinley sent the military to stop a

[29] *Id.* at 3-4.

[30] *See id.*

[31] *Id.* at 418.

[32] *E.g.*, *id.* at 157 ("Buchanan's support for the unitary executive was made manifest in his widespread use of the removal power . . . .").

[33] *Id.* at 57.

[34] *Id.* at 76.

[35] *Id.* at 82.

[36] *Id.* at 48.

[37] *Id.* at 61.

[38] *Id.* at 75.

[39] *Id.* at 84.

[40] *Id.* at 104-05.

strike and to prosecute the Spanish-American war,[41] Teddy Roosevelt ordered investigations into government scandals,[42] and so on. These assertions of power extend far beyond the proposed "moderation" of the "classic" unitary executive.[43]

If *The Unitary Executive* does not depict a unitary history, neither does it demonstrate a consistent protection of the President's power to remove his subordinates – the power at the core of the "classic" unitary theory and the one power that Calabresi and Yoo claim "every single president in American history" has "insist[ed]" upon.[44] If the authors could argue that presidents have claimed the absolute power to remove inferior officials in the face of Supreme Court decisions rejecting that position, such as *Humphrey's Executor v. United States*,[45] their case would be stronger and limited, as it should be, to the removal power. But many of the presidents in their survey embraced the power to remove in vague terms or exercised only the uncontroversial, well-settled power to remove cabinet-level officials.[46] Even more disturbing for their removal thesis, some presidents made no objection to the creation of independent agencies, which in theory insulate presidents from absolute removal power.[47]

Despite the authors' conclusion that "every" president supported the unitary executive, the book confesses counterexamples. Lincoln tolerated numerous incursions into his authority,[48] but the authors claim that these actions merely demonstrate a massively powerful president tolerating incursions for the sake

[41] *Id.* at 235-37.

[42] *Id.* at 241.

[43] *See id.* at 20-21, 428 (describing the classic unitary executive theory as granting "modest presidential powers").

[44] *Id.* at 418; *see also id.* at 4 ("Big fights about whether the Constitution grants the president the removal power have erupted frequently, but each time the president in power has claimed that the Constitution gives the president power to remove and direct subordinates in the executive branch. And each time the president has prevailed, and Congress has backed down."); *id.* at 6 (describing the removal power as a "fault line between the tectonic plates represented by the presidency and Congress").

[45] 295 U.S. 602, 629-32 (1935) (concluding that the President's power to remove without cause is limited to officers who perform only executive functions and that removal of officers with duties related to the legislative or judicial powers requires good cause).

[46] *See, e.g.*, CALABRESI & YOO, *supra* note 5, at 42 (stating that there are no records of President Washington's exercise of the removal power with regard to inferior officials).

[47] *See id.* at 217 (observing that between 1889 and 1945 "two institutions generally assumed to be inconsistent with the unitary executive – independent agencies and civil service protections for federal employees – became more widespread").

[48] *Id.* at 163, 172 (recounting Lincoln's silence even as legislation limited his power to remove certain officers, Congress gave courts authority to appoint interim federal prosecutors, and the Joint Committee on the Conduct of the War interfered in battle plans and the retention of generals).

of maintaining congressional support for his military policies.[49] The authors acknowledge an even less explicable counterexample in President Harding, whom they accuse of a "narrow conception of presidential power,"[50] a failure to object to limits on his power of removal,[51] and a refusal "to defend the unitariness of the executive branch."[52] Do not these counterexamples undermine the claim that *all* of our presidents have been unitarian? The authors' nonacquiescence framework depends on an unbroken pattern, not a pattern that is broken only for good cause.

Calabresi and Yoo anticipate the objection that they are engaged in the practice of "'law office history.'"[53] The authors reply by stating that their task is "huge and perhaps impossible" and that, at any rate, their work far surpasses the depth of any other treatment of the removal power.[54] In the authors' defense, they have provided the most complete history of the removal power available. Their book provides an impressive compendium of otherwise scattered and minor bits of history, invaluable to students of the removal power. This achievement is marred, however, by the authors' insistence on a brittle, anachronistic conclusion in defiance of the contents of their own book – that every president accepted a position as modern as "the unitary executive."

B. *Felix Frankfurter and the Acquiescence Problem*

Calabresi and Yoo's historical argument has deeper problems than anachronism. The argument rests upon a legal premise that is decidedly weak: the Frankfurter "gloss" framework on which it is built. None of the pre-*Youngstown* cases the authors cite[55] supports their novel reading of Frankfurter's thesis. In *United States v. Midwest Oil Company*,[56] the Court stated that congressional acquiescence evidenced a presumption of constitutionality, but it cautioned against the idea "that the Executive can by his course of action create a power."[57] The Court in *Myers v. United States*[58]

[49] *Id.* at 172-73; *see also id.* at 163-64 (dismissing Reconstruction-era incursions during Andrew Johnson's administration as the momentary lapses of a troubled era).

[50] *Id.* at 261.

[51] *Id.* at 262-63 (stating that Harding did not object to removal restrictions related to the comptroller general and a commission established to investigate coal strikes).

[52] *Id.* at 264.

[53] *Id.* at 17-18 (citing Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119).

[54] *Id.* at 18.

[55] *See id.* at 15 (citing pre-*Youngstown* decisions, including *The Pocket Veto Case*, *Myers v. United States*, *United States v. Midwest Oil Co.*, and *Stuart v. Laird*, that considered inter-branch practice in resolving separation-of-powers disputes).

[56] 236 U.S. 459 (1915).

[57] *Id.* at 474.

[58] 272 U.S. 52 (1926).

discussed acquiescence, but only to reject the narrower position that Congress could not unilaterally reverse a construction of the Constitution that it had established and to which the other branches had long acquiesced.[59]

In *The Pocket Veto Case*,[60] the Court observed that its reading of Article I, Section 7, which resulted in upholding the pocket veto, was "confirmed by the practical construction that has been given to it by the presidents through a long course of years, in which Congress has acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character."[61] But this language does not support Calabresi and Yoo's "gloss" framework. The Court used the word "confirmed," signaling that it looked to practical construction as supportive authority only, to corroborate other forms of constitutional argument. Furthermore, the Court spoke not of all constitutional provisions but of "constitutional provisions of this character." The context indicates that "this character" refers to procedural rules, not grand grants of substantive power.

The most explicit support for the "gloss" theory may come from *Stuart v. Laird*,[62] where the Court, discussing the practice of having Supreme Court justices sit on Circuit Courts of Appeals, stated "that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system . . . has indeed fixed the construction."[63] But it is hard to believe that fourteen years – the time between the passage of the Judiciary Act of 1789[64] and the decision of *Stuart* – could suffice to develop the sort of long-pursued, unbroken executive practice about which Frankfurter was talking. *Stuart* is probably best thought of not as laying the foundations of a major separation-of-powers doctrine but as expressing an early Court's adherence to established judicial practice.

Nor has the Court embraced the "gloss" idea even in cases after *Youngstown*. In *Walz v. Tax Commission of New York*,[65] it rebuked a similar idea in the First Amendment context, stating: "[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[66] In *INS v. Chadha*, the Court indicated that the continuing objections of presidents to legislative veto provisions foreclosed the assertion

[59] *Id.* at 174-76 (invalidating the Tenure of Office Act of 1867, through which Congress had tried to circumvent the longstanding practice of unfettered presidential removal of executive officers appointed by the President and confirmed by the Senate).

[60] 279 U.S. 655 (1929).

[61] *Id.* at 688-89.

[62] 5 U.S. (1 Cranch) 299 (1803).

[63] *Id.* at 309.

[64] Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing the federal court system).

[65] 397 U.S. 664 (1970).

[66] *Id.* at 678.

that the executive branch had acquiesced to that practice.[67] The Court did not, however, suggest that acquiescence would have rendered the practice constitutional. Instead, it appears to have rejected that idea by stating that "[t]he assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review."[68]

In *Dames & Moore v. Regan*,[69] the Court quoted Frankfurter's "gloss" language[70] to support the proposition that, at least in the province of foreign affairs, Congress might authorize executive action implicitly.[71] Even such implicit authorization, the Court observed, was sufficient to enable a president to act at the peak of his powers, in Justice Robert Jackson's well-received formulation.[72] There is a great difference, however, between treating acquiescence to a specific policy as a tacit (and presumably revocable) authorization and treating it as a permanent cession of power, as Calabresi and Yoo suggest. Justice Clarence Thomas, dissenting in both *Hamdi v. Rumsfeld*[73] and *Hamdan v. Rumsfeld*,[74] relied on *Dames & Moore* to endorse the notion of tacit congressional consent in national security and foreign affairs,[75] but he, like the rest of the Court, made no reference to Frankfurter's

[67] INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[68] *Id.*

[69] 453 U.S. 654 (1981).

[70] *Id.* at 686 ("As Justice Frankfurter pointed out . . . , 'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President . . . .'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring))).

[71] *Id.* at 680, 686, 688; *see also* Behring Int'l, Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 664 (3d Cir. 1983) (citing *Dames & Moore*, 453 U.S. at 684-86); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 151 (2002) (stating that the *Dames & Moore* Court "rested the President's authority on grounds of congressional approval rather than implied constitutional authority"). *But see id.* at 144 (arguing that the *Dames & Moore* Court "misused" Frankfurter's language).

[72] *See Dames & Moore*, 453 U.S. at 668 ("When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions. . . .'" (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

[73] 542 U.S. 507 (2004).

[74] 548 U.S. 557 (2006).

[75] *Id.* at 679-80 (Thomas, J., dissenting) (stating that in foreign policy and national security, "the fact that Congress has provided the President with broad authorities does not imply – and the Judicial Branch should not infer – that Congress intended to deprive him of particular powers not specifically enumerated" (citing *Dames & Moore*, 453 U.S. at 678)); *Hamdi*, 542 U.S. at 583-84 (Thomas, J., dissenting) (contending that when Congress enumerates presidential powers, it does not foreclose the President from having other

"gloss" language.

Finally, the cases most probative of the authors' position share a crucial weakness: their holdings and dicta concern *congressional* acquiescence to *executive* action, while the authors are concerned with the reverse scenario. After explaining their reading of Frankfurter's "gloss" language, which discussed congressional acquiescence, the authors assert that "it logically follows that a converse standard should apply in evaluating presidential acquiescence to congressional assertions of power."[76] This is more than a logical leap; it is by no means self-evident that what may be true of the functioning of one branch must be true of the others as well.

Nor can the authors point to any critical consensus on how to use Frankfurter's "gloss" language.[77] Some commentators have used the language to support the notion that practice and acquiescence can change the meaning of the Constitution, but they have not adapted it into a specific test, nor suggested it could trump constitutional text or structure.[78] Others cite the language to support the milder claim that practice and acquiescence are entitled to persuasive authority,[79] consistent with *Myers* and *The Pocket Veto Case*.[80]

Even if it were true that acquiescence could alter the meaning of the Constitution – a rather dubious proposition in our view – it is by no means clear that this idea would work in the context in which the authors apply it. In *Youngstown*, Frankfurter indicated that a systematic, unbroken pattern of legislative acquiescence to the executive would result in a constitutional exercise of executive power.[81] Frankfurter did not indicate, however, that it would result in a corresponding contraction in congressional power. The power in question in *Youngstown* was the power to authorize the "executive seizure of production, transportation, communications, or storage facilities" – a power that indisputably belonged to Congress.[82] Had Truman succeeded in

national security or foreign affairs powers (citing *Dames & Moore*, 453 U.S. at 678)).

[76] CALABRESI & YOO, *supra* note 5, at 25.

[77] Calabresi and Yoo point to no secondary commentary to support their reading of Frankfurter. *Id.* at 15.

[78] Mark D. Rosen, *Revisiting* Youngstown*: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1718 n.48 (2007); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 389-90, 392 (2006).

[79] Bernard W. Bell, Marbury v. Madison *and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 249 n.343 (2003) (citing *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring)) ("[T]he Court does give weight to traditional practice in addressing constitutional challenges."); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 243 (1997); Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1266 (2003).

[80] *See supra* text accompanying notes 58-61.

[81] *Youngstown*, 343 U.S. at 610–611 (Frankfurter, J., concurring).

[82] *Id.* at 598.

adding that power to his portfolio through a Frankfurterian "gloss," he would presumably not have diminished the power of Congress to issue similar authorizations in the future; rather, Congress and the President would have shared the power.

If we are right that Frankfurter's "gloss" language contemplates a power-sharing arrangement, then it follows that Congress and the executive would be unequal partners, with Congress retaining the power to pass legislation to override the President's exercise of congressional authority. If this is the case, then at most, a branch could *lend* power through acquiescence but not *grant* it. In this arrangement, a borrowing branch's exercise of the borrowed power would be constitutional only while the lending branch acquiesces; once the lending branch calls the loan, however, the borrowing branch would be obligated to comply, and any exercise of the borrowed power thereafter would be unconstitutional. This reading brings Frankfurter's language closer to the *Dames & Moore* Court's interpretation,[83] and it neutralizes the harsh effect Frankfurter's view might otherwise have; on this reading, practice and acquiescence do not permanently alter the distribution of power but rather enable consensual, practical cooperation among branches.

But this is not how the authors use the "gloss" language. Calabresi and Yoo's view involves a branch's power to regulate another branch, not merely the power to act on a third party (in *Youngstown*, the steel mills seized by President Truman's order).[84] More damaging, the authors' view allows for no override – no opportunity for a president to recall a power borrowed by Congress and undo the effect of a statute that impairs his constitutional powers. In this framework, then, executive acquiescence would have the effect of permanently stripping a power from a branch of government, without regard even to the text of the Constitution or a well-established practice at the Founding. It is our view that if the separation of powers means anything at all, it cannot possibly mean that.

Calabresi and Yoo's reading of Frankfurter, then, is highly strained, to put it in the kindest of terms. What, then, is the impact of their much touted – but disputable[85] – pattern of presidential nonacquiescence? If we are right,

[83] *See supra* notes 69-71 and accompanying text (asserting that the *Dames & Moore* Court used Frankfurter's language as support for implicit congressional authorization of executive action in foreign affairs). On this reading, Frankfurter's view is more conservative than that of the *Dames & Moore* decision, for it suggests that the branches could develop such an overlap only over time, through practice and acquiescence. *Dames & Moore*, by contrast, stands for the proposition that the Constitution allows a president to act under tacit congressional authorization – at least in foreign affairs – even without such a long-standing practice. *See* Dames & Moore v. Regan, 453 U.S. 654, 680, 686 (1981).

[84] *See Youngstown*, 343 U.S. at 582 ("We are asked to decide whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills.").

[85] *See supra* Part I.A.

whatever power a president has, he or she cannot permanently waive it by acquiescing to Congress. So when Calabresi and Yoo urge future presidents to resist attempts by Congress to regulate their executive power,[86] they may provide wise political advice; once a branch becomes accustomed to exercising its power over another, it is likely to continue doing so. But in binding constitutional terms, such a habit may mean very little.

II. HISTORY AND THE TEXTUAL ARGUMENT AGAINST THE UNITARY EXECUTIVE THEORY

As discussed above, Calabresi and Yoo do not actually embrace the nonacquiescence theory forming the framework of their book. They are textualists, not "Burkean common law constitutionalists,"[87] and they believe that the text alone provides the unitary theory all the support it needs.[88] As ambitious as their eleven-year-long *Unitary Executive* project may be, it is an argument in the alternative, offered to justify the unitary theory on something besides textual grounds. We turn now to the Vesting Clauses, not to rehash old debates,[89] but to show that Calabresi and Yoo's seemingly moderate and "classic" unitary theory, which is based on the removal power, relies upon the same erroneous textual approach used by a much more aggressive, no-holds-barred approach to presidential power. In the end, there simply is no way to use history to disentangle the two theories if they depend upon the same fundamental error.

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[86] CALABRESI & YOO, *supra* note 5, at 9.

[87] *Id.* at 15. In this respect they differ sharply from Frankfurter, who was no textualist. Philip Bobbitt, Youngstown: *Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3, 12 (2002) (characterizing Frankfurter's *Youngstown* concurrence as "an attack on the textualism of [Justice Black's] majority opinion").

[88] *See* CALABRESI & YOO, *supra* note 5, at 419 ("In the absence of a consistent practice in which all three branches have acquiesced, the constitutional issue must be resolved on its textualist and narrative merits."); *see generally* Calabresi, *supra* note 1.

[89] We see the Vesting Clause thesis that forms the basis of the unitary theory not as a close reading of the text's plain meaning but as a collection of creative extrapolations that fundamentally misunderstand the nature of power under the Constitution. *See generally infra* Part IV (exploring presidential power in the context of a representational constitution). Others have made a variety of arguments about the Vesting Clauses that we do not repeat here. *See, e.g.*, Bradley & Flaherty, *supra* note 20, at 554-55 (providing alternative explanations for the absence of the "herein granted" phrase in the Article II Vesting Clause); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1362-63 (1994) (proposing that contrasting the Constitution with the Articles of Confederation will best reveal the meaning of the Vesting Clauses); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 48 (1994) (rejecting the Vesting Clause thesis as rendering much of Article II superfluous); *id.* at 48 n.195 ("[T]he Vesting Clause does nothing more than show who (*a* President) is to exercise the executive power, and not *what* that power is.").

A. *The "Classic" Unitary Theory: A Wolf in Sheep's Clothing, Revisited*

The textualist argument for the unitary executive turns on small differences in language between the Vesting Clauses of the Constitution.[90] In a noteworthy 1992 article, Calabresi, writing with Kevin Rhodes, argued that the Article II Vesting Clause grants the President all executive power because, unlike the Vesting Clause of Article I, it does not restrict the President's power to those powers "herein granted."[91] Article II, by providing that all powers "shall" be vested in a single individual, created "full presidential control over *all* exercises of executive power."[92] As for the rest of Article II, Calabresi explained in a later article that it served not to enumerate powers but merely as an "exemplary list," as indicated by the absence of "herein granted," a term present in the Vesting Clause of Article I.[93] Here is a theory of the world's most powerful Constitution and we are being told that it all depends on two seemingly minor words, "herein granted."

The "Vesting Clause" approach to the separation of powers has never been accepted by the Supreme Court. Rather, it finds support in one of the Supreme Court's most powerful dissenting opinions. Twenty years ago, in *Morrison v. Olson*,[94] the independent counsel case,[95] Justice Scalia wrote a dissent that stands today as a hallmark of unitary thought.[96] In it, he claimed that the

[90] *See* U.S. CONST. art. I, § 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .") (emphasis added); *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[91] *See* Calabresi & Rhodes, *supra* note 3, at 1196.

[92] *Id.* at 1188. Calabresi and Rhodes saw the Article III Vesting Clause as similarly creating the judicial power, but not creating plenary power, since it is followed by the restriction that the judicial power "extends to" an enumerated set of cases and controversies. *Id.* at 1196.

[93] Calabresi, *supra* note 1, at 1393-94, 1397. Calabresi and Yoo support their textualist argument with extratextual evidence of the Framers' intent – namely, their frustration with despotic legislatures and weak executives and their preference for a single executive over an executive committee. CALABRESI & YOO, *supra* note 5, at 30-35. That the authors overstate these sentiments is evident from their assertion that the Founders were engaged in a "Thermidorian" reaction – as if they, like their French counterparts, were exhausted with their experiment in democracy and ready to return to autocratic rule. *Id.* at 30. In our view, the Founders' decision to opt for more executive power cannot be read as a resistance to checks on executive power in general.

[94] 487 U.S. 654 (1988).

[95] *Id.* at 659-60 ("This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. . . . We hold today that these provisions of the Act do not . . . impermissibly interfere with the President's authority under Article II in violation of the constitutional principle of separation of powers.").

[96] CALABRESI & YOO, *supra* note 5, at 411-12.

independent counsel law was a wolf in sheep's clothing.[97] Professor Nourse has written elsewhere that Justice Scalia was right that the independent counsel law was unconstitutional.[98] The majority was correct, however, in rejecting a definitional theory of the unitary executive.[99] As events have shown quite clearly, the true "wolf in sheep's clothing" was not the independent counsel law, which died an easy congressional death. The real wolf was a theory of the unitary executive disconnected from a theory of the separation of powers, a theory used to justify what even the authors believe were unconstitutional assertions of executive power.[100]

Calabresi and Yoo argue that the unitary theory in no way "compels" an absolutist model;[101] the theory does not define executive power, but asserts only that whatever is an executive power must be under presidential control.[102] But this is precisely the problem. Even Supreme Court justices find it difficult to define "executive" power.[103] Absent a strong, general limiting principle to counter power creep, there appears little reason why Calabresi and Yoo's textualist theory does not provide the opportunity for presidents to aggrandize

[97] *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting) ("Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.").

[98] Nourse, *Vertical Separation*, *supra* note 15, at 772, 774. The independent counsel law was unconstitutional based on a realistic analysis of the risks it presented to impeachment of a sitting president at the instigation of a completely unaccountable agent. Nourse, *Constitutional Anatomy*, *supra* note 15, at 895. Kenneth Starr's investigation of President Clinton showed this to be possible. Nourse, *Vertical Separation*, *supra* note 15, at 772.

[99] *But see Morrison*, 487 U.S. at 698-99, 709-710 (Scalia, J., dissenting) (describing the strength and exclusive power of the President).

[100] *See, e.g.*, CALABRESI & YOO, *supra* note 5, at 18-19, 429 ("[T]he administration of George W. Bush has explicitly invoked the theory of the unitary executive as the basis for asserting sweeping implied, inherent emergency powers in waging the War on Terrorism."); GOLDSMITH, *supra* note 4, at 97-98 (recounting that John Yoo's legal advice to the Bush administration included constitutional support for a president vested with broad military powers unrestrained by Congress).

[101] CALABRESI & YOO, *supra* note 5, at 430.

[102] *Id.* at 429-30.

[103] *Compare* Bowsher v. Synar, 478 U.S. 714, 751 (1986) (Stevens, J., concurring) ("Under the District Court's analysis, and the analysis adopted by the majority today, it would therefore appear that the function at issue is 'executive' if performed by the Comptroller General but 'legislative' if performed by the Congress."), *and* INS v. Chadha, 462 U.S. 919, 952 (1983) (describing the legislative veto as a legislative action affecting executive action), *with id.* at 960 (Powell, J., concurring) (describing implementation of the veto as adjudicative action), *and id.* at 1001 (White, J., dissenting) (describing the veto as a legislative exercise countermanding legislative action by an executive agency).

their power by simple assertion that an exercise of power is "executive."[104] The authors provide no distinguishing principle; they criticize the George W. Bush presidency for taking an "unduly vigorous view of presidential power" and for transgressing "the logical boundaries of the unitary executive,"[105] but they do not state where the limits of due vigor and logic lie.

The authors' failure to meaningfully distinguish their seemingly moderate conception of the unitary theory from a more aggressive idea puts in perspective the move that Calabresi and Yoo have made to historical argument. For a pair of textualists to write a 400-plus-page book based on a nontextualist argument that they do not embrace is, to be sure, an unconventional choice. The value of their history, though, is that it promises to differentiate their view from a more aggressive position – something that their textualist argument cannot do. Despite its many weaknesses, their historical account demonstrates a general – if inconsistent – tradition of presidential protection of the removal and supervisory powers, and, as the authors observe, only occasional assertion of the expansive military powers claimed by Presidents Lincoln, Truman, and George W. Bush.[106] If that historical difference could be put into a coherent legal framework, the "classic" unitarians could perhaps be vindicated. But because their textual argument fails, so too must their attempt at redeeming an undefined and essentialist unitary theory.

The problem lies in the very concept of a "unitary executive," which is a modern term the authors have injected into the past. The concept posits by rhetorical flourish a *functional* (emphasis on executive) and *exclusive* (emphasis on unitary) set of powers dubbed "executive." To support that concept, the authors have sliced and diced the text, particularly the Vesting Clauses, severing them from the rest of the Constitution. This brittle textualism creates grave risks. Detaching constitutional texts from the document as a whole – cutting the Constitution into tiny linguistic pieces – is not a proper way of reading a constitution, a document that was negotiated, and was meant to be read, as a whole and whose structural parts are strongly interrelated.[107]

Think of any great work of text – *Moby-Dick* or the *Gettysburg Address* or the Bible. Now consider whether we gain any real understanding of these great texts by picking and choosing friendly phrases from chapter one or ten or the first line on page 320. Detaching individual adjectives (the *executive* power) or even articles (*the* executive power) from related texts and larger

[104] At least one later Bush lawyer has observed the weaknesses of the aggressive, John Yoo-era version of the unitary theory. *See generally* GOLDSMITH, *supra* note 4 (asserting, as former head of the Office of Legal Counsel, that Bush's quest to increase presidential power actually decreased the power of future presidents and created an atmosphere of distrust).

[105] CALABRESI & YOO, *supra* note 5, at 412.

[106] *Id.* at 20.

[107] *See generally* Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447 (1996).

structures tends to empty them of meaning.[108] Once emptied of meaning, of course, such fragments are prone to be invested with someone's preferred meaning. To quote Justice Scalia in an entirely different context, "your best shot at figuring out" meaning in such a situation "is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean."[109] The executive power becomes any activity that one thinks ought to fit within the term executive; the exclusivity of that power is then achieved by adding the word "unitary," implying that no other branch shares in the power, even though we know that the document requires power-sharing in a significant number of instances (just think of the confirmation of Supreme Court justices).[110]

B. *What the Constitution Constitutes*

The problem is deeper than interpretive methodology: a definitional approach seriously misunderstands the structure and nature of constitutional power. As Justice Holmes once put it:

> [W]hen we are dealing with *words* that also are a constituent *act*, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[111]

Holmes understood the indisputable (although often ignored) fact that the Constitution *constitutes* – it quite literally constructs a representative democracy. Its words are not mere descriptions or commands; they are, as Holmes put it, constituent *acts*.[112] As Austin, the philosopher of language, would explain, its words are performative.[113] By performative, we mean the following: When two people get married, the partners say "I do."[114] The words

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[108] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79-80, 92-93 (2006).

[109] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17-18 (Amy Gutmann ed., 1997).

[110] *See* U.S. CONST. art. II, § 2, cl. 2 (providing for Senate consent to the presidential appointment of "Judges of the supreme Court").

[111] Missouri v. Holland, 252 U.S. 416, 433 (1920) (emphasis added).

[112] *See id.*

[113] J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4-7 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (calling a sentence performative when the sentence is itself an action, rather than merely a description or statement about an action).

[114] *See id.* at 5.

seal the pact; they accomplish it. No one believes that one can reduce a marriage to those words; nor should we believe that we can reduce our constitutional life to the words "executive," "legislative," or "judicial" – much less "herein granted." The most important way the Constitution acts is by organizing the people into states and a nation, so that they may govern themselves. Every time a citizen votes, every time her representative writes a letter to her, every time the Congress meets, the Constitution performs, and its principal performers are the people and their representatives.

If we want to understand the structure of the Constitution or the power of the branches, the most important words in the Constitution are not those in the Vesting Clauses or even the words "executive," "legislative," or "judicial"; they are the words that create government by consent of the governed – that create representation and voting. Indeed, most of Articles I and II are devoted to creating relationships of governed to governing. Article I authorizes people to vote for a House of Representatives and a Senate in lengthy provisions specifying who shall vote for whom.[115] Article II authorizes the people to vote for a president, through the Electoral College, again specified in rather lengthy detail.[116] Those elected in this way in turn must agree to appoint executive officers and Supreme Court Justices.[117] These are central constitutional *doings* that in fact *constitute* our government.

One can appreciate the importance of the Constitution's representational provisions relative to the Vesting Clauses by conducting an intellectual experiment. Strike the first sentences of the Vesting Clauses, eliminating any reference to "executive" or "legislative" or "judicial" powers. Will the government be without power? Will the President stop issuing executive orders? Will Congress stop making laws? Will the judiciary shut its doors? No. People will still vote, Congress will still convene, the Supreme Court will still issue opinions, and the President will still direct his administration. Now strike the clauses in Article I providing for representation and voting; strike the same clauses in Article II, including those that provide for the appointment of Supreme Court Justices. Now we have no government. It is the representational and appointment provisions, not the Vesting Clauses, that are the most important in our Constitution. Call this the "representative constitution."

If the Vesting Clauses are as central as Calabresi and Yoo believe, how is it that they can be gutted and almost nothing happens to our government?[118] The Constitution belies labeling consistency or functional "unitariness" – for any of

[115] *See* U.S. CONST. art. I, §§ 2-3, *amended by* U.S. CONST. amend. XVII.

[116] *See* U.S. CONST. art. II, § 1, cls. 2-3, *amended by* U.S. CONST. amend. XII.

[117] *See* U.S. CONST. art. II, § 2, cl. 2.

[118] Thus our claim is more than an argument about executive power "essentialism." *See* Bradley & Flaherty, *supra* note 20, at 572 (arguing that executive-power essentialism "errs . . . in its presumption that America's constitutional practitioners mechanically applied European political and legal theory").

the departments, not just the Executive. As a textual matter, there is no unified concept of "the" executive power in the Constitution. The President's veto power exists, for example, in Article I, not Article II.[119] If "all executive power" were to reside in Article II because of its Vesting Clause, then why is the veto power in Article I? If all "the executive power" resides in Article II because of the Vesting Clause, why is it that Article II then "shares" the power to appoint with the Senate?[120] The same goes for the other departments. Why is it that the power of the Chief Justice to preside over a presidential impeachment appears in Article I and not Article III, with the other "judicial" powers?[121]

As these examples make clear, there is a strong *textual* case for concluding that there are no unitary – that is, exclusive – functional divisions decreed by the constitutional text. And, if this is right, it not only affects the Vesting-Clause textualism that the authors prefer, it also affects their history. If the Constitution itself does not provide for a unitary functional definition of the departments, why would one suppose that constitutional practice could yield such a unitary definition? This is history as self-fulfilling prophecy; only if one assumes at the start that there is something like a "unitary executive" is one likely to find a unitary executive over time. The authors' finding that presidents have exerted tremendous amounts of power is hardly surprising. As they themselves recognize, "[o]ne important ground on which our book might be criticized is that it is entirely predictable that all forty-three presidents would favor a broad understanding of presidential power."[122] But this presidential preference for broad understandings of presidential power does not result from the definition of the term "executive" or a "unitary executive theory." Rather, it comes from the structure of the Constitution, which creates a real competition for electoral power and representational allegiance, as we will see; in this competitive environment, all the departments seek to maximize their powers relative to the others.

III. THE REPRESENTATIONAL SEPARATION OF POWERS

Traditionally, commentators have taken two theoretical approaches toward the separation of powers: formalism and functionalism. Functionalism has been considered a liberal version of the separation of powers on the theory that it presumes that Congress may alter the balance of power as long as it does not offend major textual provisions. Formalism has been considered a conservative version of the separation of powers on the theory that it militates against shifting power arrangements.[123] The Supreme Court, for example, has

[119] *See* U.S. CONST. art. I, § 7, cl. 2.

[120] *See* U.S. CONST. art. II, § 2, cl. 2.

[121] *See* U.S. CONST. art. I, § 3, cl. 6.

[122] CALABRESI & YOO, *supra* note 5, at 22.

[123] For a succinct and careful description of formalism and functionalism, see Kathleen

never settled on an approach; as scholars have noted for at least two decades, neither approach is particularly helpful at predicting outcomes in separation of powers cases or real dangers of structural change.[124] Indeed, at a conceptual level, these approaches differ little other than in their starting presumptions – in favor of or against structural change.[125]

The Constitution creates as much as it describes power. There is the power granted by the people, organized in a nation and states (we call this "representational power"), and there is the power described in the Constitution to perform various acts such as waging war or enacting laws or deciding cases or controversies (we call this "legal" or "juridical" power). The representational powers provide the incentive for the departments to act. If the people want to retaliate against Al Qaeda, then the President has an electoral incentive to attack Al Qaeda. The legal powers act as judicial "limits" on how the President exercises that power. President Reagan may have wanted a line item veto, and he may have had a national constituency clamoring for such a veto, but the Constitution's legal powers are in fact juridical limits on that power enforceable both by courts and other branches.[126]

If, as the constitutional text makes quite clear, the branches are created by various political relationships – by voting, by representation, by appointment – then we must pay attention to those relationships in considering power shifts. In one sense, this is obvious: moving the war power to the unelected members of the Supreme Court would significantly weaken the people's power to decide whether to go to war. Changing constituencies can literally change governmental form. Consider what might have happened if, at the Founding, the Constitution allowed the House of Representatives to elect the Senate. If this proposal had become our constitutional law, Senators would be dependent

M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 92-95 (1995) (comment). On the relationship between formalism and functionalism, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1530 (1991); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 488–94 (1987).

[124] *See, e.g.*, Brown, *supra* note 123, at 1531.

[125] *See* Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 596 (1992); *see also* Sullivan, *supra* note 123, at 92-93.

[126] President Reagan supported a presidential line item veto, but such legislation was not passed. *See* George F. Will, *Line-Item Foolishness*, WASH. POST, Oct. 21, 2007, at B7. In 1998, the Supreme Court ruled that a line item veto law enacted during the Clinton administration violated the Presentment Clause of the Constitution. Clinton v. City of New York, 524 U.S. 417, 420-21, 448-49 (1998). The Constitution also places juridical limits on the other branches. *See* Bowsher v. Synar, 478 U.S. 714, 734 (1986) ("By placing the responsibility for execution of the Balanced Budget and Emergency Deficit Control Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function. The Constitution does not permit such intrusion.").

not upon their state constituents (or state legislatures as they were then) but upon House members. From whom would senators take their marching orders? The House. Shifting representation, then, shifts real power under our Constitution.

To see the power of structural relationships to shape our Constitution is to see the Constitution entire.[127] Such a reading attempts to understand the Constitution as a whole, including its representational provisions – the provisions that *create* government by constituting electoral relationships conferring representational power and democratic legitimacy. The 1930s version of legal realism wrongly sought to reduce all law to politics, but settled, in its more mundane doctrinal forms, on ideas lawyers and judges loosely associate with "functionalism."[128] This approach is no longer sufficient to understand the Constitution's structure. The unitary executive theory makes this clear: functional ideals – to "execute," for example – assume a unity of purpose that may not exist, either as a realistic or juridical matter. One way of thinking of the "unitary executive" is that it is functionalism on steroids – the functional term "executive" is taken not only to be exclusive but all-powerful – an approach that interestingly turns liberal functionalism on its head. To impose functionalist thinking on a document that does not create functional unities[129] will expand the power branded with the functional label. To borrow a theme of Chief Judge Easterbrook's, just as inquiries about purpose tend to expand statutes' domains in the field of statutory interpretation, inquiries about function tend to expand the domain of constitutional powers defined by function.[130]

A president who risks open defiance of a congressional ban risks the wrath of the people and the courts. He risks impeachment by Congress and correction by the Supreme Court. This is the lesson of *Youngstown* and of recent cases, such as *Hamdan*, restraining the President from acting on his own, without congressional approval.[131] The Supreme Court has an incentive to protect its own power to "say what the law is,"[132] and history has shown that the Court will act to thwart presidential action defying open congressional

[127] On the importance of this simultaneity ideal, see Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 794-96 (2009); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 124 (2009).

[128] Nourse & Shaffer, *supra* note 127, at 129.

[129] *See supra* notes 118-121 and accompanying text.

[130] *See generally* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

[131] *See generally* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[132] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

resistance.[133] As Justice Jackson once explained, the President's powers are potentially at the greatest when he has congressional approval, but potentially at the least when Congress registers its opposition.[134]

IV. A REPRESENTATIONAL VIEW OF REMOVAL

What, then, are we to make of Calabresi and Yoo's attempt to revive a kinder, gentler unitary executive? To the extent that their history depends upon a theory of the Constitution that assumes "the" executive power, it does not prevent and even encourages presidents to push the limits of that term in unpredictable ways. The authors rightly – if ineffectively – disavow the recent theory of plenary military and foreign affairs power,[135] but this still leaves their retreat to the removal power. The problem is that this position is hardly uncontroversial and hardly gentle. In plain English, the "removal power" position comes down to the claim that independent agencies are unconstitutional.[136] We suspect that most people would find the notion that the Securities and Exchange Commission (SEC) or the Nuclear Regulatory Commission (NRC) was suddenly unconstitutional to be an aggressive move. Here, we offer a different view by disaggregating two significantly different removal power questions: good faith removal clauses and legislative removal vetoes.

Calabresi and Yoo insist that presidents have resisted attempts to restrain the President's removal power. That assertion is true and entirely predictable given the incentives of the representational constitution (even if presidential practice has not been as consistent as the authors claim). It is not true, however, that Congress has acquiesced in attempts to resist its restraints on the removal power. Congress has repeatedly asserted limits on the President's power to remove, in particular asserting that some executive agencies should be independent, dating back to the nineteenth century.[137] As the authors themselves note, Presidents such as Cleveland, Wilson, and Carter did nothing to resist these efforts.[138] Again, this back and forth is entirely predictable. The Constitution itself does not address the removal question – which is why we see the departments oscillating back and forth on this question, never quite achieving constitutional equilibrium.

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[133] *See, e.g.*, *Youngstown*, 343 U.S. at 586, 589.

[134] *Id.* at 635-37 (Jackson, J., concurring).

[135] *See supra* text accompanying notes 101-105.

[136] Calabresi & Prakash, *supra* note 17, at 581-82 ("By granting 'the executive Power' exclusively to the President, the Clause forecloses Congress from creating 'independent' executive entities." (footnote omitted)).

[137] *See* Lessig & Sunstein, *supra* note 89, at 30 (describing the Second Bank of the United States, established in 1816, as "the first truly independent agency in the republic's history" because the President had the power to appoint and remove only five of its twenty-five directors).

[138] CALABRESI & YOO, *supra* note 5, at 216, 258, 426.

How then should we analyze the removal problem in the absence of a controlling text? The representational approach posits that the constitutional danger does not lie in shifting functions, whether the hypertrophied functionalism of the unitary executive or the loose agnosticism associated with liberals' "functional" approach toward the separation of powers. Under a representational view, the problem with the Supreme Court sending the nation to war would not be that the Court would perform the wrong "function" but that it would be sending the nation to war without the people. A representational approach would ask whether and how the shifting of tasks among government players affects representation. The risks to be avoided are not descriptive, functional impurities but rather structural incentives likely to change political relationships between the governed and their governors.

We know from our discussion of the representational constitution that if a political incentive to create an independent agency exists, Congress will create an independent agency. If the President feels he has a constituency to resist that independence, he will resist. President Franklin Roosevelt famously removed his Federal Trade Commission chairman, William E. Humphrey, because Humphrey refused to follow Roosevelt's shift in policy.[139] If Roosevelt had simply given some reason for the removal, he could have easily avoided a constitutional confrontation: rather than asserting plenary power to remove, the President could simply have said that Humphrey was not doing his job. After all, this kind of removal problem (it is not the only kind, as we will see), is about whether the President can find a "good cause" to remove an agency head.

Good-cause limitations are why lawyers dub a particular agency "independent."[140] When Congress enacts a "good cause" or "good faith" clause, it restricts the ability of the President to fire an agency head for "purely" political or arbitrary reasons, for example, that he or she is bald or a poor tennis player. The President must have a reason, and the reason must be plausible. Independent agencies, then – the so-called headless Fourth Branch of the government – are effectively within the control of the President, provided he is willing to assert a reason for the removal. If this reasoning is correct, then the independent agency problem with which Calabresi and Yoo's "classic" unitary executive is concerned is hardly the danger the authors make it out to be. Indeed, in some cases, the danger may appear in precisely the opposite direction: would one really want the head of the SEC or the NRC to be removed for purely political reasons, without a "good cause" limitation? By the same token, would one really want to prevent a president from firing an NRC head whose conduct led to a nuclear explosion or a Chairman of the SEC who inspired a market crash.

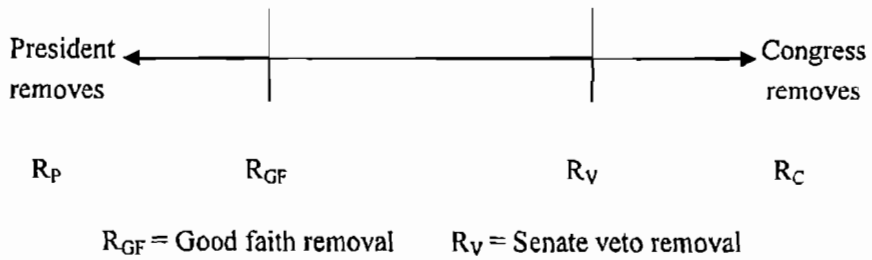
Not all removal cases are alike, however. Congress may attempt to assert

[139] *Id.* at 283-84.

[140] *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 29-30 (1995).

control over removal in different ways. One of the most infamous was the Tenure of Office Act,[141] which was passed to allow the Senate to control the removal of officers during the post-Civil War Johnson Administration. The Act aimed to limit President Johnson's power to remove radical republicans from his administration; if Johnson removed an officer, then the Senate would have had to approve the removal.[142] Congress wanted to restrain Johnson's hand on substantive policy matters; Johnson acted to prevent Reconstruction in the South, and Congress wanted to inject itself into his administration to ensure Reconstruction continued. This kind of *removal veto* is obviously a more aggressive congressional attack on the executive than the standard good faith clause.

The question remains whether such laws are unconstitutional. Here, we agree with Calabresi and Yoo that congressional veto removals are highly suspect.[143] Because no text controls removal power questions, the separation of powers comes into play. The representational texts driving the separation of powers tell us to look to representational shifts and measure them against a status quo baseline. As we have shown above, under a representational analysis, the President and the Congress are described most succinctly as holding the power of a particular constituency.[144] Every attempt by Congress to limit removal, whether by good faith clause or veto, means that Congress's constituencies may gain power relative to a baseline where there is no good faith clause or no veto provision. Let us compare the shift in constituency power under three scenarios: (1) where there is no check against the President in removal; (2) where there is a good faith clause; and (3) where the Senate has a veto power.



R_{GF} = Good faith removal R_V = Senate veto removal

When the President has complete control over removal (R_P), he can remove for any reason, which means that he may ignore Congress, he may ignore state and local minorities, he may even ignore a latent majority. If Alaska's constituents do not like the President's removal decision, they can make their

[141] Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (repealed 1887).

[142] *See* CALABRESI & YOO, *supra* note 5, at 181-83.

[143] *See id.* at 431 (concluding that the text of the Constitution, policy, and practice prevent Congress from limiting the President's removal power).

[144] *See supra* text accompanying notes 126-130.

case known, but the President can effectively ignore them. The problem arises when the President, on behalf of a putative majority, removes an officer and a significant risk exists that he is ignoring a latent majority. Presidents take actions in the face of uncertainty; they make judgments that a majority of people across the nation will approve of their actions. It is always possible, however, that the President has made the wrong anticipatory calculus. Public choice theory is correct when it says that the transaction costs of organizing make it far easier for small groups to organize politically and in effect masquerade as majorities.[145] When there is no check on a president's power of removal, the most significant risk is that he will act in the name of a false majority; but that is true of almost every decision a president makes. The only additional representational risk that absolute removal power creates is a risk of removal for arbitrary or unconstitutional reasons.

Now let us consider how constituency power shifts when we add a legislative veto, as was done in the Tenure of Office Act (R_V). This veto shifts power from a branch that serves a national constituency to one, that as a relative matter,[146] is more likely to be driven by state and local concerns.[147] In the absence of the veto, the President could simply do what he wanted, based on his determination that his decision represented a national majority's views, or that it was simply the right thing to do in the circumstances, despite apparent opposition. With the veto, power moves to the Senate and creates the risk that a small minority of the nation may thwart the President and a national majority.[148] Assume that the President has a sincere desire to remove an officer in the interest of the nation and that he is correct that, if polled, the nation would approve the removal. If the Senate must pass legislation to approve the removal, this means that a minority of states, and potentially an extremely small minority of citizens, may veto the President. This is because any single senator may seek to block action on a bill. This action is known, misleadingly, as the filibuster, but it actually reflects the fact that the Senate

[145] *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 71-73 (1994).

[146] Emphasis should be placed here on "relative" matters of representation. It is certainly easy to see that the President, relative to a single member of Congress, is a better representative of the nation as a whole.

[147] One might argue the opposite view: that Congress as a whole is a better proxy for the national interest than the President. For example, the six-year terms of senators extend beyond those of presidents, allowing them less constituent pressure than might appear. But it remains safe to say that even if we aggregate Congress, the House and the Senate and all of its members, state and local concerns are far more likely to be voiced in Congress than in the White House. Of course, this is a mere heuristic; in any individual case, the contrary could occur.

[148] For a devastating portrait of the minoritarian character of the Senate, see SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 49-54 (2006) and ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 144 (2d ed. 2003).

proceeds by consensus on most matters.[149] Ultimately, the Senate needs sixty votes to overcome a threatened filibuster. If the President's opponents can muster forty-one votes to thwart cloture,[150] they can stop the President's removal. A coalition of forty-one votes requires almost twenty-one states, but it could represent a tiny fraction of the nation's population if formed from low-population states such as Delaware or Montana. As Sanford Levinson has written, "almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5 percent of the total U.S. population."[151]

In short, the representational constitution tells us that allowing Senate control over removal could have serious counter-majoritarian consequences. The real problem, therefore, is not that a removal veto is a legislative veto but that it is potentially a *superminoritarian* veto, with the power to obstruct the President's congressional duty to represent a national majority. This result is not a foregone conclusion; it is always possible that Congress is acting in ways that reflect a truer majority than the President.[152] But the risk of a strong counter-majoritarian shift, coupled with the possibility of increasing the power of just a few states, should be enough. The structure of our government, given the Senate, already renders it far more minoritarian than most voters realize; at the very least, one should be extremely cautious about injecting this influence *within* the executive branch. A shift in removal power is not only a shift in power, it is a shift of on-going incentive and governance. An officer whom the Senate can remove[153] will look to the Senate for his job approval ratings, and an officer looking to the Senate is not one looking to the President.[154]

[149] Senate Rule 22 requires a 3/5 vote to secure cloture. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 22-23 (1998).

[150] *See id.* at 30.

[151] LEVINSON, *supra* note 148, at 51; *accord* DAHL, *supra* note 148, at 49 (observing that citizens of Nevada have seventeen times the voting power of California citizens because of the configuration of representation in the Senate).

[152] One might argue, for example, that the removal veto could have majoritarian benefits. For example, during Reconstruction, Republican senators might have argued that the removal veto was necessary to support the "nation's" will. In retrospect, we may respect the judgment of the Republican Congress that sought to impeach Johnson, but it would be wrong to suggest that, at this particular time, there was anything like a "majoritarian" position on Reconstruction, particularly given the continued estrangement of Southern states. *See* CALABRESI & YOO, *supra* note 5, at 174-75. Indeed, there is evidence that Johnson was in fact pursuing a policy that the public ultimately came to accept in the Grant administration, however unattractive we might find that policy today. *See id.* at 190-92 (discussing Grant's fight to repeal the Tenure of Office Act and the Act's eventual partial repeal). Moreover, the appropriate remedy in such a case as ultimately occurred was not a removal veto but impeachment. *See id.* at 178.

[153] By contrast, the officer subject to a good faith clause cannot be removed by Congress.

[154] This is why a removal veto differs from other minoritarian structural features that enhance the already minoritarian character of the Senate, such as the filibuster.

Now let us compare this result with the "good faith" limits that define independent agencies. These limits increase, to some extent, Congress's power, but they do so in ways that appear minor relative to the removal veto. Good faith clauses are an attempt to limit the President who makes the wrong guess about his constituency's – the nation's – interests. In a system with no check on the President's removal, there is the risk that his view of the nation's interest is in fact false or overstated. In short, good faith clauses can be seen as democracy-forcing in the sense that they avoid secret decisions or arbitrary removals. The President cannot remove someone because she is a better golfer or because she insulted him; by forcing him to give a reason, such clauses make him justify his decision in majoritarian terms. If the removal is controversial enough, a good faith removal clause may force a public debate on whether the President's proffered reason for removal is plausible or not.

Now that we have seen the alternative scenarios, it is possible to understand why all removal problems are not alike. It is our view that if a court were to consider a statute like the Tenure of Office Act today it should adhere to existing precedent and hold the law unconstitutional.[155] This is not because the constitutional text speaks to removal; it does not. Nor is it because removal is an inherently executive power; members of Congress can be removed, and so can judges. It is because such a proposal risks a major shift in the separation of powers. In the absence of a constitutional text on removal, we must refer to the constitutional text on representation. As we have seen, there are potentially very serious representational consequences to a law that allows a Senate veto on removals, injecting congressional power within the executive branch, and thus increasing the power of Congress's local constituencies at the expense of the President's national constituency.

In matters where the Constitution is silent, the prudent, restrained approach is to maintain the structural status quo. In this limited sense, Calabresi and Yoo are correct; the history of this kind of removal provision has been one of grave instability and even impeachment (it prompted the Johnson impeachment, for example).[156] Presidents and congresses should resist such proposals and, if forced, courts should strike them down. Of course, the very history of instability makes it unlikely that we are going to see a proposal such as the Tenure of Office Act in the near future; in short, if this is the removal problem about which the authors are worried, it is an academic problem, not a real one.

Good faith removal provisions present an entirely different issue but are equally unimpressive as real world problems. It would be an unwise or unresourceful president who could not find a good reason to remove a

[155] Congress, after battling President Cleveland, and not the courts, repealed the Tenure of Office Act in 1887. *See id.* at 212 (citing Act of Mar. 3, 1887, ch. 353, 24 Stat. 500). In 1926, the Supreme Court provided its opinion that the defunct Tenure of Office Act was in fact invalid. Myers v. United States, 272 U.S. 52, 176 (1926).

[156] *See* CALABRESI & YOO, *supra* note 5, at 185, 210.

subordinate officer. Some removals have been controversial, and they have produced presidential-congressional dialogue, but there is no grand history of constitutional instability produced by good-faith limitations on removal. Roosevelt's removal of Humphrey led to no impeachment.[157] It may be that presidents have continued to officially reject such limits, and it may be that Congress continues to enact them, a kind of incompletely theorized "agreement to disagree." But history suggests that good faith provisions have by and large failed to elicit major political instability. Indeed, as the authors themselves argue, presidents who created independent commissions seemed to have ignored good faith removal provisions on the theory that they were insignificant.[158]

If this reasoning is correct, it means that the authors' "classic" version of the unitary executive, taken on its own terms – as a question of removal – is largely misconceived. First, the "classic version" confuses two very different kinds of removal problems: the truly problematic and unconstitutional removal veto from the truly unproblematic and banal good faith removal clause. Second, any problem with removal vetoes was largely solved in 1789[159] and later reaffirmed in the wake of the Johnson impeachment.[160] There has been no grand outcry in the twentieth or twenty-first centuries for the return to the Tenure of Office Act. Third, the headless Fourth Branch, as far as history and law are concerned, is not headless in any way that can prevent the most powerful president in the world from having his way, as long as he has a reason for his actions, as the authors' own history shows.[161] If this relatively narrow "classic" theory of the unitary executive is misconceived in its approach toward the removal power, the skeptic must wonder whether the authors' purpose is to reach larger – and, in our view, potentially more dangerous – conclusions about the scope of executive power more generally.

Seen in this light, the Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[162] provides little support for Calabresi and Yoo's thesis. In *Free Enterprise Fund*, the Court addressed the constitutionality of a provision of the Sarbanes-Oxley Act of 2002 that provided that members of the Public Company Accounting Oversight Board (PCAOB), which regulates the accounting industry, could not be removed

[157] *See id.* at 284.

[158] *See id.* at 424-25 ("The clear role for presidential involvement in [independent] commissions' operations vitiates any suggestion that they were originally meant to be independent of presidential control.").

[159] *See id.* at 42 ("[E]ven the First Congress voted that its institutional rival the president had the removal power in the famous Decision of 1789.").

[160] *See id.* at 189.

[161] *See supra* text accompanying notes 139-141.

[162] No. 08-861, slip op. at 2, 33, 561 U.S. __ (June 28, 2010) (holding that Congress cannot restrict the President's removal power through two levels of good-cause protection).

without "justification."[163] The Court held that the statute unconstitutionally created "two levels of for-cause tenure"[164] because the SEC, which governs the PCAOB, is also an independent agency whose members cannot be removed without good cause.[165] In asserting that the statute would "strip[] [the President] of the power" to remove a Board member in the event of an actual removal controversy,[166] the Court failed to make clear how the "two-tier" system posed a significant constitutional threat.

The potential problem in *Free Enterprise Fund* was not simply numerical: two tiers of good faith insulation, rather than one. The problem was representational. Suppose that the President wanted to remove a PCAOB member for failure to pursue his duty and the SEC tried to stop him. In that case, the SEC – an unelected, quasi-independent body with an attenuated representational relationship to the public – could trump the will of the President and the nation. In that respect, *Free Enterprise Fund* is like *Bowsher v. Synar*,[167] where the risk was that the Comptroller General – who represents no one – would decide large budget questions contrary to the desires of the President or Congress.[168] To be sure, in a different case, representational theory might compel a different result. If the President tried to remove a PCAOB member because he disapproved the member's decision in a particular administrative adjudication, as Justice Breyer suggested in dissent,[169] the representational analysis would cut the other way. If this is correct, prudence suggests courts await an actual conflict between the President and an independent agent rather than consider facial challenges to good cause removal provisions. That there is no clear evidence that any president has found a "good cause" removal provision to be a real barrier to dismissal since Franklin Roosevelt[170] supports the notion that removal provisions are more powerful as symbols than as real impediments; they are proxies for academic debates about the nature of administrative government. A more restrained analysis should focus, instead, on representational effects in particular cases.

The *Free Enterprise Fund* Court should be applauded for signaling a move toward a representational theory. True, Justice Roberts begins his analysis by appealing to the Vesting Clause thesis that undergirds Calabresi and Yoo's view:

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[163] *Id.* at 5.

[164] *Id.* at 10, 20-21.

[165] *Id.* at 14-15.

[166] *Id.* at 15.

[167] 478 U.S. 714, 732, 734, 736 (1986).

[168] *See* Nourse, *Vertical Separation*, *supra* note 15, at 794 & n.182 (citing *Bowsher*, 478 U.S. at 717-18, 720).

[169] *See Free Enter. Fund*, No. 08-861, slip. op. at 17-19, 561 U.S. __ (Breyer, J., dissenting) (discussing the adjudicative role of the PCAOB and the logic in isolating its members "from fear of purely politically based removal").

[170] *See id.* at 11-12; Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935).

> The Constitution provides that "[t]he executive power shall be vested in a President of the United States of America." As Madison stated on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."[171]

But the opinion quickly moves beyond functional essentialism, eschewing a reliance on the presence of the words "herein granted" or the definitional power of "executive." Instead, it points toward a discussion of representational power:

> The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." They instead look to the President to guide the "assistants or deputies . . . subject to his superintendence." Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." This is why the Framers sought to ensure that ". . . the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[172]

We should read Justice Roberts's reference to "the community" as a reminder that what really matters in any inquiry of executive power is the power of the people – for it is only through the Constitution's connection of executive power to the power of the electorate that the President has any power at all.

CONCLUSION

The unitary executive theory led to major expansions of presidential power now deeply regretted by Republicans and Democrats alike, not to mention the authors of the original theory. Calabresi and Yoo attempt to redeem the unitary executive by suggesting that it is a smaller, more manageable theory

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[171] *Free Enter. Fund*, No. 08-861, slip. op. at 10-11, 561 U.S. __ (citations omitted); *see also id.* at 2 ("We hold that such multilevel protection from removal is contrary to Article II's vesting of the executive power in the President.").

[172] *Id.* at 16-17 (citations omitted); *see also id.* at 18 ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); *id.* at 20 ("The Framers created a structure in which '[a] dependence on the people' would be the 'primary controul [sic] on the government.'" (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961))); *id.* at 33 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.").

focused on the removal power. But the authors offer no real redemption, for their history ranges well beyond the removal power to exercises of military authority, foreign affairs, and investigatory power. Their history thus provides little comfort to those seeking a more moderate theory because the authors provide few guidelines for limiting the "executive" power. In our opinion, the very idea of the "unitary executive" is misconceived both as a textual and originalist matter if it is taken to mean a functional description that considers presidential power without regard to the Constitution entire, or what we know as "the separation of powers." Only by attending to a representational theory of the separation of powers can we see that the moderate claims of the book are far from moderate – that they leave in place the empty functional essentialism that led to excess.

TWO KINDS OF PLAIN MEANING[1]

Is plain meaning so plain? This is not meant to be a cute or even a philosophical question, but one deserving of legal analysis. It is thought that one of the great virtues of the plain meaning rule is that, relative to a rule based on purpose, it will be certain and it will narrow statutes' domains. If this claim is based on the comparison to the statutory interpretation technique known as purposivism, I agree. However, I do not agree that plain meaning analysis is as easy as its proponents suggest. In this piece, I tease out two very different ideas of "plain meaning" – *ordinary/popular meaning* and *expansive/legalist meaning*, suggesting that doctrinal analysis requires more than an invocation of plain meaning *simpliciter*. Perhaps more importantly, I argue that plain meaning, as *legalist meaning*, can quite easily expand the scope of a statute, relative to a baseline of *ordinary meaning* or the status quo ex ante.

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In 1987, Justice Scalia gave an extremely influential set of lectures[2] in which he set forth a doctrine of statutory interpretation known as the "new textualism." The Scalia Tanner lectures contain one of the most eloquent statements in print about the importance of legislation: "Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution."[3] Scalia's theory influenced me and a generation of scholars and students. In a world where very few lawyers have any clue about how legislation is debated, or even how to find legislative history,[4] the textualism rule is easy to understand and teach. It seems

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1 Victoria F. Nourse, Visiting Professor of Law, Georgetown University School of Law; Burrus-Bascom Professor of Law, University of Wisconsin. Special thanks to Professor Lawrence Solan whose essay on ordinary meaning, Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027 (2005), inspired these thoughts and to my 2010 Legislation Class at Georgetown University Law Center who have been so eager to focus on "two kinds" of plain meaning. All errors are, of course, my own.

2 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3-47 (1997) (reprinting an essay based on the lecture with commentary).

3 *Id.* at 13.

4 Elsewhere, I have been quite critical of law schools' failure to teach congressional literacy. *See* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L. J. (forthcoming 2011).

such a simple rule: When "construing statutes, consider the text, the whole text, and nothing but the text. Period."[5]

Church of the Holy Trinity v. United States[6] figures prominently in Justice Scalia's theory.[7] The question in *Holy Trinity* was whether a British minister contracting to serve a New York church fell within a statute aimed to prevent large scale importation of immigrant laborers. The opinion opens by acknowledging Justice Scalia's point: "[i]t must be conceded that the act of the [church] is within the letter of the section," the statute applying not only to "labor or service," but "labor or service *of any kind*."[8] To top it off, the court notes that the statute exempted singers, lecturers, and domestics and thus "strengthens the idea that every other kind of labor or service," came within the law.[9] Having noted all these textual arguments for covering the good rector, the court ignored them, reading the statute *to exclude him*, relying on the rule that Congress's intent trumped any plain reading. Interpreting the statute to include a rector among imported "swine" was so "broad" as to "reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against."[10]

> It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."[11]

A statute whose purpose was to prevent mass importation of manual laborers, not "brain-toilers," should not cover the rector.

To Justice Scalia, *Holy Trinity* was obviously wrong: "Well of course I think that the act was within the letter of the statute, and was therefore within the statute: end of case."[12] *Holy Trinity*, he argued, is "cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial

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5 William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514 (1998).

6 143 U.S. 457 (1892).

7 SCALIA, *supra* note 2, at 18-22.

8 *Holy Trinity*, 143 U.S. at 458.

9 *Id.*

10 *Id.* at 472.

11 *Id.*

12 SCALIA, *supra* note 2, at 20.

lawmaking."[13] As this suggests, one of Justice Scalia's greatest claims for his position is constraint for activist judges: "textualism constrains judges' decisions more than other methods do, and it gives judges a principled method for interpreting statutes separate from their own 'policy preferences.'" [14]

There are many grounds on which I stand firmly with Justice Scalia. Law should be objective, restrained, and should not be the province of activist judges. Justice Frankfurter was right when he insisted, "read the text, read the text, read the text."[15] But I am also skeptical about the "plainness" of some assertions of "plain meaning." In constitutional law, as Philip Bobbitt has argued, certain forms of argument have always played a role, such as originalism and structural argument.[16] So, too, in statutory law, I believe that certain forms of argument have always played a role in statutory interpretation. I teach the "Blackstone 5" – text, context, subject matter, absurdity, and reason[17] – these are the 5 forms of argument that have been the consistent "liquidated," (to borrow a Madisonian phrase)[18] forms of arguments used by American courts in statutory interpretation since the Founding.

Think hard, now, about two kinds of plain meaning. As the linguist Larry Solan has written, ordinary meaning is prototypical meaning,[19] which is to say that it is meaning which picks a core example, rather than reaching the conceptual or logical extension of the term. *Prototypical meaning picks the best example, not the peripheral one.* Now, let us apply this to *Holy Trinity.* In 1885 (when the *Holy Trinity* legislation was debated), the prototypical case of a laborer was a miner or a railroad worker, not a minister, at least according to the dictionaries of the day.[20] As the *Holy Trinity* court explained: the

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13 *Id.* at 21.

14 SCALIA, *supra* note 2, at 17.

15 This is apparently filtered through the eyes of Judge Friendly: Judge Friendly once reported that when Justice Frankfurter was still teaching, he urged his students to follow a three-pronged rule for statutory interpretation: (1) read the statute; (2) read the statute; and, (3) read the statute. *See* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 196, 202 (1967).

16 *See* PHILIP BOBBITT: CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

17 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *85-92.

18 THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

19 Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 239-44 (2005).

20 WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 679-80 (3d ed. 2001) ("The first definition of the term 'labor' listed in the 1879 and 1886 editions of Webster's Dictionary was "Physical toil or bodily exertion . . . hard muscular

"whole history and life of the country"[21] rebelled at the notion that this law, aimed at "importing labor as we import horses and cattle,"[22] could cover the voluntary passage of an upper-class minister. Justice Scalia, however, finds a different plain meaning: he finds the meaning prescribed by what the court calls the "letter of the law," what I will call "legalist" meaning (borrowing from Adrian Vermeule).[23] Justice Scalia abstracts from the core and considers all logical possibilities within the concept of a laborer.

Notice the difference between prototypical meaning and legalist meaning as it relates to the domain of the statute. As Chief Judge Easterbrook has written in a brilliant article, purposivism has a tendency to expand the range of a statute: this is certainly true if you assume that the baseline statute is in fact expanding the range of law.[24] Notice, however, how a similar expansion may occur when one moves from ordinary to legalist meaning. By definition, prototypical meaning looks for the "best example," legalist meaning looks for all examples, examples that may invite fringe or peripheral meanings.[25] In *Holy Trinity*, the "plain meaning" approach expands the meaning of the statute beyond the status quo *ex ante* (all labor including the minister versus the original baseline of no regulation of alien contract labor). More importantly, it expands the baseline relative to *ordinary meaning*. If ordinary meaning was "manual labor" in 1885, then "all labor" expands the domain of the statute. Plain meaning of this kind (legalist meaning) expands the domain of the statute relative to plain meaning of another kind (ordinary meaning), suggesting that it should be important to decide which meaning counts.

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effort directed to some useful end, as agriculture, manufactures, and the like."); *see also id.* at 980 (citing other sources, including Black's Law Dictionary, in which labor was equated to manual laborers and service to servants).

21 *Holy Trinity*, 143 U.S. at 472. *Holy Trinity* is typically known as an "absurdity" case but one way of thinking about absurdity is to view it as arising when there is a strong conflict between legalist meaning (all workers) and prototypical meaning (manual labor or service). Compare, for example, standard examples of "absurdity": "blood-letting" (prototypical meaning = fight; legalist meaning = any bloodletting including by a surgeon); "prison escape" (prototypical meaning = escape to flout law; legalist meaning = any escape even if to escape fire).

22 16 CONG. REC. 1781 (1885) (statement of Sen. Platt).

23 *See* ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 2–3 (2009).

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

25 There is an analogy here, as well, to H.L.A. Hart's famous distinction between core and penumbral meaning. *See* DAVID LYONS, MORAL ASPECTS OF LEGAL THEORY 84–85 (1993).

I am not confident enough of the distinction between ordinary/prototypical and legalist/expansive meaning to urge it as a matter of logic or linguistics. At the same time, there are enough examples to make this more than an academic curiosity. For example, in *Bock Laundry*,[26] the ordinary meaning (to the average person on the street) of a defendant means "criminal defendant," which narrows the range of the balancing act at issue, relative to a legalist meaning (all possible defendants, civil and criminal, or all parties, civil and criminal). Similarly, in *Public Citizen v. DOJ*,[27] the question was whether a government advisory committee was subject to a legalist meaning (any two persons conferring with the President, which could include his children or his political advisors), or an ordinary "best example" meaning of an advisory committee created by the government. At the same time, it is important to acknowledge that, in some cases, ordinary meaning itself may be contested.[28]

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

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

27 Public Citizen v. Dep't of Justice, 491 U.S. 440 (1989).

28 *See* Solan, *supra* note 19, at 2031 ("It is not always easy to decide what makes ordinary meaning 'ordinary.'").

There is nothing terribly modern about this idea. It has existed in statutory interpretation since the 16th century, expressed in the shell-and-kernel metaphor:

> And the law may be resembled to a nut which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter.[29]

Here, the kernel represents prototypical "sense" while the shell represents the legalist "letter of the law." At the founding, American courts were fond of a similar idea, quoting the latin phrase, *Nam qui haeret in litera, haeret in cortice*: "he who sticks to the letter of the law will only stick to its bark."[30]

Academic textualists have not in my opinion grappled with this distinction as much as they might. Instead, there seems to be a good deal of talk of ordinary meaning, that is accompanied by a definition of ordinary meaning as technical or legalist meaning. John Manning writes: textualists seek out "technical meaning, including the specialized connotations and practices common to the specialized sub-community of lawyers."[31] As Jonathan Molot writes, textualists tend to see "words written on a piece of paper, rather than a collective effort by elected representatives to govern on behalf of their constituents."[32] This tendency to detach chunks of text from the statute and then hold them up to the light to test their greatest possible extent reflects the lawyerly love of logic. "The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer."[33]

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29 WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 4 (1994) (quoting reporter's commentary on Eyston v. Studd, 75 Eng. Rep. 688, 695 (K.B. 1574)).

30 Church v. Thomson, 1 Kirby 98, 98 (Conn. Super. Ct. 1786); Olin v. Chipman, 2 Tyl. 148, 148 (Vt. 1802); Miller's Lessee v. Holt, 1 Tenn. (1 Overt.) 111, 116 (1799); Commonwealth v. Andrews, 2 Mass. (1 Tyng) 14, 30 (1806); Sumner v. Williams, 8 Mass. (1 Tyng) 162, 183 (1811). My thanks to the research assistance of Asher Steinberg, Georgetown University Law Center Class of 2011, who found this phrase and its repetition in dozens of nineteenth century cases.

31 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434-35 (2005).

32 Jonathan Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 48 (2006).

33 Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L. Q. 351, 354 (1994).

Indeed, this tendency to prefer legalist meaning is reflected in two important aspects of textual theory. Generally, textualism is advertised as a more "restrained" view of statutory interpretation, relative to "intentionalism" or "purposivism." Although textualists claim that they, unlike purposivists, do not "add" meaning to text, in fact, they do. They may reject legislative history, but they are perfectly willing to add lawyerly meanings, taken from past precedents, canons of construction, and even the common law. The implied preference for specialized meanings speaks loudest in textualists' affection for the "common law" baseline. As one prominent textualist writes: "Textualists assign common-law terms their full array of common-law connotations; they supplement otherwise unqualified tests with settled common law practices."[34] Surely, however, this affection for the "common law" stands in some tension with the notion of "ordinary meaning." Does the ordinary man or woman on the street know much about the common law? Does the ordinary legislator?

Textualists will reply that it is not fair to tar textualism with affection for arcane lawyerly meanings; textualists seek "ordinary meanings." Justice Scalia writes:

> [F]irst, find the *ordinary meaning* of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the *ordinary* one applies. If not—and especially if a good reason for the *ordinary meaning* appears plain—we apply that ordinary meaning. [35]

I agree entirely. But, as other scholars have wondered, there may remain a gap between talking about "ordinary" meanings and applying "ordinary" meaning. There is reason to wonder, for example, whether the best and brightest lawyers confuse "ordinary" meaning with expert or specialized meaning.[36] In one recent study of Justice Scalia's dissents, the author found that "plain meaning," referred "to something different than "ordinary meaning" -- to a

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34 Manning, *supra* note 31, at 435.

35 Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphasis added). In the constitutional context, he is similarly insistent. See District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning.'").

36 *See* Solan, *supra* note 19, at 2046-47.

specialized but accepted meaning of a term . . . ."[37] In another empirical study, the political scientist Frank Cross found that "[o]verall, the plain meaning standard seems ideologically manipulable and incapable of constraining preferences to provide greater consensus."[38] In yet another more recent empirical study by Ward Farnsworth and Anup Mulani, based on over 1000 subject responses, it was found that "plain meaning" correlated to ideological bias, whereas "ordinary meaning" did not.[39] There is a reason for this: plain meaning simply asserts its plainness and thus bears the risk of dogmatism and self-regard (it is plain because I say so). Ordinary meaning requires the interpreter to put themselves in the shoes of a non-legal audience; it has a built-in form of impartiality, not to mention democratic appeal. Perhaps that helps to explain empirical work showing that Congress has a greater tendency to "override" plain meaning decisions rather than decisions relying on legislative history.[40]

Herein lies an important question for textualist theory. "New textualism" remains unclear about precisely what type of meanings it will apply.[41] While some textualists tend to emphasize "expert" meaning and semantic content, others emphasize "ordinary" meaning. Indeed, some textualists are quick, even within a single article, to refer to ordinary meaning and specialized meaning as if there were no difference between the two.[42] Perhaps textualists are

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37 McGowan, *Do As I Do, Not As I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L. J. 129, 149 (2008).

38 FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 166 (2009).

39 Ward Farnsworth, Dustin F. Guzior & Anup Mulani, Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation 6, 8–12 (Univ. of Chicago Public Law Working Paper No. 280, Boston Univ. Sch. of Law Working Paper No. 09-50, 2009), available at http://ssrn.com/abstract=1441860. Farnsworth, Guzior & Mulani usefully distinguish between plain meaning as an "internal view," with "ordinary meaning" as external. Whereas the question "is this meaning plain?" tends to elicit views correlated with strong ideological positions (the internal view), the question "would an ordinary person think this meaning is plain" (the external view), does not.

40 *See* CROSS, *supra* note 38, at 82–83 (2009) (summarizing this evidence and relying on Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 909–10 (2000)), William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 350 tbl.8 (1991), and Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 446 (1992).

41 *See* Molot, *supra* note 32, at 36 ("little attention is devoted to the interpretive methodology textualism offers to replace strong purposivism or variations within the textualist movement.").

42 *See, e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1852-53 (1998).

assuming that the average citizen is a lawyer—something I am quite sure the voting public would find odd if not offensive. The very existence of two kinds of plain meaning should require a theory of when courts should apply expert meaning and when it should apply public, or prototypical, meaning.

LEGISLATION AND THEORIES OF STATUTORY INTERPRETATION

Prof. Victoria Nourse
Fall Semester 2010
Georgetown University Law Center
Tuesday & Thursday, 9:35-11 am

Office Hours (Rm. 576): Tuesday and Thursday – 3:30 to 5:00 PM or by appointment.

This course intensifies students' understanding of the legislative process and statutory interpretation, as well as Congress's place in our constitutional order. The principal text is **ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION (4th ed. 2007).** This is supplemented by a variety of materials appearing on the class TWEN site.

Class participation: In general, I will create panels of students who are "on call" for the class period, who will be required to present the assigned reading material as if they were arguing before courts of appeal. On several occasions, students outside the panel will be required to play "roles" such as legislators or judges or professors. On some specialized topics (budget, campaign finance, agency interpretation), we will hear from outside lecturers.

Evaluation: There will be a 48 hour take-home exam conforming with Georgetown University Law Center requirements. I reserve the right to lower your grade based on persistent absences or failure to participate.

Additional Class Credit: If you would like to do an independent research project developing a legislative history, please let me know via e-mail, and we may be able to arrange an additional class credit as an independent study.

LAPTOPS ARE NOT PERMITTED IN THIS CLASS. THIS CLASS IS NOT RECORDED. ALL POWERPOINTS ARE AVAILABLE PRIOR TO OR IMMEDIATELY AFTER THE CLASS ON THE TWEN SITE.

PART I: Congress and Its Role in the Constitutional Order

A. Introduction: The Basic Constitutional Structure

The Constitution and Congress's Role

B. **Introduction to the Legislative Process** (pp. 1-42)

1964 *Civil Rights Act, the Filibuster, and Vetogates*

C. **Congressional Process and Reading the Record**

Griggs (pp. 42-47): the Tower Amendment

TWEN: Supreme Court Griggs opinion, actual (2 page) leg. History

D. **Theories of the Legislative Process** (pp. 47-87)

Nourse, Rodriquez/Weingast excerpts interpreting the leg. History in Griggs

PART II: The Nature and Difficulties of Representation

A. **Theories of Congressional Representation**

Powell, Term Limits (pp. 196-226)

B. **Campaign Finance Reform**

Buckley, Austin, McConnell (pp. 235-297); excerpt from *Citizens United* on TWEN

Guest lecture (8/16):

Mr. Robert Lenhard, Covington & Burling (former chair FEC)

C. **Representation in Congress v. the Executive**

Guest lecturers (8/21):

Ms. Lisa Monaco, former AUSA, Chief of Staff to FBI Director Robert Mueller and present Chief of Staff to the Deputy Attorney General

Ms. Donna McLean, former Ass't Secretary of Transportation (Bush administration)

TWEN material to be provided

C. **The Budget Process**

Guest Lecture (8/23):

GULC Prof. Tim Westmoreland (former House staff)

TWEN material to be provided

PART III: Statutory Interpretation History and Theory

A. **History of Statutory Interpretation** (pp. 689-712)
What is plain meaning?

Holy Trinity
TWEN material: Solan, Nourse excerpts

B. **Statutory Interpretation Theory I** (pp. 712-42)
Purpose v. Text: Legal Process and Dynamic Theory

Locke, Shine, & Jacob

C. **Statutory Interpretation Theory II** (pp. 743-49)
Absurdity

Public Citizen, Trans Am

D. **Statutory Interpretation Theory III** (pp. 749-81)
Textualism

TVA, Bock Laundry, Chisom

E. **Statutory Interpretation Theory IV** (pp. 798-814)
Economic Theory & Game Theory

Marshall

PART IV. Legislative History, Canons, Common Law

A. Traditional Canons and the Common Law (pp. 847-903, 922-71)

Babbitt

B. Substantive Canons: Lenity & Federalism (pp. 888-03, 922-41)

Muscarello, Aschroft, BFP

C. Legislative History I (pp. 983-1014)

Blanchard, Sinclair, Review Babbitt

D. Legislative History II (pp. 1001-14; 1027-35)

Pepper & Montana Wilderness I

E. Legislative History III (pp. 1036-1064)

Montana Wilderness II, Jones

F. Legislative History IV (pp. 956-970)
Canons v. Common Law v. Legislative History

Smith v. Wade, review Babbitt, review Sep. of Powers

G. Problems & Presidential Signing Statements (pp. 970-71, 1043-47)

Problems 8-4, 8-5 & 8-6

PART V. AGENCY INTERPRETATIONS

A. **Agency Interpretation I** (pp. 1194-95; 1197-1213)

Chevron & MCI

B. **Agency Interpretation II** *(*pp. 1213-44)

Mead & Gonzales

C. **Agency Interpretation & Separation of Powers Review**

TWEN material

PART VI. REVIEW

A. **Review Lecture**

B. **Review Practice Exam**

SYLLABUS

Twentieth Century Constitutional History

Professor V.F. Nourse

Georgetown University

Fall 2010

The constitutional present has imbibed a particular vision of the constitutional past which appears in modern constitutional decisions. This seminar focuses students on the question whether that vision is correct, asking students to read and study in-depth the doctrine of a "lost" history of constitutional law, dating roughly from 1890 until 1950. Then, constitutional law was not governed by constitutional interests or strict scrutinies; it was not terribly fearful of substantive due process and did not attempt to define constitutional rights as much as constitutional power. Constitutional law was less concerned with text and more with the "reserved rights" of the states. Then, the constitutional law of the first amendment and equal protection looked very similar to the constitutional law of substantive due process. Where did this older, lost, constitutional law come from? What power does it hold over the present and is that power justified or based on myth? What external and internal events prompted the change to modern doctrine? How are external and internal events related to each other in this transformation? Students are required to present cases or positions throughout the semester, as well as author a significant paper.

Chapter One: The Contemporary Doctrinal Struggle

Cases: *Glucksberg, Lawrence, McDonald*

Chapter Two: The *Lochner* Era Cases

Cases: *Lochner, Holden, Crowley, Gundling, Frisbie, Allgeyer, McGuire, Muller*

Chapter Three: **Due Process & Equal Protection in the Progressive Era**

Cases: *Slaughterhouse, Barbier, Yick Wo, Plessy, Raich, Buchanan, Thind Gong Lum*

Chapter Four: *Lochner* **in modern constitutional theory**

Commentary: *Sunstein, Epstein, White, Friedman, Bernstein, Nourse*

Chapter Five: **The First Amendment in the Police Power Era**

Cases: *Frohwerk, Schenk, Abrams, Gitlow, Whitney*

Commentary: Chafee

Chapter Six: **Commerce Power**

Cases: *E.C. Knight, Shreveport Rate Cases, Hoke, Hipolite Egg, Dagenhart*

Commentary: Thomas, J. (concurring); Souter, J.

Chapter Seven: **The Taft Court and Property: Reviving** *Lochner*

Cases: *Bunting, Adkins, Truax, Tyson, Miller, Euclid, Mahon*

Commentary: Treanor, Epstein

Dean Treanor will be present at this session

Chapter Eight: **Police Power and the Family**

Cases: *Meyer, Pierce, Bartels, Buck*

Commentary: Nourse, Ross, Bybee, Woodhouse

Chapter Nine: **The 1930s "Revolution"?**

Cases: *Nebbia, Schechter Poultry, Carter, Tipaldo, Parrish*

Jones & Laughlin

Commentary: Cushman

Chapter Ten: **Judicial Review in Post World War II World**

Cases: *Carolene Products, Gaines, Gobitis, Barnette, Skinner, Korematsu, Brown, Sharpe*

Context: Nourse

Paper Presentations **11/17 and 12/1**