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### Who Cares How Congress Really Works?

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# WHO CARES HOW CONGRESS REALLY WORKS?

66 DUKE L.J. \_\_ (forthcoming 2017)

*Ryan D. Doerfler*

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## WHO CARES HOW CONGRESS REALLY WORKS?

*Ryan D. Doerfler\**

Legislative intent is a fiction. Courts and scholars accept this by and large. As this Article shows, however, both are confused as to *why*, and, more importantly, as to what this *entails*.

This Article argues that the standard account of why legislative intent is a fiction—that Congress is a “*they*,” not an “*it*”—rests on an overly simplistic conception of shared agency. Drawing on contemporary work in philosophy of action, this Article contends that Congress *as such* has no intentions not because of difficulties in aggregating the intentions of individual members, but rather because Congress lacks the sort of delegatory structure that one finds in, for example, a corporation. This reformulated argument for intent skepticism reveals that recent attempts to rehabilitate actual, historical intent—all of which rest upon a delegatory model—are misguided.

Second and more importantly, this Article argues that the fictional nature of legislative intent entails that, contrary to a recent, influential wave of scholarship, interpreters of legislation have little reason to care about the fine details of legislative *process*. It is platitude that legislative text must be interpreted “in context.” As this Article explains, however, “context” consists of information salient to *author* and *audience* alike. This basic insight from philosophy of language necessitates what this Article calls the *conversation* model of interpretation, whereby legislation is treated as having been written *by* legislators *for* those tasked with administering the law (e.g., courts, agencies) and, critically, those on whom the law operates (e.g., citizens). An interpreter thus occupies the position of *conversational participant*, hearing statements directed at her and other participants. So situated, that interpreter reads legislative text in a “context” consisting of information salient both to members of Congress and to, for example, citizens.

The conversation model displaces what this Article calls the *eavesdropping* model of interpretation, the prevailing paradigm among both courts and scholars. When asking what sources of information an interpreter should consider, courts and scholars—both textualists and purposivists—reliably privilege the epistemic position of members of Congress. The result is that legislation is treated erroneously as having been written *by* legislators *for* legislators. An interpreter is thus relegated to *eavesdropper*, left to listen in on the conversation. So situated, that interpreter reads legislative text in a “context” consisting of information salient to members of Congress in particular. This tendency is plainest in recent scholarship urging greater attention to legislative process—the nuances of which are of high salience to legislators, but plainly not so to citizens. As this Article explains, attending to “how Congress really works” could make sense *if* Congress had unexpressed intentions to

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discover. Because legislative intent is a fiction, however, Congress has no such hidden intentions to find.

## INTRODUCTION

Claims about legislative intent are pervasive and, contrary to much scholarly opinion,<sup>1</sup> unavoidable. The reason is that statutory interpretation, like ordinary conversation, is rife with what linguists and philosophers call *pragmatic* inference, i.e. inference based upon the practical circumstance. In both mundane contexts and in the law, attribution of practical intentions is indispensable to understanding what people mean. The War Powers Resolution (“WPR”), for example, states that the President shall “terminate any use of United States Armed Forces” within sixty days “unless,” among other things, “the Congress ... has declared war.”<sup>2</sup> Setting aside constitutional concerns,<sup>3</sup> all agree that the WPR requires the President to terminate hostilities within sixty days unless Congress has declared war *since those hostilities were initiated*. That Congress has declared war *at some point*<sup>4</sup> is, by contrast, irrelevant. Interpreters rightly treat this as obvious. But how do they know? As this Article explains, interpreters know what Congress is trying to *say* only because they know also what Congress is trying to *do* (here, limit the President’s authority to engage in hostilities without congressional approval).

Although necessary, claims about legislative intent are also literally false. This is because, as an empirical matter, members of Congress do not *share* intentions.<sup>5</sup> That Congress is a “they,” not an “it,” is a common refrain.<sup>6</sup> But, as this Article explains, familiar public-choice theoretic arguments against legislative intent of the sort voiced by Kenneth Shepsle rest on a doubtful

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<sup>1</sup> See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 76 (2012) (“[N]o one need look for the fictional intent of Congress in searching for the meaning of its decisions. The term ‘legislative intent’ is obscuring, even for those of us who consider ourselves ‘originalists’ in matters of statutory interpretation. Intent is simply a constitutional heuristic used to remind judges that, in the end, it is not their decision, but Congress’s.”); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 793 (1999) (“The notions of congressional understanding and legislative intent are merely metaphors, of course, and somewhat misleading anthropomorphizing metaphors at that ....”).

<sup>2</sup> 50 U.S.C. § 1544(b).

<sup>3</sup> See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 108-12 (1984) (surveying arguments for and against).

<sup>4</sup> See, e.g., S.J. Res. 116, Pub. L. No. 77-328, 55 Stat. 795 (1941) (declaring war on Japan in the wake of Pearl Harbor).

<sup>5</sup> See generally MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER (2014) [hereinafter BRATMAN, SHARED AGENCY]; MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD (2013) [hereinafter GILBERT, JOINT COMMITMENT]; John Searle, *Collective Intentions and Actions*, in INTENTIONS IN COMMUNICATION (Philip R. Cohen, Jerry Morgan, & Martha E. Pollack eds., 1990).

<sup>6</sup> Kenneth A. Shepsle, *Congress Is A “They,” Not an “It”: Legislative Intent As Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

premise, namely that sharing intentions is about aggregation of attitudes. As this Article shows, the ability to aggregate lots of individual intentions is neither necessary nor sufficient to the formation of shared intentions. One can, for example, attribute to a corporation its general counsel's intention to settle a lawsuit even if other members of the corporation are unaware of the suit. As this Article goes on to argue, however, the much en vogue analogy between corporations and Congress also fails.<sup>7</sup> To use the previous example, one can make sense of that attribution of an intention to settle only because members of a corporation share an intention to delegate to the corporation's general counsel control over legal strategy. Members of Congress, by contrast, share no corresponding intention to treat as authoritative the views of, say, a statute's "principal sponsors" or "others who worked to secure enactment."<sup>8</sup> Add to this the lack of a mechanism for reconciling the intentions of, for instance, committee drafters and drafters of later amendments, and it becomes clear that, even on a more sophisticated understanding of shared agency, Congress has few if any intentions qua "it."

This Article argues that, to resolve the above tension—that Congress must have intentions for legislation to be meaningful, yet Congress has no "collective" intentions—one should embrace what philosophers call *fictionalism* about legislative intent.<sup>9</sup> Fictionalism about some domain of human discourse is the thesis that claims within that domain are best understood not as aiming at literal truth but rather as involving a useful fiction. When children play cops and robbers, for example, utterances such as "Mary has a gun!" or "The money is in the vault!" involve an obvious pretense. In analytic philosophy, fictionalism is a well-established approach to making sense of a discourse that appears to refer to things that do not exist.<sup>10</sup> As this Article explains, utterances within a fictionalist discourse are still apt or inapt. It is just that aptness is determined by pretense in combination with facts on the ground. Whether Mary "has a gun," for instance, could hinge on whether Mary possesses a twig.

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<sup>7</sup> See, e.g., Nourse, *supra* note 1, at 82 ("Just as corporations are bound by the statements of their agents, Congress may be bound by the statements of its agents."); JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 280 (2009) ("We find no problem attributing intentions to corporations, groups, and institutions in ordinary life ....").

<sup>8</sup> ROBERT A. KATZMANN, JUDGING STATUTES 48 (2014).

<sup>9</sup> See generally Matti Eklund, *Fictionalism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), <http://plato.stanford.edu/archives/fall2011/entries/fictionalism/>.

<sup>10</sup> See, e.g., Gideon Rosen & Cian Dorr, *Composition as Fiction*, in THE BLACKWELL GUIDE TO METAPHYSICS (Richard M. Gale ed., 2002) (arguing for fictionalism about ordinary objects); RICHARD JOYCE, THE MYTH OF MORALITY (2001) (arguing for fictionalism about morality); HARTRY H. FIELD, SCIENCE WITHOUT NUMBERS: A DEFENSE OF NOMINALISM (arguing for fictionalism about numbers).

This Article defends fictionalism about legislative intent as to claims about the United States Congress. As this Article explains, intent claims about Congress are false if taken literally because federal statutes have no unitary author. For that reason, the fiction this Article hypothesizes is that such statutes have some author or other. Understood as involving this fiction, a claim about legislative intent is apt if and only if *one would make that claim about a generic author just on the basis of her having written the statute at issue in the context of enactment*. So conceived, fictionalism about legislative intent amounts to a philosophical refinement of what textualists sometimes refer to as “objectified” legislative intent.<sup>11</sup> Fictionalism improves upon prior accounts of objectified intent in that it both offers a more rigorous theoretical justification for attributing such intent—in particular, by explaining why intent attributions are *necessary* as opposed to merely *useful*—and provides a more precise account of the truth (or aptness) conditions of such attributions.

To say that intent is a fiction is thus not to say that anything goes, that one can attribute any ‘intention’ one wants to a piece of legislation. It is a platitude that a legislative text must be interpreted in “context.”<sup>12</sup> As this Article explains, however, “context” consists of information salient to *author* and *audience* alike.<sup>13</sup> “[P]articipants in [a] conversation” depend upon cognitive “common ground” to make known their communicative intentions.<sup>14</sup> When, for example, Karen says to Amy, “I will see you at the beach,” that attempt at communication will succeed only if there is some beach that is salient to both.

<sup>11</sup> E.g., John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) [hereinafter Manning, *Legislative Intent*] (“[T]extualists focus on ‘objectified’ intent—the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts*] (explaining that textualists appeal to “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.”).

<sup>12</sup> See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) [hereinafter Manning, *The Absurdity Doctrine*] (“[I]t is now well settled that textual interpretation must account for the text in its social and linguistic context.”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 536 (1983) (“The philosophy of language, and most particularly the work of Ludwig Wittgenstein, has established that sets of words do not possess intrinsic meanings and cannot be given them . . .”).

<sup>13</sup> See, e.g., Kent Bach, *Content ex Machina*, in SEMANTICS VERSUS PRAGMATICS 15, 19 (Zoltán Gendler Szabó ed., 2005) [hereinafter Bach, *Content ex Machina*] (“Communicative success requires uttering a sentence which, given the *mutually salient information* that comprises the extralinguistic cognitive context of utterance, makes the speaker’s communicative intention evident and enables his audience to recognize it.” (emphasis added)).

<sup>14</sup> Robert C. Stalnaker, *Common Ground*, 25 LING. & PHIL. 701, 701 (2002).

More generally, successful communication depends upon agreement among conversational participants as to what “matters.”<sup>15</sup> For this reason, a speaker takes it for granted that what she says will be interpreted against the backdrop of information that is salient both to her and to those to whom she speaks.<sup>16</sup>

The importance of the above insight to statutory interpretation is subtle but hard to overstate. It necessitates what this Article calls the *conversation* model of interpretation, which is crucial to understanding the nature of legislative intent. On this model, legislation is treated as having been written by Congress for those tasked with administering the law (e.g., courts, agencies) and for those on whom the law operates (e.g., citizens). An interpreter thus occupies the position of conversational participant, hearing statements directed at her and the other participants. So situated, an interpreter reads legislative text in a context consisting of information salient both to members of Congress and to, for example, citizens. As this Article explains, adherence to the conversation model does not by itself dictate what sources of information an interpreter should consider when making sense of a statute. What it does is limit the range of plausible answers to that question. If, in addition to text, one thinks that courts should consider, say, legislative history, one is hard-pressed to explain why they should not also consider public statements by officials or reports by popular media outlets. Such visible portrayals of legislation are, after all, of much higher salience to most Americans than House Report 114-706.

The conversation model displaces what this Article calls the *eavesdropping* model of interpretation, which has been the prevailing paradigm among both courts and scholars. When asking what information an interpreter should consider, both courts and scholars reliably privilege the epistemic position of members of Congress. The result is that legislation is treated erroneously as having been written *by* legislators *for* legislators. An interpreter is thus relegated to eavesdropper, listening in on the conversation. So situated, an interpreter reads legislative text in a context consisting of information salient to members of Congress in particular. This Article argues that privileging the epistemic

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<sup>15</sup> Stefano Predelli, *Painted Leaves, Context, and Semantic Analysis*, 28 LING. & PHIL. 351, 365 (2005); see also Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 598 (2013) [hereinafter Soames, *Deferentialism*] (observing that “[i]n most standard linguistic communications, all parties know, and know they all know, . . . the general purpose of the communication”).

<sup>16</sup> Robert Stalnaker, *Indicative Conditionals*, in CONTEXT AND CONTENT: ESSAYS ON INTENTIONALITY IN SPEECH AND THOUGHT 63, 67 (1999) [hereinafter Stalnaker, *Indicative Conditionals*] (“A speaker inevitably takes certain information for granted when he speaks as the common ground of the participants in the conversation. It is this information which he can use as a resource for the communication of further information, and against which he will expect his speech acts to be understood.”).



position of members could make sense *if* Congress had unexpressed intentions to discover—much in the way that it could make sense to consult an historical individual’s private papers when making sense of an unclear public statement. Because, however, legislative intent is a fiction, Congress has no concealed intentions to find. There is, in turn, no corresponding reason to rifle through members’ personal effects.

This Article shows that both textualists and purposivists adhere to the eavesdropping model much if not all of the time. The longstanding debate over whether to consider legislative history,<sup>17</sup> for example, reflects an impulse to eavesdrop on both sides.<sup>18</sup> Adherence to the eavesdropping model is plainest, however, in recent, influential scholarship urging greater attention to “how Congress really works.”<sup>19</sup> This scholarship asks interpreters, through attention to process, to sort legislative history “wheat” from “chaff.”<sup>20</sup> Judge Robert Katzmann, for example, suggests that courts pay special attention to those materials participants in the drafting process use to “become educated about [a] bill.”<sup>21</sup> Likewise, Abbe Gluck and Lisa Bressman recommend attention to different types of legislative history—along with other non-textual sources, such

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<sup>17</sup> See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 964 & n.212 (2013) [hereinafter Gluck & Bressman, *Part I*] (“The other primary interpretive source that courts consider—and the one whose use is most hotly contested—is legislative history.” (collecting cases)); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353 (2005) [hereinafter Nelson, *What Is Textualism?*] (recognizing that “[t]extualists and intentionalists have a well-known disagreement about the proper use of internal legislative history”); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998) (“Intentionalists and textualists have vigorously debated whether judges should consult legislative history in statutory interpretation cases.”).

<sup>18</sup> See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question . . .”); KATZMANN, *supra* note 8, at 18-19 (“In that circumstance, beyond the work of their own committees, of which legislators have direct knowledge, members operate in a system in which they rely on the work of colleagues on other committees. . . . Legislators and their staffs become educated about the bill by reading the materials produced by the committees and conference committees from which the proposed legislation emanates.”).

<sup>19</sup> Nourse, *supra* note 1, at 143 (“Both textualists and purposivists have to understand how Congress really works.”); accord KATZMANN, *supra* note 8, at 8 (“[T]here has been scant consideration given to what I think is critical as courts discharge their interpretative task—an appreciation of how Congress actually functions . . .”).

<sup>20</sup> KATZMANN, *supra* note 8, at 54. See also Gluck & Bressman, *Part I*, *supra* note 17, at 989 (“[T]he real question about legislative history is not whether it should be consulted but, rather, how to separate the useful from the misleading.”); Nourse, *supra* note 1, at 72 (“Since neither scholars nor lawyers dispute that, as a matter of fact, legislative history is used, the question is how it is best used.”).

<sup>21</sup> KATZMANN, *supra* note 8, at 19.

as Congressional Budget Office (“CBO”) scores, and structural features like a statute’s “path through Congress”<sup>22</sup>—in proportion to the significance assigned to those sources by “drafters,” i.e. participants in the legislative drafting process.<sup>23</sup> This Article argues that none of this makes sense when context consists of information salient to *all*, not to “drafters” in particular. “[I]gnorance of how Congress works”<sup>24</sup> is lamentable for various reasons. But, as this Article contends, the nuances of the legislative process are largely irrelevant for the purpose of interpretation.

This Article has three Parts. Part I argues that claims about legislative intent are pervasive and unavoidable. The argumentative strategy is to identify various parallels between ordinary conversation and statutory interpretation. In both conversation and interpretation, this Part explains, an audience is interested in what proposition(s) a speaker intends to communicate as opposed to what proposition is, for example, expressed by sentence she utters. And, drawing on contemporary work in philosophy of language by Charles Travis and other so-called “radical contextualists”<sup>25</sup>—highly pertinent to but thus far wholly neglected by the statutory interpretation literature—this Part argues further that, in each setting, one can most often identify a speaker’s communicative intention only on the basis of her apparent practical intentions.

Part II argues that claims about legislative intent are systematically false if taken literally. Under the Constitution, legislative power rests with Congress as a collective.<sup>26</sup> So understood, talk of legislative intent presupposes that the Congress is capable of forming shared intentions. On any tenable account of shared agency, however, Congress as structured is systematically incapable of forming such intentions (other than the bare intention to enact text into law). Recent scholarship urging greater attention to the legislative process insists that shared intentions are there to be found if one looks hard enough. This Part argues that greater attention to process instead supports skepticism about intent instead.

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<sup>22</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 780 (2014) [hereinafter Gluck & Bressman, *Part II*].

<sup>23</sup> See Gluck & Bressman, *Part I*, *supra* note 17, at 988-89.

<sup>24</sup> Nourse, *supra* note 1, at 85; see also KATZMANN, *supra* note 8, at 49 (“The paucity of judicial knowledge about congressional rules and processes relating to the judicial process ... is striking.”).

<sup>25</sup> See generally CHARLES TRAVIS, OCCASION SENSITIVITY: SELECTED ESSAYS (2008); FRANÇOIS RÉCANATI, LITERAL MEANING (2003).

<sup>26</sup> See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

Part III argues that, to resolve the tension resulting from Parts I and II, one should embrace fictionalism about legislative intent. Again, on this approach, a claim about legislative intent is apt if and only if one would make that claim about a generic author on the basis of her having written the legislation at issue in the context of enactment. As Part III explains, fictionalism does not by itself dictate what information an interpreter should consider as part of the context of enactment. It does, however, dramatically alter the range of plausible answers to that question, requiring that any information considered be of mutual salience to government actors and citizens. Traditionally, the debate between textualists and purposivists has offered interpreters a choice between considering just formally adopted materials (e.g., legislative text, prior judicial decisions) and considering such materials plus certain information of high salience to government officials (e.g., legislative history). Pursuant to fictionalism, the choice is, instead, between considering just formally adopted materials—salient to all in virtue of their formal bindingness—and considering such materials along with an array of non-textual sources including but not limited to public speeches and popular media coverage.

#### I. ATTRIBUTIONS OF LEGISLATIVE INTENT ARE UNAVOIDABLE

Claims about legislative intent are pervasive and, contrary to popular belief, unavoidable. To understand why, bring to mind an ordinary conversation. There, recognizing a speaker's intention is integral to efficient and effective communication. As this Part explains, communication via statute is, as practiced, no different.<sup>27</sup> For that reason, to make sense of legislation in a way

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<sup>27</sup> This Article assumes a standard *Gricean* account of communication according to which the meaning of words and sentences can be analyzed in terms of speaker intention, in particular the intention to communicate certain information via the utterance of sentences. See, e.g., PAUL GRICE, *STUDIES IN THE WAY OF WORDS* (1991). The Gricean framework contrasts with, for example, a *semantic externalist* framework, according to which the meaning a term is determined, in whole or in part, by factors external to the speaker. See, e.g., SAUL KRIPKE, *NAMING AND NECESSITY* (1980). As even its critics acknowledge, the Gricean framework enjoys “almost universal acceptance” within legal interpretation. Marcin Matczak, *Does Legal Interpretation Need Paul Grice: Reflection on Lepore and Stone's Imagination and Convention* (unpublished manuscript, on file with author) (defending an alternative, externalist account of statutory and constitutional interpretation); see also ERNIE LEPORE & MATTHEW STONE, *IMAGINATION AND CONVENTION: DISTINGUISHING GRAMMAR AND INFERENCE IN LANGUAGE* (2014) (defending an externalist account of communication generally). Courts in particular accept a broadly Gricean—or, in terms more familiar to legal scholarship, intentionalist—framework more or less without exception. See, e.g., *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1450 (2012) (“[O]ur task is to determine what Congress meant by ‘actual.’”); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) (“Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis.”); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285, 98 S. Ct. 566, 573, 54 L. Ed. 2d 538 (1978)

that is at all consistent with our positive law of interpretation, one must attribute intentions to authors of legislation with much the same frequency as one does to speakers in ordinary conversation. Legislative intent, it turns out, is not just a dispensable “metaphor.”<sup>28</sup>

#### A. *What Is Meant*

What an interlocutor cares about in ordinary conversation is a speaker’s communicative intent. Take a simple case: it is late morning and A says to B, “Would you like a bagel?” B responds, “No, thank you. I’ve had breakfast.” Philosophers of language disagree as to whether, in this context, the sentence “I’ve had breakfast” expresses the proposition that A has had breakfast *at some point in the past* or the proposition that A has had breakfast *that morning*.<sup>29</sup> Where everyone agrees, of course, is that B intends to communicate the latter proposition.<sup>30</sup> And while the philosophical question regarding sentence meaning is interesting, for A’s purposes, what matters is that B’s communicative intention is clear.

The above case is trivial. What it shows is just that, in ordinary conversation, what is of interest to an interlocutor is what proposition a speaker intends to communicate. Whether, for instance, that proposition corresponds to the proposition expressed (assuming there is one) by the uttered sentence is of interest to philosophers of language. For conversational purposes, however,

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(“In the Act, Congress has given a substantial indication of the intended meaning of the term [at issue.]”); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542 (1940) (“In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”); see also Ryan D. Doerfler, *The Scrivener’s Error*, 110 NW. U.L. REV. 811, 826 (arguing that “it is well established as a matter of positive law that the object of inquiry in statutory interpretation is Congress’s communicative intention, appropriately conceived.”).

<sup>28</sup> E.g., John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1924 (2015) [hereinafter Manning, *Inside Congress’s Mind*]; Nourse, *supra* note 1, at 74 (“Let us agree that the anthropomorphic metaphor portraying Congress as a single person misleads.”).

<sup>29</sup> Compare Bach, *Content ex Machina*, *supra* note 13, at 37 (“[T]he speaker ... didn’t say that he hadn’t had breakfast that day. That’s because he left this for inference (notice that this inference is much harder to make if [the sentence] is uttered late in the day.)” with RÉCANATI, *supra* note 25 at 21 (“[B]y saying that she’s had breakfast, the speaker implies that she is not hungry and does not to be fed. ... Now th[is] implicature[] can be worked out only if the speaker is recognized as expressing the (non-minimal) proposition that she’s had breakfast *that morning* ...”).

<sup>30</sup> See Bach, *Content ex Machina*, *supra* note 13, at 38-39.

what an interlocutor wants to know is what a speaker “means” in a broad, pragmatic sense.<sup>31</sup>

The object of inquiry in statutory interpretation is, likewise, communicative intent as opposed to something like sentence meaning. Another simple case: the War Powers Resolution states that the President shall “terminate any use of United States Armed Forces” within sixty days “unless,” among other things, “the Congress . . . has declared war.”<sup>32</sup> Again, philosophers dispute whether, as used, this sentence expresses the proposition that the President shall terminate any military action within sixty days unless the Congress has declared war *at some point in the past* or the proposition that she shall do so unless the Congress has declared war *against the target of the hostilities at issue since the commencement thereof*.<sup>33</sup> Interpreters agree, of course, that the statute is correctly interpreted as communicating the latter proposition.<sup>34</sup> This is because (apparent) communicative intention behind the statute is clear.<sup>35</sup> For purposes of interpretation, that is all that matters.

Again, the above case is trivial. What it shows is that, when engaging in statutory interpretation, what is of interest to courts is what proposition Congress (apparently) intends to communicate as opposed to, say, the proposition expressed by the sentence it uses. As before, what courts want to know is what Congress “means” in a broad, pragmatic sense.<sup>36</sup>

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<sup>31</sup> See Soames, *Interpreting Legislative Texts*, *supra* note **Error! Bookmark not defined.**, at 404 (“Semantic content is often merely a vehicle for getting to pragmatically enriched content, and sometimes the semantic content of a sentence is not itself asserted, or even included in what the speaker is committed to.”).

<sup>32</sup> 50 U.S.C. § 1544(b).

<sup>33</sup> See *supra* note 29 and accompanying text.

<sup>34</sup> See, e.g., *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980) (“The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad.”).

<sup>35</sup> Interpreters assume, for instance, that Congress would not intend to enact a requirement that would be trivially satisfied in all future cases.

<sup>36</sup> In other words, an interpreter is interested in what Richard Fallon refers to as a statute’s “contextual meaning.” Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015). Fallon argues that an interpreter might reasonably be interested in a variety of ‘meanings’ when interpreting a statute (e.g., “literal” meaning, “intended” meanings, “reasonable” meaning, “interpreted” meaning). For reasons articulated below, however, if fictionalism is correct, various candidate ‘meanings’ collapse into one (e.g., “intended” meaning and “reasonable” meaning become one and the same). See *infra* notes 233-272 and accompanying text.

## B. *What Is Asserted*

Even where a speaker uses some sentence literally, one must appeal to the practical context in some if not all cases to determine what proposition that speaker intends to assert or, alternatively, what a speaker intends to claim.<sup>37</sup> “Context,” for these purposes, consists of the information that is “salient” or “relevant” to conversational participants.<sup>38</sup> And what information is “salient” or “relevant” depends in part upon shared or individual practical ends of the participants.<sup>39</sup> For that reason, to determine what a speaker intends to *assert* or to *claim*, one must, in some if not all cases, determine what she (and/or her interlocutors) intends to *do*.

Courts too must appeal to context to determine what Congress (apparently) intends to assert even where it is assumed that Congress uses a sentence literally. And, as with ordinary conversation, such appeals to “context” involve an assessment of what practical ends are at issue. Often, courts appeal to context to determine Congress’ (apparent) communicative intent in so-called “hard” cases.<sup>40</sup> As the discussion below illustrates, however, appeal to context is important but often unnoticed in “easy” cases as well.

### 1. Ambiguity

First, appeal to a speaker’s practical ends can be necessary for an interlocutor to resolve lexical or structural ambiguities in the words the speaker utters. A familiar example: suppose that A says to B, “I will be at the bank this afternoon.” To resolve the lexical ambiguity, i.e. whether “bank,” as used, refers to a river side or a financial institution, B will appeal to what it is that A (with B,

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<sup>37</sup> See Kent Bach, *You Don’t Say?*, 128 SYNTHESIS 15, 28 (2001) (arguing that intuitions concerning the truth of a particular utterance pertain to “what a speaker is claiming,” as opposed to “what he is saying”).

<sup>38</sup> Bach, *Content ex Machina*, *supra* note 13, at 21 (“What is loosely called ‘context’ is the conversational setting broadly construed. It is the mutual cognitive context, or salient common ground. It includes ...salient mutual knowledge between the conversants, and relevant broader common knowledge”).

<sup>39</sup> See, e.g., Predelli, *supra* note 15, at 365 (observing that one must take into account “what intuitively matters” in a conversational context to evaluate the truth of a claim); Robert C. Stalnaker, *Assertion*, in CONTEXT AND CONTENT 78, 79 (1999) (“In particular inquiries, deliberations, and conversations, alternative states of the subject matter in question are conceived in different ways *depending on the interests and attitudes* of the participants in those activities.” (emphasis added)).

<sup>40</sup> Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) (“The problem of justifying judicial decisions is particularly acute in ‘hard cases,’ those cases in which the result is not clearly dictated by statute or precedent.”).

perhaps) plans to do (e.g., to go fishing, to complete a financial transaction, etc.). Another example: suppose that A cautions B, “Flying planes can be dangerous.” To resolve the structural ambiguity, i.e. whether the words form a sentence that expresses the proposition that the act of flying planes can be dangerous or a sentence that expresses the proposition that planes that are flying can be dangerous, B must discern A’s apparent end (e.g., to discourage B from becoming a pilot, to persuade B not to go skydiving near the airport, etc.).

Courts too must appeal to context to resolve lexical and structural ambiguities in the words that Congress selects. As to lexical ambiguity, appeal to context can be necessary where a statute contains a word or phrase has two or more possible meanings. Title VII, for example, states that it shall be unlawful for an employer to “discharge” an individual on the basis of her race, color, religion, sex, or national origin.<sup>41</sup> Courts (rightly) take it as obvious that “discharge,” as used, refers to terminating employment as oppose to, say, shooting out of a canon.<sup>42</sup> In so doing, however, courts (latently) attribute to Congress concern with discriminatory employment (as opposed to ammunition) decisions. As to structural ambiguity, courts often must appeal to context where, for instance, a statute contains an adjective, adverb, or prepositional phrase adjacent to a list of nouns or verbs. For instance, the federal aggravated identity theft statute mandates an additional term of imprisonment of two years for one who “knowingly transfers, possesses, or uses” a form of identification of another person without lawful authority during or in relation to a covered felony.<sup>43</sup> Courts rightly treat it as plain that, as used, “knowingly” modifies “transfers,” “possesses,” and “uses” (as opposed to, say, just “transfers”).<sup>44</sup> In so doing, however, courts (latently) appeal to what it is that Congress is trying to do, namely punish *knowing* misconduct.<sup>45</sup>

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<sup>41</sup> 42 U.S.C. § 2000e-2(a).

<sup>42</sup> *See, e.g.,* Penn. State Police v. Suders, 542 U.S. 129 (2004); McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 354 (1995).

<sup>43</sup> 18 U.S.C. § 1028A(a)(1).

<sup>44</sup> *See* Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009) (“All parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using *something*.”); *cf.* Liparota v. United States, 471 U.S. 419 (1985) (treating it as obvious that the federal statute governing food stamp fraud, which criminalizes the “knowing[] use[], transfer[], acqui[sition], alter[ation], or possess[ion]” of coupons or authorization cards in a manner not authorized by the statute or regulation, applies only to knowing acquisition).

<sup>45</sup> Harder is whether “knowingly” modifies “without lawful authority.” 18 U.S.C. § 1028A(a)(1); *cf. Liparota*, 471 U.S. at 433 (holding that the word “knowingly,” as used in the statute governing food stamp fraud, modified the phrase “in any manner not authorized by [law]”).

## 2. Pragmatic Enrichment

Second, appeal to a speaker's practical ends can be necessary in cases of what some philosophers or language call "expansion"<sup>46</sup> or "pragmatic enrichment."<sup>47</sup> Consider: if A says to B, "I'm ready," one must appeal to features of the practical context to determine whether A intends to assert/claim that she is ready to leave for dinner, ready to enter the game, etc.<sup>48</sup> In such a case, appeal to context is required to fill in the words the speaker omits.<sup>49</sup> One can accept this regardless of what proposition (if any) one understands the sentence "I'm ready" to express in context.<sup>50</sup>

Courts similarly must appeal to Congress' practical ends in such cases. Section 102(b)(4) of the Americans with Disabilities Act, for example, makes it unlawful for an employer to discriminate against a "qualified individual" on the basis of disability with respect to hiring.<sup>51</sup> Courts (reasonably) take it as obvious that, as used, "qualified individual" refers to an individual qualified *for the position for which she applied* (as opposed to, say, qualified *to operate a motor vehicle* or qualified *to vote*).<sup>52</sup> To arrive at this (surely correct) interpretation, however, one must attribute to Congress concern with a particular kind of discrimination, namely hiring discrimination against persons with the requisite skills. Examples of this sort abound.<sup>53</sup>

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<sup>46</sup> Kent Bach, *Conversational Implicature*, 9 MIND & LANGUAGE 124 (1994) [hereinafter Bach, *Conversational Implicature*].

<sup>47</sup> E.g., François Récanati, *Pragmatic Enrichment*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LANGUAGE 67, 70 (Gillian Russell & Delia Graff Fara eds., 2012).

<sup>48</sup> Other examples include sentences such as "Steel isn't strong enough" and "The princess is late." Bach, *Conversational Implicature*, *supra* note 46, at 127-28.

<sup>49</sup> See Kent Bach, *Speaking Loosely: Sentence Nonliterality*, 25 MW. STUD. PHIL. 249, 250 (2001) ("[W]e commonly speak loosely, by omitting words that could have made what we meant more explicit, and we let our audience fill in the gaps. Language works far more efficiently when we do that.").

<sup>50</sup> Compare, e.g., Bach, *Conversational Implicature*, *supra* note 46, at 127 (arguing that such sentences fail to express complete propositions) with HERMAN CAPPELEN & ERNIE LEPORE, INSENSITIVE SEMANTICS: A DEFENSE OF

SEMANTIC MINIMALISM AND SPEECH ACT PLURALISM 168-69 (2005) (arguing that such sentences express minimal propositions such as that A is just plain ready).

<sup>51</sup> 42 U.S.C. § 12112(b)(4).

<sup>52</sup> *Larimer v. Int'l Bus. Machines Corp.*, 370 F.3d 698, 700 (7th Cir. 2004) (Posner, J.) ("The term 'qualified individual' in that provision must simply mean qualified to do one's job, as assumed though nowhere discussed in the legislative history and the cases." (citations omitted)).

<sup>53</sup> See, e.g., 49 U.S.C. § 60111(a) (authorizing Secretary of Transportation to issue notice if an operator of a liquefied natural gas facility lacks "adequate financial responsibility for the facility [for safety purposes]").



### 3. Travis Cases

Third, appeal to a speaker's practical ends might be necessary as a matter of course.<sup>54</sup> Charles Travis has put forward a variety of ingenious cases to suggest that the proposition expressed by a *prima facie* context-insensitive sentence nonetheless varies by context.<sup>55</sup> For instance, Travis observes that whether a speaker says something true when uttering the sentence "The leaves are green" plausibly depends upon the practical interests at issue:

A story. Pia's Japanese maple is full of russet leaves. Believing that green is the colour of leaves, she paints them. Returning, she reports, 'That's better. The leaves are green now.' She speaks truth. A botanist friend then phones, seeking green leaves for a study of green-leaf chemistry. 'The leaves (on my tree) are green,' Pia says. 'You can have those.' But now Pia speaks falsehood.<sup>56</sup>

One may or may not be convinced that so-called "Travis cases"<sup>57</sup> demonstrate global "semantic underdeterminacy" of sentences.<sup>58</sup> One must concede, however, that such cases show that appeal to context can be—and, perhaps, is always—necessary to determine what proposition a speaker intends to assert

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<sup>54</sup> Cf. Bach, *Content ex Machina*, *supra* note 13, at 26-27 ("Even if what a speaker means consists precisely in the semantic content of the sentence he utters and that content is precise, this fact is not determined by the semantic content of the sentence. The reason for this claim is very simple: no sentence has to be used in accordance with its semantic content. Any sentence can be used in a nonliteral or indirect way. A speaker can always mean something distinct from the semantic content of the sentence he is uttering.")

<sup>55</sup> See, e.g., Charles Travis, *Meaning's Role in Truth*, 105 MIND 451 (1996); Charles Travis, *On What Is Strictly Speaking True*, 15 CAN. J. PHIL. 187 (1985).

<sup>56</sup> Charles Travis, *Pragmatics*, in A COMPANION TO THE PHILOSOPHY OF LANGUAGE 87, 89 (Bob Hale & Crispin Wright eds., 1997).

<sup>57</sup> E.g., Agustín Vicente, *On Travis Cases*, 35 LING. & PHIL. 3 (2012).

<sup>58</sup> See, e.g., Martin Montminy, *Two Contextualist Fallacies*, 3 SYNTHÈSE 317 (2010) (arguing that radical contextualist arguments for global semantic underdeterminacy rest on two fallacies); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1120 (2008) ("It is true that the compositional nature of language—the ability to understand sentences we have never heard before—is one of the hardest and most complex of questions concerning the nature of language. But anything even residing in the neighborhood of the 'meaning is use on a particular occasion' view of language fails even to address the compositional problem ....").

(or, perhaps, the truth-conditions of what she asserts<sup>59</sup>) even if the sentence she utters contains no obviously context-sensitive component.<sup>60</sup>

Courts too plausibly must appeal to context even where Congress uses sentences that are *prima facie* context-insensitive. An example. During a tour of the White House, A steals a pen from the President's desk. About to exit the property, a Secret Service Officer asks A to stop. A panics and fatally stabs the Officer with the stolen pen. A then shoves the pen into her bag, jumps into a cab, and speeds to the airport. At the airport, A proceeds to the security check, where a TSA agent, invoking the federal prohibiting carrying a concealed dangerous weapon on an aircraft, asks her "Are you carrying a dangerous weapon?"<sup>61</sup> A says, "No," speaking truly.<sup>62</sup> A continues on to the gate, where she is apprehended by the police. Invoking the enhanced penalty provision of the federal statute prohibiting forcible assault on a federal officer asks, "Are you carrying a dangerous weapon?"<sup>63</sup> A says, "No," speaking falsely.<sup>64</sup>

Again, the above example is fantastical. The principle it illustrates, however, is straightforward. Even where a statute uses some *prima facie* context-insensitive predicate *F* (e.g., is a dangerous weapon, weighs one gram or more<sup>65</sup>), whether some object *X* (e.g., A's pen, B's stash of LSD tabs<sup>66</sup>) "counts as"<sup>67</sup> *F* might depend upon the practical interests implicated by that legislation. So long

<sup>59</sup> See John MacFarlane, *Nonindexical Contextualism*, 166 SYNTHESE 231, 246 (2009) (hypothesizing a "counts-as" parameter" that "settles what things have to be like to have various properties: e.g. the property of weighing 160 pounds, or of being tall").

<sup>60</sup> What is distinctive about Travis cases is that such cases suggest intuitions about truth-values depend upon context even when the sentence uttered contains no demonstrative, indexical, etc.

<sup>61</sup> See 49 U.S.C. § 46505(b)(1) (criminalizing attempt to board an aircraft while concealing a "dangerous weapon" that would be accessible during flight).

<sup>62</sup> See *United States v. Dishman*, 486 F.2d 727, 730 (9th Cir. 1973) (holding that a starter pistol incapable of firing a projectile was not a "deadly or dangerous weapon" within the proscription of § 46505's predecessor statute, reasoning that "the proscribed weapon must be one that is a "deadly and dangerous" weapon per se or inherently so through its construction").

<sup>63</sup> See 18 U.S.C. § 111(b) (providing for enhanced penalties where an individual uses a "deadly or dangerous weapon" in the course of forcibly assaulting a federal officer).

<sup>64</sup> See *United States v. Arrington*, 309 F.3d 40, 45 (D.C. Cir. 2002) (holding that an automobile may qualify as a "deadly weapon" for purposes of § 111(b) if used as such, accepting that "[f]or an object that is not inherently deadly, ... the object must be capable of causing serious bodily injury or death to another person and the defendant must use it in that manner").

<sup>65</sup> See 21 U.S.C. § 841(b)(v) (establishing a mandatory minimum sentence of five-years' imprisonment for distribution of "1 gram or more" of a "mixture or substance" containing a detectable amount of LSD).

<sup>66</sup> See *Chapman v. United States*, 500 U.S. 453 (1991) (holding that, for purposes of § 841(b)(v), weight of "mixture or substance" containing a detectable amount of LSD includes weight of blotter paper).

<sup>67</sup> MacFarlane, *supra* note 59, at 246.

as there exist two practical contexts, one in which “X is *F*” expresses a truth and one in which it expresses a falsehood, one must appeal to context to determine whether X “counts as” *F* for purposes of the statute at issue.

C. *What Is Implied, Intimated, Etc.*

Last, what a speaker intends to communicate often exceeds what she asserts. The most familiar cases here are those of “implicature,” a phenomenon explored famously by Paul Grice.<sup>68</sup> Implicature is a form of indirect communication. If, for example, A asks B, “Would you like coffee or tea?” and B responds, “I would like coffee,” all agree that B has not asserted the proposition that B would not like tea. Be that as it may, all agree that B intends to communicate that proposition (e.g., A knows not to bring coffee *and* tea).<sup>69</sup> Or suppose that A asks B, “Do you know where I can get some gas?,” and B responds, “There is a gas station around the corner.”<sup>70</sup> All accept that B has not asserted that the gas station around the corner is open for business. Nonetheless, it is clear to all that B intends to communicate that proposition (e.g., A need not follow up with, “Okay, but is it *open*?”).<sup>71</sup>

Using implicature to communicate more than one asserts advances a variety of ends.<sup>72</sup> Most relevant here, using implicature promotes verbal efficiency: Through implicature a speaker can communicate multiple propositions by uttering a single sentence.<sup>73</sup>

Courts likewise regularly attribute to Congress the intention to communicate more than it asserts. In particular, courts recognize many of the same sorts of Gricean implicatures as do interlocutors in ordinary conversation. Where, for example, a statute contains a provision defining its pre-emptive reach, courts will assume, absent additional evidence, that Congress intends not

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<sup>68</sup> See H.P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS, VOLUME 3: SPEECH ACTS (Peter Cole & Jerry L. Morgan eds., 1975).

<sup>69</sup> See *id.* at 45 (identifying maxim of “quantity,” i.e. maxim that one should “[m]ake [one’s] contribution as informative as is required (for the current purposes of the exchange”).

<sup>70</sup> See *id.* at 51.

<sup>71</sup> See *id.* at 46 (identifying maxim of “relation,” i.e. maxim that one should “[b]e relevant”).

<sup>72</sup> See, e.g., PENELOPE BROWN & STEPHEN C. LEVINSON, *POLITENESS. SOME UNIVERSALS IN LANGUAGE USAGE* (1987) (arguing that indirect speech can be used to promote the value of politeness).

<sup>73</sup> See STEPHEN C. LEVINSON, *PRESUMPTIVE MEANINGS: THE THEORY OF GENERALIZED CONVERSATIONAL IMPLICATURE* 28-31 (2000); cf. Elizabeth Camp, *Metaphor and that certain ‘je ne sais quoi’*, 129 *MIND & LANGUAGE* 1, 3 (2006) (“Because metaphorical utterances ... express such complex contents in so few words, they are highly efficient vehicles for communication.”).

to pre-empt matters outside that reach.<sup>74</sup> Or where a statute expressly creates a right, courts will assume, other things equal, that Congress intends there to be a corresponding remedy.<sup>75</sup>

Scholars dispute whether Grice's account of implicature "readily translate[s] from the conversational setting to the complex, multilateral bargaining process of framing a statute."<sup>76</sup> All agree, however, that implicature does and should play *some* role in statutory interpretation—no one disputes, for example, that application of the *expressio unius est exclusio alterius* canon is legitimate in some cases.<sup>77</sup> As in the conversational context, the use of implicature, however restricted, promotes verbal efficiency.<sup>78</sup> To require that legislation make explicit every proposition communicated would be cumbersome if not practically impossible.

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To sum up: statutory interpretation as practiced involves widespread attribution of legislative intent. First, in all cases, what is of interest to an interpreter is the proposition(s) Congress (apparently) intends to communicate as opposed to, say, the proposition expressed by the sentence Congress used.

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<sup>74</sup> *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

<sup>75</sup> *See Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916) (inferring a private right of action from a statutory requirement, reasoning that "[t]his is but an application of the maxim, *Ubi jus ibi remedium*," i.e. where there is a right there is a remedy).

<sup>76</sup> Manning, *The Absurdity Doctrine*, *supra* note 12, at 2462 n. 274; *see also* Andrei Marmor, *Can the Law Imply More Than It Says? On Some Pragmatic Aspects of Strategic Speech*, in *LANGUAGE IN THE LAW* 81 (Andrei Marmor & Scott Soames eds., 2011) (arguing that, unlike ordinary conversation, conversation in the legal context is often strategic and so allows for only limited pragmatic inference); Soames, *Interpreting Legislative Texts*, *supra* note **Error! Bookmark not defined.**, at 422 ("The legislative process is governed by purposes that transcend, and sometimes conflict with, the conversational ideal of the efficient and cooperative exchange of information. Consequently, the way in which conversational maxims based on this ideal contribute to filling the gap between the meaning and content of legal texts may, in some cases, differ from their contribution to filling similar gaps in ordinary conversations.").

<sup>77</sup> *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 179 (2011) ("Consider the once-dreaded maxim of negative implication, *expressio unius est exclusio alterius*. The specification of one thing surely does not always mean the exclusion of others. ... Still, while there is no master rule that can tell us when the maxim applies, that does not mean that skilled users of language are utterly unable to identify when a speaker has used language in a way that creates a negative implication. We do so all the time. Sometimes the maxim's applicability is obvious; other times, it is subject to reasonable disagreement." (footnotes omitted)).

<sup>78</sup> Less clear is whether values such as politeness are implicated by the legislative context. *See supra* note 72.

Second, in most if not all cases, an interpreter must attribute to Congress various practical intentions<sup>79</sup> in order to attribute to it a communicative intention. Attributions of practical intent are often latent. Such attributions are, however, necessary *if* one is to understand legislation as an effective means of communication—which, as a matter of positive law, courts plainly *do*.<sup>80</sup> It is possible—though, in the author’s view, highly doubtful—that courts are mistaken in thinking of legislation as a means of communication.<sup>81</sup> Legislation-as-communication has intuitive appeal, and is, for that reason, the “standard picture” among legal theorists.<sup>82</sup> In addition, it is the “law of interpretation” within our federal system,<sup>83</sup> or, perhaps better, the positive law of “what the

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<sup>79</sup> This Article uses the phrase “practical intention” to refer to both general and specific practical aims. As used, the phrase thus encompasses what Mark Greenberg and others refer to as “legal intention,” i.e. the intention to alter legal rights or obligations in a particular way. Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Greenberg, *Legislation as Communication?*]. To go back to the WPR example, the intention that one attributes to Congress to limit the President’s authority to engage in hostilities without congressional approval is plausibly a legal intention in Greenberg’s sense. Nonetheless, this Article characterizes it as a practical intention for the reason that it is intuitively glossed as what Congress is trying to *do*, as opposed to what Congress is attempting to *say*. Of course, one could, in addition, attribute to Congress on the basis of its enacting the WPR the more general practical intention of, say, maintaining the separation of powers or reducing the frequency of significant military intervention. The point here is just that the phrase “practical intention,” as used, is not limited to such general aims or purposes.

<sup>80</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2494 n.4 (2015) (“Congress said expressly that it wanted to avoid adverse selection in the health insurance markets.”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014) (“Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations”); *Jones v. United States*, 529 U.S. 848, 858 (2000) (“Congress should have spoken in language that is clear and definite . . . .” (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222 (1952)); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .”)); *United States v. Nat’l City Lines, Inc.*, 337 U.S. 78, 84 (1949) (“Congress indeed meant what it said . . . .”); *United States v. Am. Sugar Ref. Co.*, 202 U.S. 563, 577 (1906) (“[I]t is the meaning of Congress . . . we are to ascertain . . . .”); *The Kensington*, 183 U.S. 263, 274, 22 S. Ct. 102, 106, 46 L. Ed. 190 (1902) (“Congress meant by the[se] words . . . but one thing . . .”).

<sup>81</sup> For arguments that legislation should *not* be regarded as a means of communication, see, e.g., Greenberg, *Legislation as Communication?*; Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1990). Assessing the merits of these arguments goes beyond the scope of this Article.

<sup>82</sup> Mark Greenberg, *The Moral Impact Theory of the Law*, 123 YALE L. J. 1288, 1296–97 (2014) (describing the “standard picture” as the view that “the content of the law is primarily constituted by linguistic (or mental) contents associated with the authoritative legal texts,” observing that the picture “has deep roots in ordinary thought about the law,” and is “encapsulated in the layperson’s idea that the law is what the code or law books say”).

<sup>83</sup> William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. \_\_\_\_ (forthcoming 2017); cf. William Baude, *Is Originalism Our Law*, 115 Colum. L. Rev. 2349 (2015)

[statutory] law is.”<sup>84</sup> For these reasons, this Article assumes the picture of legislation as communication *arguendo*. And, given that picture, attributions of legislative intent, both communicative and practical, are to a large degree unavoidable.

Among other things, the above-identified need to attribute to Congress practical intentions calls into question the textualist claim that, when interpreting a statute, one should prioritize so-called “semantic context” over “policy context.”<sup>85</sup> According to John Manning, “semantic context” consists of “evidence that goes to the way a reasonable person would use language under the circumstances.”<sup>86</sup> Included in “semantic context” are such things as “dictionary definitions,” “specialized trade usage,” and “colloquial nuances that may be widely understood but that are unrecorded in standard dictionaries.”<sup>87</sup> “Policy context,” by contrast, consists of “evidence that suggests the way a reasonable person would address the mischief being remedied.”<sup>88</sup> Within the ambit of “policy context” are:

[M]atters such as public knowledge of the mischief the lawmakers sought to address; the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute’s preamble, title, or overall structure; and the way alternative readings of the statute fit with the policy expressed in similar statutes.<sup>89</sup>

Manning argues that “[w]hen contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy.”<sup>90</sup> What Travis cases in particular suggest, however, is that, to determine what a speaker intends to *say*, one must, in nearly

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(articulating a positive law argument for originalism about constitutional interpretation); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 821 (2015) (same).

<sup>84</sup> See Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 32 (2009) (noting the distinction “between what the law is and what judges should do” when interpreting a legal text).

<sup>85</sup> John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006) [hereinafter Manning, *What Divides?*]; see also Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 693 (2014) [hereinafter Fallon, *Three Symmetries*] (observing that “Professor Manning’s distinction between semantic contexts and policy contexts hav[e] achieved broad acceptance”).

<sup>86</sup> Manning, *What Divides?*, *supra* note 85, at 76.

<sup>87</sup> *Id.* at 92.

<sup>88</sup> *Id.* at 76.

<sup>89</sup> *Id.* at 93.

<sup>90</sup> *Id.* at 92-93.

all instances, determine first what she intends to *do*.<sup>91</sup> In most cases, what a speaker intends to do is obvious, making the corresponding determination unthinking or automatic. Nonetheless, is it a determination a listener must make. With respect to statutes, this suggests that “evidence of semantic usage” is rarely clear when considered apart from evidence of “the mischief being remedied.” Again, very often, that “mischief” will be so apparent that it will not require conscious consideration. All the same, even in easy cases, what the legislature intends to do must be taken into account. As this Article explains below, the question remains what *sources* an interpreter should consider when making sense of a statute. This claim here is just that, in most cases, one cannot determine how “a reasonable person would use language under the circumstances” apart from evidence of purpose, whatever the source.

## II. CONGRESS AS SUCH HAS NO INTENTIONS

So attributions of legislative intent are widespread and seemingly unavoidable. The problem is there is no legislative intent. At least not in the United States Congress. As this Part explains, the Constitution vests the legislative power in Congress as a collective. On any plausible account of shared agency, however, Congress as structured is systematically incapable of forming collective intentions (other than the bare intention to enact text into law). As a consequence, attributions to Congress of legislative intent in the familiar sense are systematically false.

### A. Congress Is an “It,” Not a “They”

As far as the Constitution is concerned, Congress is an “it,” not a “they.” Article I, § 1 vests all legislative powers in “a Congress.”<sup>92</sup> The Constitution also specifies various things “the Congress” may or shall do.<sup>93</sup> In each instance, the

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<sup>91</sup> This cuts against the argument voiced by Joseph Raz that legislative intent “plays no real role” in interpretation because, barring specific exceptions, “one means what one says.” RAZ, *supra* note 7, at 286-87; *see also id.* at 287 (“[T]he normal way of finding out what a person intended to say is to establish what he said. The thought that the process can be reversed mistakes the exceptional case ... for the normal case”). If determining what a speaker “says” requires attention to the practical circumstances in most cases, Congress’s practical ends have an important role in interpretation most of the time.

<sup>92</sup> U.S. CONST. art. I, § 1.

<sup>93</sup> *See, e.g., id.* § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes ...”); *id.* cl. 8 (“[The Congress shall have the power to] [t]o establish Post Offices and post Roads ....”); *id.* art. II, § 2, cl. 2 (“[T]he Congress may by Law vest the Appointment of ... inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

Constitution refers to Congress as a *collective* as opposed to a mere set of individuals. To illustrate, when a disgruntled citizen says, “Congress is out of touch,”<sup>94</sup> her claim is best understood as something like that most members of Congress are out of touch.<sup>95</sup> So taken, the claim that Congress is corrupt is akin to the claim that ravens are black or that the 12th Man cheers the Seattle Seahawks; it a *generic* ascription of a trait to the individuals that constitute the referenced set.<sup>96</sup> By contrast, when the Constitution says, “[T]he Congress may ... establish [inferior courts],”<sup>97</sup> the takeaway is not that a generic member of Congress may establish such a court on her own. Rather, it is that Congress may do so as a collective, much in the same way that the Villanova Wildcats may win the NCAA championship or that the Supreme Court may grant certiorari.

The above might seem obvious. One must bear it in mind, however, when thinking about the slogan that Congress is a “they,” not an “it.”<sup>98</sup> As discussed below, that slogan was introduced as a banner for skepticism about legislative intent. But, more recently, it has come to border on truism, accepted even by some who find recognition of legislative intent unproblematic.<sup>99</sup> This broad, casual acceptance of the thesis that Congress is a “they” makes little sense. If the legislative power belongs to Congress as a collective, the choice is stark: either Congress forms intentions qua “it” or there is no legislative intent.

### B. *Traditional Skepticism*

Traditional skepticism about legislative intent is rooted in skepticism about the aggregability of attitudes of legislators.<sup>100</sup> In one form, traditional

<sup>94</sup> Letters to the Editor, *Congress Out of Touch with America*, THE WASHINGTON POST (June 24, 2014), [http://www.washingtonpost.com/opinions/a-congress-out-of-touch-with-america/2014/06/24/4b1a8fae-fadb-11e3-9f27-09f20b8bfd1a\\_story.html](http://www.washingtonpost.com/opinions/a-congress-out-of-touch-with-america/2014/06/24/4b1a8fae-fadb-11e3-9f27-09f20b8bfd1a_story.html).

<sup>95</sup> See *id.* (citing as evidence that Congress is out of touch that “House Majority Leader Eric Cantor (Va.) is ... out of touch”).

<sup>96</sup> See Sarah-Jane Leslie, *Generics*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (Edward Craig ed., 2011), <http://www.rep.routledge.com/article/U059>.

<sup>97</sup> U.S. CONST. art. III, § 1.

<sup>98</sup> Shepsle, *supra* note 6.

<sup>99</sup> See, e.g., Gluck & Bressman, *Part II*, *supra* note 22, at 737 (acknowledging “Kenneth Shepsle’s famous insight that Congress is a ‘they,’ not an ‘it’” (internal quotation marks omitted)); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEORGETOWN L.J. 705, 711 (1992) [hereinafter McNollgast, *Positive Canons*] (“As Kenneth Shepsle reminds us, ‘Congress is a they, not an it.’”).

<sup>100</sup> Traditional skepticism has historical roots in an influential article by Max Radin. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) (“The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.”).



skepticism fixes on legislator *preference*. As public-choice theorists observe, majority preference of a legislative body need not be transitive, i.e. a majority of legislators might prefer X to Y and Y to Z, but also Z to X.<sup>101</sup> For this reason, the legislative process is susceptible to “cycling” unless structured produce a final vote.<sup>102</sup> But this means that legislative outcomes might be owed to “agenda sett[ing],” i.e. control over on what gets voted and when,<sup>103</sup> making it impossible to “differentiate,” in a given case, “the ‘will of the majority’ from the machinations ... of agenda setters.”<sup>104</sup> Alternatively, legislative outcomes might be owed to “logrolling,” i.e. strategic trading of votes between legislators.<sup>105</sup> Logrolling “yields unanimity on every recorded vote,” masking substantive policy disagreement.<sup>106</sup> “[T]he legislative process is,” thereby, “submerged,” and “courts lose the information they need to divine the body’s design.”<sup>107</sup> Or so the argument goes.

In its other form, traditional skepticism fixes on legislator *intention*. The legislative process does not require legislators to prefer one policy to another for the same reasons.<sup>108</sup> Thus, even where substantive policy preferences align, different legislators might have in mind different ends—for instance, Legislator A might prefer policy X to policy Y because she believes policy X will be more efficacious while Legislator B might do so because she believes that policy X will be less efficacious but an adequate fig leaf.<sup>109</sup> In such a scenario, “there is

<sup>101</sup> See Shepsle, *supra* note 6, at 241-44; see also Leo Katz, *A Theory of Loopholes*, 39 J. LEGAL STUD. 1, 11-12 (2010) (providing an illustration).

<sup>102</sup> Shepsle, *supra* note 6, at 241-44

<sup>103</sup> *Id.* at 246 (noting “structural advantages of agenda setters, both in determining what the full chamber may vote on and when (proposal power), and more subtly on what the full chamber may not vote on (veto power)”); see also Easterbrook, *supra* note 12, at 547-48 (“Legislators customarily consider proposals one at a time. ... Additional options can be considered only in sequence, and this makes the order of decision vital.”).

<sup>104</sup> Shepsle, *supra* note 6, at 248.

<sup>105</sup> Easterbrook, *supra* note 12, at 548.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See Shepsle, *supra* note 6, at 244 (“[T]he winning majority consists of many legislators; their respective reasons for voting against the status quo may well be as varied as their number.”); see also Timothy W. Grinsell, *Linguistics and Legislative Intent*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471026](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471026) (“Shepsle and Easterbrook both treat the problem of ‘many intents’ as independent of the Arrowian-based argument. To some degree, it is: individual legislators may have the same ranking of proposals for *entirely different reasons*.” (footnote omitted)).

<sup>109</sup> See, e.g., *Health-Care Cooperatives: Fig Leaf or Fix?*, BLOOMBERGBUSINESSWEEK (August 18, 2009), <http://www.businessweek.com/stories/2009-08-18/health-care-cooperatives-fig-leaf-or-fix-businessweek-business-news-stock-market-and-financial-advice> (discussing, in the

not a single legislative intent, but rather many legislators' intents."<sup>110</sup> And one simply has no way of knowing whether such a scenario obtains.<sup>111</sup>

Traditional skepticism draws various responses. Some question the frequency with which cycling occurs in practice. Daniel Farber and Philip Frickey, for example, maintain that social choice theory's predictions of arbitrariness and instability are "markedly inconsistent with our empirical knowledge of legislatures such as the U.S. Congress."<sup>112</sup> Among other things, Farber and Frickey cite Congress' committee structure and the distribution of member preferences along a "unidimensional, liberal-conservative spectrum" as making cycling unlikely.<sup>113</sup> Others insist that skeptical fears ought to be dispelled simply by the familiar practice of attributing intentions to multi-member bodies such as corporations. Justice Stephen Breyer reasons, for instance, that "[c]orporations, companies, partnerships, municipalities, states, nations, armies, bar associations, and legislatures engage in intentional activities, such as buying, selling, promising, endorsing, questioning, undertaking, repudiating, and legislating."<sup>114</sup> "Linguistic and social conventions (complicated but well understood)," Breyer assures, "tell us when and how to attribute purposes to these bodies."<sup>115</sup> Others still observe that the possibility of cycling is not unique to the decisions of multi-member bodies. Timothy Grinsell explains that cycling can occur where individuals apply multicriterial predicates, i.e. predicates that denote a decision function aggregating multiple criteria into a single judgment, such as "healthy" or "nice."<sup>116</sup> Because we have no difficulty attributing coherent intentions to individuals who apply such predicates, Grinsell argues,

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context of the ACA, whether proposed healthcare cooperatives are an effective substitute for previously advocated public insurance option).

<sup>110</sup> Sheplse, *supra* note 6, at 244.

<sup>111</sup> *See id.* at 248 ("When a bill passes the House and Senate in the same form, and is signed by the president, there are only limited inferences to be drawn. We know that one majority in each chamber has revealed a "preference" for the bill over x<sup>0</sup>. We do not know why, and it is likely that each legislator has a mix of different reasons.")

<sup>112</sup> Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 430 (1988).

<sup>113</sup> *Id.*

<sup>114</sup> STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 99 (2011) [hereinafter BREYER, MAKING OUR DEMOCRACY WORK].

<sup>115</sup> *Id.*; *see also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864-65 (1992) ("One often ascribes 'group' purposes to group actions. A law school raises tuition to obtain money for a new library. A basketball team stalls to run out the clock. A tank corps feints to draw the enemy's troops away from the main front. ... All this is to say that ascribing purposes to groups and institutions is a complex business, and one that is often difficult to describe abstractly. But that fact does not make such ascriptions improper. In practice, we ascribe purposes to group activities all the time without many practical difficulties.")

<sup>116</sup> Grinsell, *supra* note 108.

the mere possibility of cycling cannot be enough to render problematic attributions of intentions to legislatures.<sup>117</sup>

The above responses draw their own responses.<sup>118</sup> What this Part suggests, however, is that this whole dialectic misses the fundamental problem with attributions of legislative intent. A premise of traditional skepticism—unquestioned by the abovementioned respondents—is that the aggregability of legislator attitudes is a necessary (and, perhaps, sufficient) condition for legislative intent. That premise is squarely at odds with philosophical accounts of shared agency, which recognize that, for there to be shared intention, aggregability is neither necessary nor sufficient.

### C. *Accounts of Shared Agency*

Sometimes we act side by side. Other times we act together. Philosophical accounts of shared agency try to make sense of the difference.

Take Margaret Gilbert's example of taking a walk.<sup>119</sup> Suppose that you and I walk next to each other through the park but each is unaware of or indifferent to the other. In this case, you and I each walk alone in some sense.<sup>120</sup> Suppose now that you and I each walk the same path but do so as part of a date. In this case, you and I walk *together* in the sense that we are engaged in a "shared cooperative activity."<sup>121</sup> In each case, our external behavior is the same. What differ are our respective intentions.<sup>122</sup> In the first case, I intend that *I* walk through the park and you intend that *you* do the same. In the second case, each

<sup>117</sup> See *id.* at \*3 ("Since ... the public choice argument applies with equal force to decisions made by legislatures and to decisions made by individuals, the notions of legislative intent and individual intent stand or fall together. And we should let them stand." (footnote omitted)).

<sup>118</sup> See, e.g., Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 789–93 (2005) (arguing that cycling can be common and is often unseen because it is pushed back in the legislative process); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981) (arguing that the absence of apparent cycling does not imply the absence of preferences that induce cycling).

<sup>119</sup> See Margaret Gilbert, *Walking Together: A Paradigmatic Social Phenomenon*, 15 MW. STUD. PHIL. 1 (1990).

<sup>120</sup> See *id.* at 2 ("Imagine that Sue Jones is out for a walk along Horsebarn Road on her own. Suddenly she realizes that someone else—a man in a black cloak—has begun to walk alongside her, about a foot away. His physical proximity is clearly not enough to make it the case that they are going for a walk together. It may disturb Sue precisely because they are not going for a walk together.").

<sup>121</sup> Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327 (1992).

<sup>122</sup> Cf. Searle, *supra* note 5, at 403 (discussing analogous examples, observing that "[e]xternally observed the two cases are indistinguishable, but they are clearly different internally.").

of us intends that *we* walk through the park. It is this “we-intention,”<sup>123</sup> philosophers suggest, that distinguishes our shared cooperative activity from a “mere summation or heap of individual acts.”<sup>124</sup>

For there to be shared cooperative activity, we-intentions must be *shared*. At a minimum,<sup>125</sup> this means that, for a collective as such to  $\varphi$ , its members—either all or sufficiently many<sup>126</sup>—must each intend that “we”  $\varphi$ .<sup>127</sup> If, for example, I intend that we walk through the park but you are unaware of my presence, we do not walk together (despite my mistaken belief that we do<sup>128</sup>). In addition, each member’s intention that “we”  $\varphi$  must be transparent, i.e. each

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<sup>123</sup> *Id.* at 404.

<sup>124</sup> Abraham S. Roth, *Shared Agency*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), <http://plato.stanford.edu/archives/spr2011/entries/shared-agency/>. Philosophers disagree as to whether we intentions can be reduced to ordinary individual intentions. Compare, e.g., BRATMAN, SHARED AGENCY, *supra* note 5, at 4 (“[I]ndividual planning agency brings with it sufficiently rich structures—conceptual, metaphysical, and normative—that the further step to basic forms of sociality, while significant and demanding, need not involve fundamentally new elements.”) with Searle, *supra* note 5, at 407 (arguing that “we-intentions are a primitive phenomenon” and that we intentions are “not reducible to I-intentions plus mutual beliefs”). Where philosophers agree is that some sort of “participatory intention” is a necessary condition of shared agency. Christopher Kutz, *Acting Together*, 61 PHIL. & PHENOMENOLOGICAL RESEARCH 1, 3 (2000).

<sup>125</sup> This Article identifies only certain *necessary* conditions of shared agency. What conditions suffice for shared agency goes beyond the scope of this Article and is a matter of philosophical dispute.

<sup>126</sup> Whether an intention need be shared by all or sufficiently many members to be attributed to a group plausibly depends upon whether that group is “ephemeral” or “institutional.” See *id.* at 28. Ephemeral groups, according to Christopher Kutz, “are groups whose identity as a group consists just in the fact that a set of persons is acting jointly” (e.g., a group pushing a car). *Id.* Institutional groups, in contrast, have additional identity criteria (e.g., to be a member of the U.S. Senate, it is not enough for one to “intentionally participat[e] in its deliberations; one must instead be elected in accordance with operative elections procedures). *Id.* at 28-29. In the case of ephemeral groups, it seems straightforward that *all* members of a group must share an intention to  $\varphi$  for that intention to be attributed to the group: what makes that group a *group*, after all, is just its shared intention to  $\varphi$ . Compare this to institutional groups such as the U.S. Senate: because the Senate exists as a group for reasons apart from its members shared intention to  $\varphi$ , it is at least plausible that one could attribute to the Senate an intention to  $\varphi$  if a large enough subset of senators shared that intention. This Article need not answer this question.

<sup>127</sup> See BRATMAN, SHARED AGENCY, *supra* note 5, at 152 (identifying as a necessary condition of shared agency that “[w]e each have intentions that we *J*”); GILBERT, JOINT COMMITMENT, *supra* note 5, at 7 (“[I]n the process of joint commitment, two or more people jointly commit the same two or more people.” (emphasis omitted)).

<sup>128</sup> For me to believe that we walk together, I must believe that we share an intention to do so. See BRATMAN, SHARED AGENCY, *supra* note 5, at 42 (“Of course, an individual may have an intention he would express as ‘we will do it,’ and yet be mistaken that his use of ‘we’ succeeds in referring. Perhaps he is a brain in a vat. But in that case there is no shared intention ....”).

member must recognize that each other member also intends that “we”  $\varphi$ .<sup>129</sup> Hence, if each of us intends that we walk through the park but each keeps that intention a secret, we do not (yet<sup>130</sup>) walk as a joint venture. Last, members must intend to coordinate their efforts toward  $\varphi$ ing.<sup>131</sup> We do not share an intention that we walk through the park if, for instance, we make no effort to walk at the same pace.

Whenever there is an instance of shared cooperative activity, one can, in a minimal sense, correctly attribute an intentional action to a collective as such. When, for example, you and I walk through the park together, one can truthfully say that *we* walk through the park in a way that one cannot when you and I merely walk side by side. Likewise, whenever one can correctly attribute an intentional action to a collective, one can, again, in a minimal sense, correctly attribute an intention to that collective. Hence, when *we* walk through the park, one can ascribe to *us* the intention to do so in a way that one cannot when *you* and *I* each walk alone. Philosophers disagree as to whether and to what extent collective action must involve collective *agents* in some metaphysically interesting way.<sup>132</sup> Similarly, philosophers disagree as to whether and under what conditions it makes sense to regard a collective as constituting a “group mind” to which one could reasonably attribute cognitive attitudes.<sup>133</sup> This Article need not wade

<sup>129</sup> See, e.g., GILBERT, JOINT COMMITMENT, *supra* note 5, at 7 (“In the basic case [of joint commitment], ... each makes clear to each his personal readiness to contribute to it, in a way that is entirely out in the open to all.”); Michael E. Bratman, *Shared Intention*, 104 ETHICS 97, 99 n.8 (identifying “common knowledge” as a necessary condition of shared agency).

<sup>130</sup> Assuming we are not confused, each of us intends in this case that we walk together at some point in the (near) future. See *supra* note 128. For us to succeed, we must disclose our respective intentions to one another prior to our walk. See GILBERT, JOINT COMMITMENT, *supra* note 5, at 29 (describing mutual expression of intention to walk together resulting in a “joint decision” to do so)..

<sup>131</sup> See BRATMAN, SHARED AGENCY, *supra* note 5, at 52 (“If we share an intention to go to NYC, and if you intend that we go to NYC by taking the New Jersey local train while I intend that we go by taking the Amtrak train, we have a problem. In a case of shared intention we will normally try to resolve that problem by making adjustments in one or both of these sub-plans, perhaps by the way of bargaining, in the direction of co-possibility.”).

<sup>132</sup> Compare Philip Pettit & David Schweikard, *Joint Actions and Group Agents*, PHIL. SOC. SCI. 18, 30 (2006) (seeing “no metaphysical reason why a joint intentional action has to be the product of a single agent”) with Margaret Gilbert, *What Is It for Us to Intend?*, in SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY 14, 22 (2000) [hereinafter Gilbert, *What Is It?*] (reasoning that, if there is shared intentional activity, there is a “plural subject” of that shared intentions).

<sup>133</sup> Compare BRATMAN, SHARED AGENCY, *supra* note 5, at 127 (“Should we say ... that the group agent of the shared intentional action is the *subject* of this intention? I think that this is not in general true: in modest sociality there need not be a group subject who has the shared intention. To talk of a *subject* who intends is to see that subject as center of a more or less coherent mental web of, at the least, intentions and cognitions. The idea of a subject who intends X but has few other intentional attitudes—who intends X in the absence of a mental web of that subject in

into these discussions. For present purposes, to say that a collective as such  $\varphi$ s is just to say that its members  $\varphi$  as a shared cooperative activity. In turn, to say that a collective intends to  $\varphi$  is just to say its members share an intention to  $\varphi$  as a collective, i.e. that its members share a we-intention to  $\varphi$ . If one accepts that there is such a thing as shared cooperative activity,<sup>134</sup> one can and should accept such minimal claims.

Questioning the applicability of the above model of shared agency to large groups, Christopher Kutz argues that a shared intention to  $\varphi$  is *too strong* a condition for a collective to  $\varphi$  in the case of, say, an orchestra. Kutz reasons that, because the contribution of an individual member to the groups  $\varphi$ ing is minimal, it makes no sense for her to intend to bring it about that the group  $\varphi$ s.<sup>135</sup> As a weaker alternative, Kutz proposes that members need share an intention to do their respective parts in  $\varphi$ ing for the collective to  $\varphi$ .<sup>136</sup> Kutz's argument rests, at bottom, on disputable linguistic intuitions.<sup>137</sup> Regardless, Kutz's "minimal contribution" concern, *id.*, has little purchase as to legislation, where each member's "contribution," i.e. her vote, is conditional on enough other members so contributing.

Scott Shapiro contends similarly that a shared intention to  $\varphi$  is too strong a condition for large groups because collective  $\varphi$ ing can occur even when some members of a collective are "alienated," i.e. even when some members do their part despite being apathetic or even hostile to the project of  $\varphi$ ing.<sup>138</sup> As a motivating example, Shapiro imagines two unaffiliated contractors each paid \$1,000 to do "what [the hiring party] tells him to do."<sup>139</sup> The hiring party tells

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which this intention is located—seems a mistake.") with Gilbert, *What Is It?*, *supra* note 132, at 14 (articulating "an account of shared intention as *the intention of a plural subject*" (first emphasis added)).

<sup>134</sup> As opposed to, say, mere "strategic interaction." BRATMAN, SHARED AGENCY, *supra* note 5, at 92 ("A central thought of this discussion is that modest sociality, while consisting in appropriate forms of interconnected planning agency, is not merely strategic interaction within a context of common knowledge."); see also Natalie Gold & Robert Sugden, *Collective Intentions and Team Agency*, 66 J. PHIL. 109 (2007) ("A general problem for ... accounts [of shared agency] is how to differentiate collective intentions from the mutually-consistent individual intentions that lie behind Nash equilibrium behaviour in games. ").

<sup>135</sup> See CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE* AGE 98 (2000) (claiming that for "an individual cellist" to intend that "[the orchestra] play the *Eroica*" would be for her to "take too grandiose a view of his or her role").

<sup>136</sup> *Id.* at 98-99.

<sup>137</sup> See *id.* at 98 (claiming that it would "ring false" to attribute to an individual cellist the intention that "we play the *Eroica*").

<sup>138</sup> Scott J. Shapiro, *Massively Shared Agency*, in *RATIONAL AND SOCIAL AGENCY: ESSAYS ON THE PHILOSOPHY OF MICHAEL BRATMAN* 257, 270 (Manuel Vargas & Gideon Yaffe eds., 2014).

<sup>139</sup> *Id.*

one contractor to scrape the old paint off his house and the other to paint a new coat on the scraped surface.<sup>140</sup> Each does as told. From this, Shapiro infers that the contractors “have intentionally painted the house together.”<sup>141</sup> This, Shapiro continues, despite the contractor instructed to scrape having been indifferent to whether the other contractor applied the paint.<sup>142</sup> Shapiro thus concludes, contractors need not share an intention that “we” paint the house to paint the house together intentionally.<sup>143</sup>

The problem with Shapiro’s example is that it conflates *intentionally brought about* with *brought about by intentional activity*. In the example, each contractor acts intentionally: The first contractor intentionally scrapes off the old paint while the second contractor intentionally applies the new. What results is a newly painted house. That result was reasonably foreseeable to each. But a newly painted house was not brought about intentionally. At least not as far as the first contractor is concerned. Rather, a newly painted house is the foreseeable result of the two contractors’ strategic interaction.<sup>144</sup>

Despite this, there is some truth to Shapiro’s more general observation. As explained above, it is plausible to attribute to an *institutional* group an intention to  $\varphi$  despite some members of that group failing to intend that “we”  $\varphi$ .<sup>145</sup> One can imagine, in turn, scenarios in which an institutional group might intend to  $\varphi$  despite some its members being “alienated” from the project of  $\varphi$ ing. If, for example, most members of Congress were to vote for a gun bill with the intention that “we” facilitate the purchase of assault rifles, it would be plausible to attribute to Congress the intention to facilitate the purchase of assault rifles even if a handful of members voted in favor begrudgingly to preserve their National Rifle Association “grades.”<sup>146</sup>

Return now to traditional skepticism. Just from the above sketch of shared agency, one can infer that neither preference nor intention aggregability is a sufficient condition for there to be legislative intent. Consider the motivating example of taking a walk. If you and I walk through the park side by side but each is unaware of the other, each of us prefers walking to other activities (assume for the sake of argument that our alternatives are the same).

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 271 (“[The contractor] do[es]n’t care a wit about painting the house, only [about] getting [his] money.”).

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* note 134.

<sup>145</sup> See *supra* note 126.

<sup>146</sup> See *How the N.R.A. Rates Lawmakers*, THE NEW YORK TIMES (December 19, 2012), <http://www.nytimes.com/interactive/2012/12/19/us/politics/nra.html>.

More to the point, each of us intends to walk through the park. As such, both our preferences and our intentions are aggregable in the way the traditional skeptic demands—aggregable in terms of the activity preferred or intended—here, to walk through the park—without regard to whether that activity is conceived as individual or joint.<sup>147</sup> In this case, however, *we* do not intend to walk through the park—even if *you* and *I* each do.

What of necessity? At one level, aggregability of legislator intention is, by definition, a necessary condition of legislative intent on the account of shared agency just sketched: if a collective intends to  $\varphi$  only if its members share an intention that “we”  $\varphi$ , then, for all cases in which Congress intends to  $\varphi$ , its members’ respective intentions to  $\varphi$  will be aggregable. In relation to traditional skepticism, however, to say that shared agency entails intention aggregability is misleading. Traditional skeptical arguments all have to do with the aggregability of *substantive* policy preferences or intentions (e.g., an intention to curb carbon emissions, a preference for expanding access to Medicaid, etc.).<sup>148</sup> But, for reasons touched on by Lawrence Solan, a legislature might, in an exercise of shared agency, intend a substantive policy without all or even a majority of legislators ever having had that policy in mind.<sup>149</sup> Drawing on examples from Gilbert, Solan observes that members of Congress might share an intention to enact some policy X the details of which are to be determined by some specific member (e.g., a bill sponsor, a committee chair, etc.), subset of members (e.g., a committee), or, conceivably, some non-member third party (e.g., an executive branch official, a lobbyist, etc.).<sup>150</sup> In so doing, Congress would exercise shared agency in much the same way as do you and I if each of us intends that we take

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<sup>147</sup> See Shepsle, *supra* note 6, at 244-45 (“[T]here is not a single legislative intent, but rather many legislators’ intents. Congress is a ‘they,’ not an ‘it.’ Legislator A may have voted for an amendment that ultimately became part of the winning policy because he favored the ‘plain meaning’ of the text. Legislator B, on the other hand, may have voted for it because he thought (incorrectly as it turned out) that the amendment would undermine support for the final bill or draw a presidential veto, thereby allowing the status quo ante to survive. Finally, Legislators C, D, and E may have supported the amendment, disinterestedly, as a reasonable compromise among competing interests.” (footnote omitted)).

<sup>148</sup> See *id.* at 241-44 (constructing Arrowian dilemma around intransitivity of substantive policy preferences).

<sup>149</sup> See Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005).

<sup>150</sup> See *id.* at 447 (“While committees will often be at the center of this inquiry, this will not always be the case. Sometimes, for example, the administration may propose legislation through members of Congress. When that happens, the relevant committees may adopt statements from the executive branch as reflecting the bill’s purpose. In other instances, the bill’s journey through committees, floor debate and conference is complicated, with particular moments in the process being crucial to passage of the bill.” (footnotes omitted)).



a trip but I leave to you the choice of destination.<sup>151</sup> In either case, members of the collective share a “we” intention that commits them to something specific without ever having to contemplate—let alone prefer or intend—that specific thing.

#### D. *New Skepticism*

Congress does sometimes act as an “it.” When Congress takes an up-or-down vote on a particular bill, for example, its members share a conditional intention that “we” approve the bill in question if it receives the requisite number of votes. For a member to cast her vote with this intention is just for her to cast her vote intentionally.<sup>152</sup> Likewise, when the House or the Senate votes on a proposed rule of legislative procedure, its members share an intention that “we” adopt the rule if sufficiently many members vote in favor. This much is clear. Less clear is whether Congress, qua “it,” sometimes enacts a bill for some *purpose* or intends that a textual provision have some specific *meaning*. This Part suggests that not. Or at least not with any systematicity.

Again, on the account of shared agency just sketched, to say that Congress as such intends to  $\varphi$  is just to say that (sufficiently many of) its members share an intention that “we”  $\varphi$ . As the above discussion suggests, this can come about in one of two ways. First, members can share a direct intention that “we”  $\varphi$ . Second, members can share a direct intention that “we”  $\theta$  that commits them indirectly to an intention that “we”  $\varphi$ .

To illustrate, consider the recent dispute in *King v. Burwell*<sup>153</sup> over the phrase “Exchange established by the State,” as used in § 36B of the Internal Revenue Code (“IRC”), enacted as part of the Patient Protection and Affordable Care Act (“ACA”).<sup>154</sup> Opponents of the ACA argued that, as used, “Exchange established by the State” could only be read to refer just to healthcare exchanges established by one of the fifty states or the District of Columbia.<sup>155</sup> In response, the Government argued that “the ACA’s structure and purpose all evince Congress’s intent” that the phrase refer to “both state-run and federally-facilitated Exchanges.”<sup>156</sup> Per the above, one of two conditions must obtain for

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<sup>151</sup> See *id.* at 439-40.

<sup>152</sup> Put another way, to cast one’s vote without this intention would be to evince a basic misunderstanding of voting procedure.

<sup>153</sup> 135 S. Ct. 2480 (2015).

<sup>154</sup> 26 U.S.C. § 36B.

<sup>155</sup> *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

<sup>156</sup> *King v. Sebelius*, 2014 WL 1028988 (C.A.4), 13 (quoting *Halbig v. Sebelius*, No. CV 13-0623 (PLF), 2014 WL 129023, at \*17 (D.D.C. Jan. 15, 2014) rev’d and remanded sub nom. *Halbig v.*

the Government's claim to have been true: 1) when enacting the ACA, members of Congress shared a direct intention that, by "Exchange established by the State," "we" mean exchanges established by the states or the federal government; or 2) members shared some other direct intention (e.g., an intention that the ACA be interpreted in a manner consistent with the assumptions underlying the corresponding CBO score<sup>157</sup>) that committed them indirectly to this reading.

Appeal to direct intention is, as a rule, hopeless for purposes of substantiating an attribution of legislative intent. As an empirical matter, member of Congress "don't read text,"<sup>158</sup> let alone form communicative intentions as to (or understandings of<sup>159</sup>) specific textual provisions. Further, because members act at the behest of different constituencies, it is rare for members to agree<sup>160</sup> upon reasons for action (outside of preambles, at least<sup>161</sup>).

This leaves appeal to indirect commitment. Various scholars have pursued this approach in recent years. For the most part, these are the same scholars who have urged courts, when engaging in interpretation, to pay greater attention to "how Congress really works."<sup>162</sup> Such scholars appeal to indirect commitments of one of two sorts. The first is commitments resulting from members' acceptance of formal norms. The second is commitments resulting from members' adherence to informal norms. For the reasons below, both approaches fail.

## 1. Formal Norms

On occasion, Congress plausibly commits itself indirectly to a communicative intention by adopting some formal norm such as an enacted procedural rule. For example, as Victoria Nourse observes, both the House and the Senate have a rule that prohibits conference committees from altering of the

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Burwell, 758 F.3d 390 (D.C. Cir. 2014) reh'g en banc granted, judgment vacated, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014)).

<sup>157</sup> See Gluck & Bressman, *Part II*, *supra* note 22, at 782.

<sup>158</sup> Gluck & Bressman, *Part I*, *supra* note 17, at 972.

<sup>159</sup> At least some participants in the drafting process seem to understand statutory meaning as 'objective,' i.e. as determined apart from the subjective intentions of drafters. See, e.g., Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 831 (2014) (observing that legislative counsel "view their role as ensuring [textual] clarity").

<sup>160</sup> In the sense of coordinate.

<sup>161</sup> See *infra* notes 173-178 and accompanying text.

<sup>162</sup> Nourse, *supra* note 1, at 143; accord Gluck & Bressman, *Part I*, *supra* note 17, at 909; KATZMANN, *supra* note 8, at 8.

text of a bill where the two chambers have agreed to the same language.<sup>163</sup> From this procedural rule, Nourse rightly infers that, where post-conference language (e.g., “utilized”) differs from agreed upon pre-conference language (e.g., “established”), Congress is committed—where plausible<sup>164</sup>—to the intention that the former communicate something substantially similar to that that was communicated by the latter.<sup>165</sup> And, as Nourse appears to recognize, this commitment to pre-/post-conference consistency will entail a commitment to a discernable communicative intention *if* the intention expressed by pre-conference language is itself discernable (e.g., where one can tell what Congress meant—or at least did not mean<sup>166</sup>—with that language).<sup>167</sup>

Nourse goes on to suggest that attention to the formal norms of legislative procedure renders both unmysterious and unproblematic the search for legislative intent. None of Nourse’s other examples, however, support that generalization. Nourse argues, for instance, that various procedural rules (e.g., cloture rules) dictate which stages of the legislative process (e.g., pre-filibuster compromise) are “important point[s] of textual decision.”<sup>168</sup> From this, Nourse infers that the legislative history most proximate to some such decision (e.g., the inclusion of specific language) will, other things equal, shed the most light on legislative intent as it pertains to that decision.<sup>169</sup> Legislative history consists just of non-binding statements or reports prepared by (or on behalf of) some individual member or subset of members. By assuming uncritically that legislative history is probative of legislative intent, Nourse thus shifts without remark from intent qua *shared indirect commitment* to intent qua *what was likely in the*

<sup>163</sup> See Nourse, *supra* note 1, at 94 & n.97 (“Conference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language.” (citing Rules of the House of Representatives, H.R. Doc. No. 111-157, R. XXII (9), at 37 (2011); Standing Rules of the Senate, S. Doc. No. 112-1, R. XXVIII (2a), at 52 (2011))).

<sup>164</sup> In cases where the rule was plainly violated, one cannot plausibly attribute to Congress such an intention.

<sup>165</sup> See *id.* at 96 (“A faithful member of Congress would assume that, when both houses pass the same language, any added language must be read as making no substantive change in the bill.”).

<sup>166</sup> If, for example, pre-conference language plainly precluded a particular reading, one could infer that Congress did not intend that reading post-conference. This would be true regardless of whether pre-conference language was in some other way unclear.

<sup>167</sup> See *id.* (“If the ambiguity is created in conference committee, ... then the court may resolve the ambiguity by conforming to Congress’s own rules.” (emphasis added)).

<sup>168</sup> *Id.* at 98. Here, Nourse builds upon prior work in positive political science. See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) (purporting to “identify aspects of the legislative history that are more reliably informative about the intent of the majority coalition that enacted a statute” through the identification of “veto gates”); McNollgast, *Positive Canons*, *supra* note 99 (same).

<sup>169</sup> See Nourse, *supra* note 1, at 110 (“[T]he best legislative history is the history most proximate to text, rather than a particular type of report or statement ....”).

*head of a member at the time of decision to the extent she was paying attention.*<sup>170</sup> There is, of course, no guarantee (and strong reason to doubt) that all or a majority of members are paying attention at the time of any given decision.<sup>171</sup> Therefore, absent some unmentioned shared *informal* commitment to, say, treating as authoritative the view of some individual member or set of members, Nourse offers no reason to share her confidence that attention to cloture rules will reveal shared intentions. Each of Nourse's additional arguments (e.g., that statements by legislative "winners" are more probative than statements by "losers"<sup>172</sup>) suffers from this defect.

Congress also sometimes commits itself to communicative intentions via statute. The Dictionary Act in Title 1 of the United States Code, for example, contains various rules of construction that inform "the meaning of any Act of Congress."<sup>173</sup> Because it has committed itself to these rules, one can attribute to Congress, other things equal,<sup>174</sup> the intention to "include the future as well as the present" where it has used the present tense.<sup>175</sup> So too, where it has used the term "person," one can attribute to Congress the intention to refer to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."<sup>176</sup> In addition to the Dictionary Act, Congress makes liberal use of definitions sections within specific statutes. Hence, when interpreting Title 18, one can attribute to Congress, where it uses the term "United States" in a "territorial sense," the intention to refer to "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."<sup>177</sup> Last, in terms of broader practical intentions, Congress does sometimes commit itself to such intentions via preamble. When interpreting some provision of the Animal Welfare Act, for instance, one can attribute to Congress the background intent of "[e]nsur[ing] that animals intended for use in research facilities ... are provided humane care and treatment."<sup>178</sup>

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<sup>170</sup> In other words, to the extent that committee reports et al. are non-binding, such sources are, at best, probative of how a given member understood the corresponding text as a historical matter.

<sup>171</sup> See *supra* notes 158-159 and accompanying text.

<sup>172</sup> Nourse, *supra* note 1, at 118-19.

<sup>173</sup> 1 U.S.C. § 1.

<sup>174</sup> The Dictionary Act's rules of construction are framed as default rules, i.e. as rules that apply "unless the context indicates otherwise." *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 18 U.S.C. § 5.

<sup>178</sup> 7 U.S.C. § 2131.

Unfortunately, definitions sections<sup>179</sup> and preambles only get one so far. Setting aside the old problem that one must interpret definitions sections and preambles,<sup>180</sup> such provisions plainly do not—and could not plausibly<sup>181</sup>—ground the array of intent attributions described in Part I.

In sum, appeal to formal norms adopted by Congress fails as a general method for substantiating attributions of legislative intent.

## 2. Informal Norms

Appeal to informal legislative norms fares no better. First, judicial recognition of a non-obvious legislative norms would plausibly conflict with fair notice. Particularly so with the informal norms alleged. Second, recent empirical studies of the legislative drafting process support skepticism about intent attributable to Congress via informal norm.

What is an informal legislative norm? For present purposes, an informal norm is just a recognized norm with no formal basis.<sup>182</sup> Consider, for example, the norm in soccer that a player kick the ball out of bounds if a player from the opposing team is injured. This norm appears nowhere in the FIFA rulebook but is widely recognized by both players and fans. It is, therefore, an informal norm of the sport.<sup>183</sup> An informal *legislative* norm, in turn, is just a norm recognized but not formally adopted by Congress as such. The norm that a home senator retains veto power over a judicial nominee, for example, has no

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<sup>179</sup> In effect, the Dictionary Act is a definitions section for the entire United States Code.

<sup>180</sup> Cf. Fallon, *Three Symmetries*, *supra* note 85, at 711 (observing that “if a theory ... tried to incorporate within itself rules for its own application, then someone could always demand to see the principles specifying how those prescriptions should in turn be interpreted”); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 217 (G.E.M. Anscombe ed., 1991) (“How am I able to obey a rule?”—if this is not a question about causes, then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: “This is simply what I do.”).

<sup>181</sup> Congress could not, for instance, simply define away the range of conceivable Travis case.

<sup>182</sup> Cf. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181 (2013) (contrasting informal “conventions” with “formal legal rules”).

<sup>183</sup> See Nate Scott, *Italian Soccer Game Has Heartwarming Display of Sportsmanship*, USA TODAY SPORTS (March 20, 2014), <http://ftw.usatoday.com/2014/03/soccer-game-italian-serie-d-sportsmanship> (“A player for [Team A] was injured, so [Team B] kicked the ball out of bounds to allow him to get treatment. As is customary in soccer, [Team A] then threw the ball in and gave the ball back to [Team B]’s goalkeeper.”).

basis in statute or formal procedural rule. It is, nonetheless, recognized by members as binding.<sup>184</sup>

Various accounts of legislative intent are built upon appeal to informal legislative norms. Such accounts claim that members of Congress share intentions to *delegate* the task of authoring legislation. In turn, members are alleged to be committed, albeit informally, to regarding the intentions of their delegates as authoritative. Solan, for example, claims that Congress delegates to “subplanners” the task of giving “content” to particular bills.<sup>185</sup> Often but not always the subplanners in question are originating congressional committees.<sup>186</sup> According to Solan, members of Congress share a “*general recognition* that those who ushered [a] bill through the process did so with particular [intentions] that deserve to be honored.”<sup>187</sup> From this, Solan infers, among other things, that “the historical record of a committee ... that developed the details of a statute is typically useful evidence of that subgroup’s, and thus the entire group’s, intent.”<sup>188</sup> Similarly, Judge Katzmann reasons that courts should consider legislative history because so doing “can aid the judge in understanding how *the legislation’s congressional proponents* wanted the statute to work, what problems they sought to address, what purposes they sought to achieve, and what methods they employed to secure those purposes.”<sup>189</sup> Judge Katzmann goes on to assert that “[w]hen Congress passes a law, it can be said to incorporate the materials that it or at least the law’s principal sponsors (and others who worked to secure enactment) deem useful in interpreting the law.”<sup>190</sup> Judge Katzmann infers this informal commitment to incorporation from the “substantial control” over the legislative process afforded to “particular legislators,” including “committee chairs, floor managers, and party leaders.”<sup>191</sup> Gluck and Bressman likewise argue that that “faithful-agent judges” should use legislative history to discern the intentions of “legislative drafters,” i.e. those members and staffers most responsible for putting together a particular bill.<sup>192</sup> Gluck and Bressman go on to advocate various interpretive rules (e.g., that a statute be interpreted in accordance with the assumptions underlying the corresponding CBO score, that a statute drafted

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<sup>184</sup> See MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917-PRESENT (2003).

<sup>185</sup> Solan, *supra* note 149, at 448-49.

<sup>186</sup> See *id.* at 447.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> KATZMANN, *supra* note 8, at 35.

<sup>190</sup> *Id.* at 48; see also *id.* at 38 (characterizing committee reports and conference committee reports as “authoritative materials”).

<sup>191</sup> *Id.* at 48-49.

<sup>192</sup> E.g., Gluck & Bressman, *Part I, supra* note 17, at 959.

by a committee be construed to preserve that committee's jurisdiction<sup>193</sup>) supposed to approximate the intentions of those "doing the drafting."<sup>194</sup> Gluck and Bressman equate without argument the intentions of drafters and those of Congress as such.

The above accounts give rise to two concerns.<sup>195</sup> First, greater attention to "how Congress really works" supports *skepticism* about legislative intent via delegation. Assume *arguendo* that Congress intends to delegate authorship to "drafters." In the simple case, a committee drafts a bill. Both chambers then adopt that bill without amendment. Here, whatever intentions are attributable to the committee are attributable to Congress as such. But how to determine what intentions are attributable to the committee? Beyond looking at the statutory text, the traditional answer is: read the committee report.<sup>196</sup> That answer is difficult to square, however, with survey responses showing differences of opinion amongst drafters as to whether such reports are

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<sup>193</sup> See Gluck & Bressman, *Part II*, *supra* note 22, at 781, 782.

<sup>194</sup> Gluck & Bressman, *Part I*, *supra* note 17, at 946; see also *id.* at 989 ("Courts rather easily might implement many of our respondents' insights related to the different types of legislative history, for example: distinguish between omnibus and appropriations legislative history; entrench the inconsistently applied doctrine that committee reports are the most reliable history; pay more attention to markups; and place more weight on scripted colloquies or other documents issued jointly by committee leaders of opposing parties.").

<sup>195</sup> In addition to the concerns voiced here, delegation-based accounts of legislative intent have been subject to non-delegation critique. As mentioned above, Article I, § 1 vests all legislative power in Congress as such. See *supra* notes 92-97 and accompanying text. According to Justice Scalia, "[i]t has always been assumed that these powers are nondelegable—or, as John Locke put it, that legislative power consists of the power 'to make laws, . . . not to make legislators.'" *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring) (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 87 (R. Cox ed. 1982)). Sharpening the critique, John Manning argues that "legislative *self*-delegation poses a particularly acute danger to [the Article I, § 7 requirements of] bicameralism and presentment and is unconstitutional *per se*." John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997) [hereinafter Manning, *Nondelegation*] (emphasis added). Manning reasons that when a court "gives authoritative weight to," say, "a committee's subjective understanding of statutory meaning (announced outside the statutory text), it empowers Congress to specify statutory details—without the structurally-mandated cost of getting two Houses of Congress and the President to approve them." *Id.* at 707.

This non-delegation critique, however, rests on the premise that Congress votes on legislative text, not 'drafter's' understanding thereof. But, to the extent that 'drafter's understanding' is just something like speaker meaning, that contrast is difficult to sustain for the reasons articulated in Part I.

<sup>196</sup> See *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))).

reliable.<sup>197</sup> So too with the concession by drafters in those same surveys that committee reports are used sometimes “to include ‘something we couldn’t get in the statute’ in order ‘to make key stakeholders happy.’”<sup>198</sup> Further, because the majority party drafts the report, “[t]his puts [it] in a position to be able to use [its] control of legislative history to sneak in [its] preferred interpretation even if it goes against the bargains that [it] made with the minority party to achieve passage.”<sup>199</sup>

Consider next a more complex (and more realistic) case. Some committee drafts a bill. Prior to adoption, various amendments are made on the floor. Whose intentions are attributable to Congress here? The naïve response is that the committee’s intentions are attributable as to the un-amended portions of the bill and that the intentions of amendment authors are attributable as to the portions amended.<sup>200</sup> This is too quick. Because a bill is read as a whole, amended portions shape one’s reading of un-amended portions and vice versa.<sup>201</sup> For this reason, one must, to make sense of a whole bill, attribute a coherent set of practical and communicative intentions to its author(s). But how? Committee member and amendment authors need not coordinate

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<sup>197</sup> Perhaps unsurprisingly, drafters responsible for committee reports regard those reports more highly than those not. Compare Gluck & Bressman, *Part I*, *supra* note 17, at 977-78 (reporting that most committee staffers regard committee reports as either “very reliable” or “reliable”) with Schobe, *supra* note 159, at 848 (reporting that legislative counsel—responsible for statutory text but not legislative history—regard committee staffers as having difficulty articulating policy goals clearly); see also Gluck & Bressman, *Part I*, *supra* note 17, at 978 (recognizing “potential bias” of committee staffers in favor of committee work product).

<sup>198</sup> Gluck & Bressman, *Part I*, *supra* note 17, at 973; see also Schobe, *supra* note 159, at 870; Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 607 (2002) (“As one staffer put it: ‘[T]o maintain agreement, people often prefer to leave language ambiguous and put things in legislative history.’”).

<sup>199</sup> Schobe, *supra* note 159, at 870. As Schobe goes on to explain, “While [the majority party’s] duplicity could cost them credibility, it will often not be revealed until many years later—if at all—when the case is litigated.” *Id.* Gluck and Bressman anticipate this concern, emphasizing that committee reports and other group-produced legislative “often convey bipartisan, multimember understandings. See Gluck & Bressman, *Part I*, *supra* note 17, at 978. For the reasons explained below, however, even in cases where a committee report reflects a bipartisan consensus *among committee members*, the question remains how to integrate that consensus with the attitudes of non-committee members.

<sup>200</sup> Because the amendments occur after committee, the committee need not form intentions as to their purpose or meaning. Nor is there an apparent reason to privilege committee intentions formed after a bill reaches the floor.

<sup>201</sup> By analogy, suppose a studio contracts with A to write a screenplay. Dissatisfied, the studio then contracts with B to rewrite the ending. B’s new ending will influence the audience’s interpretation of early scenes despite her having left those scenes unaltered. Likewise, the early scenes will influence the audience’s interpretation of the new ending.



intentions. And how to reconcile conflicting, uncoordinated intentions (whether policy or communicative) is unclear.<sup>202</sup>

Return now to the initial assumption that members share an intention to delegate. What is clear is that members share an intention to delegate to other members and staffers the *drafting* of proposed legislation, i.e. the putting of finger to keyboard. Also clear is that members depend on other members and staffers for information about what proposed legislation does. Less clear is whether members share an intention to delegate to other members or staffers *authorship* of proposed legislation in the sense of authoritative understanding thereof. For example, in the course of arguing against a “text-focused approach” to interpretation,<sup>203</sup> Gluck and Bressman claim that “[i]t is not uncommon to hear that a group of elected officials has reached a ‘deal’ before pen is put to paper.”<sup>204</sup> As evidence, Gluck and Bressman cite a complaint by Senator Mike Lee (R-UT) that “a gun bill was being debated even as ‘not a single senator ha[d] been provided the legislative language.’”<sup>205</sup> Senator Lee’s complaint only makes sense, of course, if proposed legislation consists of “legislative language” as opposed to some extra-textual “deal.” More to the point, it only makes sense if he regards himself as free to interpret that “language” himself. Again, this is of a piece with members making floor statements that conflict with committee reports and the like.

Taken together, the above provides ample reason for skepticism about intent via delegation. It is doubtful that members share an intention to delegate authorship. And, even if Congress so intends, the intentions of delegates are unknowable or unformed.

In the above respects, Congress thus contrasts sharply with a typical *corporation*. Various scholars reason that attributing intentions to Congress is

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<sup>202</sup> Add to this the practical complication that the legislative history generated with respect to floor amendments is alleged to be poor.

<sup>203</sup> In particular, an approach to interpretation that considers text at a “granular” level. Gluck & Bressman, *Part II*, *supra* note 22, at 743 (“This is not to say that members and staff do not care about text .... Rather, it is to say that micro-level legal disputes over what is often a single word in a lengthy statute may be improperly focused ....”); see also Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015) [hereinafter Gluck, *Imperfect Statutes*] (arguing that “[w]hereas the Court’s recent statutory interpretation jurisprudence has been marked by a targeted focus on a few contested words, King [v. Burwell] responds by looking at the full picture, at Congress’s ‘plan’”).

<sup>204</sup> *Id.* at 740.

<sup>205</sup> Jennifer Bendery, *Gun Bill Vote: Senate Overcomes GOP Filibuster Effort to Begin Debate*, HUFFINGTON POST (Apr. 11, 2013), [http://www.huffingtonpost.com/2013/04/11/gun-bill-vote\\_n\\_3061275.html](http://www.huffingtonpost.com/2013/04/11/gun-bill-vote_n_3061275.html).

unproblematic because we freely attribute intentions to corporations and other multi-member bodies.<sup>206</sup> In the case of corporations, intent attribution is often unproblematic because corporations are, generally speaking, *hierarchical* organizations with clear allocations of decisionmaking authority. Because, for example, a corporation's general counsel has decisionmaking authority with respect to the corporation's legal strategy, the general counsel's intentions with respect to legal strategy are, as a rule, attributable to the corporation as a whole.<sup>207</sup> In this way, the typical corporation is quite unlike Congress. Contrary to the suggestion of many, a bill's primary sponsors do not appear to enjoy the sort of widely recognized delegation of authority as does a general counsel.

Second, judicial recognition of non-obvious informal legislative norms would plausibly conflict with *fair notice*. As a constitutional matter, "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."<sup>208</sup> This means, at a minimum, that information necessary to understanding a law must be publicly available<sup>209</sup> and that guidance concerning the content of the law must not be misleading.<sup>210</sup> As a normative matter, notice is required by "[e]lementary notions of fairness."<sup>211</sup> It is also "recognized as an essential element of the rule of law."<sup>212</sup> Quite plausibly, "blame and punishment

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<sup>206</sup> See, e.g., Nourse, *supra* note 1, at 86 ("If lawyers find no difficulty in understanding the complexities of other collective entities, such as corporations or administrative agencies, one wonders why it is too difficult to understand Congress."); BREYER, MAKING OUR DEMOCRACY WORK, *supra* note 114, at 99 ("It is not conceptually difficult, however, to attribute a purpose to a corporate body such as Congress. Corporations, companies, partnerships, ... and legislatures engage in intentional activities ....").

<sup>207</sup> Delegation also explains attributions of intent to judicial opinions of multimember courts. See Nourse, *supra* note 1, at 74 ("[Lawyers] do not charge the multimember Supreme Court with having no 'intent' and, from this premise, dismiss judicial opinions as if the Court had made no decision."). Because courts delegate authorship of an opinion to a particular judge or justice in most cases, the intentions of the authoring judge or justice are attributable to the court as a whole.

<sup>208</sup> *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

<sup>209</sup> See Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 470 (2005) ("There is a consensus, for instance, that the people subject to a statute should have fair notice of the law's requirements; that is why even intentionalists restrict themselves to *publicly available* materials when trying to discern what the enacting legislature meant." (emphasis added)).

<sup>210</sup> See *Fox*, 132 S. Ct. at 2312-14, 2318 (holding that broadcasters lacked fair notice that prohibition against broadcast of "obscene, indecent, or profane language" applied to "fleeting" expletives where agency policy at time of broadcast indicated that prohibition applied only "repeated" expletives).

<sup>211</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment ....").

<sup>212</sup> Note, *Textualism As Fair Notice*, 123 HARV. L. REV. 542, 543 (2009); accord *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions,

*presuppose* that [an] agent had a fair opportunity to avoid wrongdoing.”<sup>213</sup> So too a rule of law, which ensures an “opportunity to know what the law is and to conform [one’s] conduct accordingly.”<sup>214</sup>

Recognition of certain informal norms is plainly consistent with fair notice. Some such norms are obvious. The norm that legislation be written in English, for example, has no formal basis but is widely recognized by members of Congress and by interpreters, both professional and lay.<sup>215</sup> Because the norm is so obvious, one would be hard-pressed to say that a “person of ordinary intelligence”<sup>216</sup> lacks notice of its operation.<sup>217</sup> Contrast this, however, with the alleged norm that a statute is to be interpreted in accordance with the understanding of its principal sponsors. Members routinely make floor statement that “disavow[] the committee’s or sponsor’s interpretation.”<sup>218</sup> In so doing, those members implicitly repudiate the alleged delegatory norm. Assume for the moment these statements are subterfuge. Even still, it would be

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one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids’” (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

<sup>213</sup> David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility*, in 1 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 284, 285 (David Shoemaker ed., 2013) (emphasis added).

<sup>214</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); accord Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 471 (1982) (“The rule of law ... is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance.”).

<sup>215</sup> See Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 101 n.9 (2003) (“[T]extualists assume that ... statutes are written in English. But no text by itself declares the language in which it is written. Rather, the context—English-speaking authors writing to direct an English-speaking audience—shows that English was the language intended.” (citations omitted)).

<sup>216</sup> *Fox*, 132 S. Ct. at 2317 (“A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained ‘fails to provide a person of ordinary intelligence fair notice of what is prohibited.’” (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008))); accord *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”).

<sup>217</sup> The same can probably be said of the various “linguistic” canons that interpreting courts apply. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* \_\_ (2012) (discussing what the authors refer to as “semantic” and “syntactic” canons). Because those canons are just approximations of the usage norms of ordinary English, the general norm that statutes in English plausibly entails the more specific norm that, for example, those same statutes conform to the principle of *expressio unius est exclusio alterius*. Gluck and Bressman observe that drafters report varying degrees of compliance with the linguistic canons. See Gluck & Bressman, *Part I*, *supra* note 17, at 932. Because such canons are best understood as rules of thumb, as opposed to rigid prescriptions, such varied compliance is compatible with the thesis that statutes conform to those canons generally.

<sup>218</sup> Manning, *Nondelegation*, *supra* note 195, at 721 & n.207 (collecting cases).

troubling to say that citizens have notice of a norm the existence of which officials deny.<sup>219</sup> Add to this the recent finding that a sponsor’s understanding is often informed by “‘inside information’ that may be unknowable to courts or litigants,”<sup>220</sup> and the fair notice concern becomes greater still.<sup>221</sup>

For the above reasons, appeal to informal norms also fails as a method for substantiating attributions of legislative intent.

### III. LEGISLATIVE INTENT AS FICTION, OR THE IRRELEVANCE OF LEGISLATIVE PROCESS

So claims about legislative intent are systematically false if taken literally. This Part argues that such claims are, therefore, best understood as involving a useful fiction. The fiction this Part posits is that legislation is written by a generic author. So understood, a claim about legislative intent is apt if and only if one would make that claim about a generic author on the basis of her having written the legislation at issue in the context of enactment.

#### A. Fictionalism

Fictionalism about a particular discourse is the thesis that claims within that discourse are best understood not as aiming at the literal truth but rather as involving a useful fiction.<sup>222</sup> When children play cops and robbers, for example, utterances such as “Mary has a gun!” or “The money is in the vault!” involve an obvious pretense. Hence it being unembarrassing that Mary carries a twig, not a firearm. Within such a discourse, utterances are still apt or inapt;<sup>223</sup> thus it

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<sup>219</sup> *Cf. id.* at 720 (expressing concern that, “because the Court has stated that it will treat committee reports and sponsor’s statements as more ‘authoritative’ than ordinary floor statements, individual legislators can even take to the floor and make statements disavowing the committee’s or sponsor’s interpretation, without precluding judicial reliance on the history produced by the more ‘authoritative’ legislative actors” (footnotes omitted)).

<sup>220</sup> Gluck & Bressman, *Part I, supra* note 17, at 985.

<sup>221</sup> *Cf. Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in part and concurring in the judgment) (“Indeed, it is not unlike the practice of Caligula, who reportedly ‘wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.’” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46 (1765))).

<sup>222</sup> *See* Roth, *supra* note 124.

<sup>223</sup> In other words, to say that a discourse involves a useful fiction is not to say that, within that discourse, anything goes.

matter whether Mary is in possession of the twig. It is just that aptness is determined by pretense in combination with facts on the ground.<sup>224</sup>

Fictionalism is often motivated by the concern that a discourse would suffer from a systematic defect if claims within it aimed at literal truth.<sup>225</sup> That concern might be metaphysical or epistemological. In the case of cops and robbers, the concern is metaphysical. Within the discourse, children appear to refer to objects that do not exist (e.g., money, vaults, guns). As such, claims within the discourse would be systematically false if attempts at literal truth. Contrast this with children discussing a plan to unearth buried treasure in the backyard. Here, if taken literally, claims within the discourse would be systematically unwarranted even if true (while the yard might contain buried treasure, the children have no way of *knowing*<sup>226</sup>). In each case, appeal to pretense explains away the would-be defect.<sup>227</sup>

Fictionalism can be *hermeneutic* or *revolutionary*.<sup>228</sup> Hermeneutic fictionalism is the thesis that a discourse involves a pretense.<sup>229</sup> Revolutionary fictionalism is the thesis that it should.<sup>230</sup> With cops and robbers, hermeneutic fictionalism is plainly true. Children do not, for instance, mistake a twig for a gun once the game has come to an end. Contrast this, however, with a child's talk about her imaginary friend. Here, it might be unclear whether the child regards her friend as imaginary. If not, hermeneutic fictionalism as to her talk is false. Revolutionary fictionalism, however, is probably true. The child can

<sup>224</sup> See, e.g., Stephen Yablo, *Does Ontology Rest on a Mistake?*, 72 PROC. ARISTOTELIAN SOC. 229, 247 (1998) (offering a pretense-based account of truth within a fiction); Kendall Walton, *Metaphor and Prop Oriented Make-Believe*, 1 EURO. J. PHIL. 39, 46 (1993) (same).

<sup>225</sup> See Jason Stanley, *Hermeneutic Fictionalism*, in MIDWEST STUDIES IN PHILOSOPHY VOLUME XXV: FIGURATIVE LANGUAGE 36 (Peter A. French & Howard Wettstein eds., 2001) (“On a fictionalist view, engaging in discourse that involves apparent reference to a realm of problematic entities is best viewed as engaging in a *pretense*.”).

<sup>226</sup> See, e.g., JOHN HAWTHORNE, KNOWLEDGE AND LOTTERIES 23 (2004) (“The practice of assertion is constituted by the rule/requirement that one assert something only if one knows it.”); TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS 243 (2000) (defending the “knowledge rule,” i.e. the rule that “[o]ne must: assert *p* only if one knows *p*”). While not all philosophers accept the knowledge norm of assertion, it is common ground that the norm(s) of assertion relate to epistemic access to the proposition asserted. See, e.g., Jennifer Lackey, *Norms of Assertion*, 41 NOÛS 594 (2007) (defending the “reasonable to believe” norm of assertion).

<sup>227</sup> In other words, fictionalism is a charitable reconstruction of an otherwise defective discourse.

<sup>228</sup> JOHN P. BURGESS & GIDEON ROSEN, A SUBJECT WITH NO OBJECT: STRATEGIES FOR NOMINALISTIC INTERPRETATION OF MATHEMATICS 6 (1999) (observing distinction).

<sup>229</sup> *Id.* (“On what may be called the hermeneutic conception, the claim is . . . , ‘All anyone really means—all the words really mean—is . . .’”).

<sup>230</sup> *Id.* (“On what may be called the revolutionary conception, the goal is reconstruction or revision.”).

and should<sup>231</sup> continue her friendship (and, in turn, her talk about that friendship) as a game of make-believe.<sup>232</sup>

### B. Fictionalism About Legislative Intent

Fictionalism about legislative intent is the thesis that claims about intent are best understood as involving a pretense. More specifically, fictionalism is the thesis that such claims involve the pretense that legislation is written by some author or other. As explained in Part I, intent attribution is necessary if legislation is to be an effective means of communication. For that reason, simply abandoning discourse about legislative intent is not a serious option. As explained in Part II, the primary motivation for fictionalism is the metaphysical concern that legislation has no author.<sup>233</sup> If legislation has no author, then claims about legislative intent are systematically false if taken literally. Appeal to the pretense of a generic author explains away this defect.<sup>234</sup> Understood as involving this pretense, a claim about legislative intent is apt if and only if one would make that claim about a generic author on the basis of her having written the legislation at issue in the context of enactment.

Why a *generic* author? Intent claims are made in relation to a context of enactment. A context of enactment consists of information from which one can draw inferences about an author about whom one knows nothing otherwise. Just from the fact that one is interpreting a federal statute, for example, one can infer that its author has written legislation as opposed to satire. Likewise, one can infer that the statute's author has written in English, given the obvious convention of so doing.<sup>235</sup> More generally, a context of enactment provides enough information to make sense of what an author is doing. For this reason, appeal to the pretense of a generic author is enough to make sense of discourse about legislative intent. Appeal to the pretense of, say, a "reasonable legislator"

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<sup>231</sup> See, e.g., Paige E. Davis, Elizabeth Meinsb, & Charles Fernyhough, *Individual Differences in Children's Private Speech: The Role of Imaginary Companions*, 116 J. EXPERIMENTAL CHILD PSYCHOL. 561 (2013) (finding that children who had imaginary companions were more likely to engage in covert private speech).

<sup>232</sup> Discourse about a child's imaginary friend thus contrasts with discourse about ghosts or phlogiston, which one probably does best to abandon.

<sup>233</sup> A secondary motivation for fictionalism about legislative intent is the epistemological concern that, even if legislation has an author, its author's intentions are unknowable. See *supra* notes 196-199 and accompanying text. If an author's intentions are unknowable, then claims about legislative intent are systematically unwarranted if aimed at literal truth. See *supra* note 226.

<sup>234</sup> Appeal to this pretense also explains away the abovementioned epistemological defect because it renders legislative intent knowable by definition, i.e. on a fictionalist approach legislative intent just is what one would have reason to believe it to be.

<sup>235</sup> See *supra* note 215 and accompanying text.

is, for this reason, unnecessary.<sup>236</sup> One can thus avoid the political philosophical judgments such an appeal might entail.<sup>237</sup>

So understood, fictionalism about intent is a refinement of “objectified intent,” as invoked by some textualists. According to Manning, “[l]egislative intent, to the extent textualists invoke it, is a framework of analysis designed to satisfy the minimum conditions for meaningful communication by a multi-member body without actual intentions to judges, administrators, and the public, who all form a community of shared conventions for decoding language in context.”<sup>238</sup> As Manning goes on to explain, “textualists focus on ‘objectified intent,’” i.e. “the import that a reasonable person conversant with applicable social and linguistic conventions would attach to the enacted words.”<sup>239</sup> As discussed above, textualists sometimes unreasonably restrict context to so-called “semantic context.”<sup>240</sup> And, as explained below, textualists sometimes misidentify the epistemic position(s) that determine what information context

<sup>236</sup> E.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 895 (2003) (observing that “[p]urposivism usually attributes goals or aims by envisioning reasonable legislators acting reasonably”); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (recommending that courts interpret statutes under the presumption that the legislature is “made of reasonable persons pursuing reasonable purposes reasonably”).

<sup>237</sup> Given a minimalist gloss, the ‘reasonable legislator’ collapses into the generic author. A generic author is presumptively reasonable in the sense that a listener assumes, other things equal, that a speaker has complied with the operative conversational norms. See Kent Bach, *Speech Acts and Pragmatics*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LANGUAGE* 155 (Michael Devitt & Richard Hanley eds., 2006) (“The listener presumes that the speaker is being cooperative and is speaking truthfully, informatively, relevantly, perspicuously, and otherwise appropriately. If an utterance superficially appears not to conform to this presumption, the listener looks for a way of taking the utterance so that it does conform.”). And, because she is the author of legislation, a generic author is a legislator just in that sense. Given a non-minimalist gloss, however, the ‘reasonable legislator’ can diverge from the generic author in one of two ways. First, one can apply to the ‘reasonable legislator’ a stronger presumption of reasonableness than would one to a run-of-the-mill interlocutor (e.g., a super-strong presumption against misstatement, see *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (“[T]he *sine qua non* of any ‘scrivener’s error’ doctrine, it seems to me, is that the meaning genuinely intended but inadequately expressed must be *absolutely clear*; otherwise we might be rewriting the statute rather than correcting a technical mistake.” (emphasis added))). See Soames, *Deferentialism*, *supra* note 15, at 604 (“When ordinary speakers leave crucial contingencies unaddressed, when they unwittingly undertake inconsistent commitments, or when what they advocate transparently defeats the goals of their advocacy, we do not pretend that Beneficent Providence has filled every gap, removed every contradiction, and rationalized every linguistic performance.”). Second, one might build in to the idea a philosophically robust conception of ‘legislator’ (e.g., a delegate or a trustee conception).

<sup>238</sup> Manning, *Legislative Intent*, *supra* note 11, at 434.

<sup>239</sup> *Id.* at 424.

<sup>240</sup> See *supra* notes 88-93 and accompanying text.

includes.<sup>241</sup> Still, the pretense of a generic author both captures and renders more precise the basic textualist insight that legislative intent is just the intent that one would attribute to the author of legislation as such.

Fictionalism is thus similar to but importantly different from the sort of *minimalism* about legislative intent defended by Joseph Raz and others. Raz argues that, when a legislator votes on some text, she does so with the minimal—and presumably shared—intention that the text be read in accordance with “the [interpretive] conventions prevailing at the time.”<sup>242</sup> Jeremy Waldron likewise assures that a legislator casts her vote “on the assumption that—to put it crudely—what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed).”<sup>243</sup> Understood in one way, such claims are uncontroversial but uninformative: To say that a member intends a text to be read in accordance with “prevailing” conventions is plausibly just to say that the member regards the conventions she intends as prevailing. Likewise, to say that a member assumes a text will mean to its audience what it means to her is plausibly just to say that the member understands her interpretation as correct. In other words, Raz and Waldron read one way claim just that a text’s meaning is assumed by all parties to be *objective*. Read another, more ambitious way, however, such claims amount to an endorsement of factionalism—or, to be more precise, a realist functional equivalent: On this understanding, to read a text in accordance with “prevailing” conventions is to attach to it the “import” that “a reasonable person conversant with applicable social and linguistic” norms would, i.e. as expressing “objectified” intent.<sup>244</sup> For the reasons articulated above, to so intend is to intend that a text be read as if written by a generic author.

Richard Ekins argues similarly that a reasonable legislator intends that a legislative text have “the meaning that a reasonable sole legislator who attends to the context . . . would be likely to intend to convey in uttering” those words.<sup>245</sup> Ekins observes rightly that “meaning” attribution of the sort he imagines involves attribution of both linguistic and practical intentions.<sup>246</sup> The

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<sup>241</sup> See *infra* note 282 and accompanying text.

<sup>242</sup> RAZ, *supra* note 7, at 286.

<sup>243</sup> JEREMY WALDRON, LAW AND DISAGREEMENT 129 (1999); see also *id.* (“That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.”).

<sup>244</sup> Manning, *Legislative Intent*, *supra* note 11, at 424.

<sup>245</sup> RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 236 (2012).

<sup>246</sup> See *id.* at 235-36 (“It is possible for drafters to convey more than the semantic content of the bill alone because legislators have good reason to understand proposals for action to be the choice that a rational legislator would be likely to make in enacting this text.”).



“reasonable sole legislator” that Ekins posits is plausibly more robust and, hence, more contestable than the generic author posited here.<sup>247</sup> Still, Ekins comes close to defending a functional equivalent to fictionalism as a thesis about actual shared legislator intention.

The problem with a generic author conception of legislative intent as a thesis about actual legislator intention is that such a thesis is difficult to square with the express position of some but not all legislators that interpreters owe special attention to legislative history, i.e. that interpreters should privilege legislators’ epistemic position.<sup>248</sup> More plausible is that there just is no legislator consensus as to which interpretive norms should apply.<sup>249</sup> Ekins might be right that a *reasonable* legislator would intend that a statute be read as if written by a generic author.<sup>250</sup> The trouble is that, as an empirical matter, numerous actual legislators appear highly unreasonable.

Fictionalism also shares similarities with so-called “original public meaning” originalism in constitutional interpretation.<sup>251</sup> As characterized by Lawrence Solum, “[t]he original-meaning version of originalism emphasizes the meaning that the Constitution (or its amendments) would have had to the relevant audience at the time of its adoptions.”<sup>252</sup> More precisely, original-public-meaning originalists inquire into the “conventional” meaning of constitutional language “in context” at the time of adoption and ratification.<sup>253</sup> Original-public-meaning originalism thus contrasts with so-called “original

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<sup>247</sup> See, e.g., *id.* at 128 (“The sole legislator has a duty to oversee the content of the law and to act to change the law when this serves the common good.”); *id.* at 220 (“[P]roposals for action that are fit to be chosen by a reasonable sole legislator [are] coherent, reasoned plans to change the law.”); see also *supra* notes 236-237 and accompanying text.

<sup>248</sup> See KATZMANN, *supra* note 8, at 36 (observing that members of both parties “have consistently supported judicial resort to legislative history”).

<sup>249</sup> See *supra* notes 204-205 and accompanying text.

<sup>250</sup> See EKINS, *supra*, at 235-36; see also RAZ, *supra* note 7, at 286 (arguing that a legislator must intend that a legislative text be read in accordance with prevailing conventions because to intend otherwise would be futile and so irrational); cf. Lawrence B. Solum, *Semantic Originalism* (Illinois Pub. Law Research Paper No. 07-24, 2008), at 5, <http://ssrn.com/abstract=1120244> [hereinafter Solum, *Semantic Originalism*] (arguing that “under normal conditions successful constitutional communication requires reliance by the drafters, ratifiers, and interpreters on the original public meaning of the words and phrases”).

<sup>251</sup> E.g., Solum, *Semantic Originalism*, *supra* note **Error! Bookmark not defined.**, at 2; Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4 (2011).

<sup>252</sup> *Id.* at 51; see also Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 926 (2009) [hereinafter Solum, *Heller and Originalism*] (characterizing “original public meaning originalism” as “the view that the original meaning of a constitutional provision is the conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified”).

<sup>253</sup> Solum, *Semantic Originalism*, *supra* note **Error! Bookmark not defined.**, at 2.

intention” originalism,<sup>254</sup> which has as its object of inquiry the actual, historical intentions of the enactors of the Constitution.<sup>255</sup> Much like textualists,<sup>256</sup> original-public-meaning originalists tend to underestimate the role of pragmatics in communication.<sup>257</sup> For that reason, original-public-meaning originalists rely upon the notion of “conventional” meaning to a greater extent than is, perhaps, warranted.<sup>258</sup> Still, much like fictionalism, original-public-meaning originalism focuses quite plausibly on the communicative intentions one would attribute to the author of the Constitution as such.<sup>259</sup> This despite the reluctance of original-public-meaning originalists to talk in terms of ‘intent.’<sup>260</sup>

To illustrate the fictionalist approach, consider again the dispute in *King*. As described above, the Government claimed that it was “Congress’s intent” that the phrase “Exchange established by the State,” as used in IRC § 36B, refer to “both state-run and federally-facilitated Exchanges.”<sup>261</sup> How to evaluate this

<sup>254</sup> E.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). As Richard Kay explains, original intention originalism is not to be confused with originalism about expected application. See Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 709-10 (2009) (characterizing “original intended meaning” as “the meaning that textual language had for the relevant enactors when they approved the text in question,” as contrasted with “the enactors’ expectations with respect to the particular instances that would come within the scope of the rules created”); see also Frederick Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797, 806 (1982) (arguing that originalism about expected application is “implausible precisely because [it] ignore[s] the distinction between the meaning of a rule (such as a constitutional provision) and the instances of its application”).

<sup>255</sup> See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (“The search is not for a subjective intention . . . . [W]hat counts is what the public understood.”).

<sup>256</sup> See *supra* notes 88-93 and accompanying text.

<sup>257</sup> Solum, for example, appears to regard pragmatics as limited to vagueness and ambiguity resolution. See Lawrence B. Solum, *Semantic and Normative Originalism: Comments on Brian Leiter’s “Justifying Originalism,”* LEGAL THEORY BLOG, Oct. 30, 2007, <http://lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html>.

<sup>258</sup> To illustrate, Solum contrasts “conventional” meaning with “special or idiosyncratic” meaning based upon the “secret” intentions of authors. Solum, *Heller and Originalism*, *supra* note 252, at 951-52. Only to the extent that Solum has in mind intentions that are “special or idiosyncratic” *given the practical context* is that contrast tenable. See *supra* notes 40-67 and accompanying text.

<sup>259</sup> Whether the same sorts of arguments against shared intentions in Congress raised in Part II apply to the Framers goes beyond the scope of this Article. There are, however, obvious disanalogies between the two settings (e.g., it is far more plausible that the Framers paid careful attention to constitutional text, see *supra* note 158).

<sup>260</sup> Steven Calabresi and Julia Rickert, for example, use the phrase “objective social meaning.” Calabresi & Rickert, *supra* note 251, at 8. This general reluctance to talk of ‘intent’ suggests that at least some original-public-meaning originalists regard intent as a dispensable metaphor. Cf. *supra* note 1.

<sup>261</sup> See *supra* notes 204-205 and accompanying text.

claim? If fictionalism is correct, this claim is apt if and only if one would attribute to a generic author an intention refer to “both state-run and federally-facilitated Exchanges” on the basis of her having written the phrase “Exchanges established by the State” in the context of enactment. So understood, whether the Government’s claim is apt plausibly depends on what counts as the “context of enactment.”

If context is limited to the operative and immediately surrounding statutory provisions, the Government’s claim appears somewhat implausible: More fully, § 36B refers to “Exchange[s] established by the State under section 1311 of the [ACA].”<sup>262</sup> Section 1311, in turn, encourages but does not require a state to “establish” an exchange.<sup>263</sup> Section 1312 creates a backstop, directing the federal government, through the Secretary of Health and Human Services, to “establish and operate such Exchange within [a] State” if that state opts not to establish an exchange under § 1311.<sup>264</sup> Considering this explicit contrast between state and federal exchanges, one would likely take the author of § 36B to mean state by “state.”

If, by contrast, context includes the ACA in its entirety, the Government’s position becomes much more plausible. For one, the narrow reading of § 36B would give rise to various anomalies throughout the Act. Among other things, the Act would thus require the creation of federally facilitated Exchanges on which there would be no “qualified individuals” eligible to shop,<sup>265</sup> as well as the reporting of information for a “[r]econciliation” of tax credits that could never occur.<sup>266</sup>

The Government’s position becomes even more plausible if context is expanded further still include public discussion of the Act and its structure as a “three-legged stool”<sup>267</sup>: Again and again in 2008, the proposed healthcare reform was characterized as having three basic elements:

First, people will be required to buy insurance, to spread costs among the sick and the healthy. Second, insurers will be prohibited from cherry-picking only the healthiest customers,

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<sup>262</sup> 26 U.S.C. § 36B.

<sup>263</sup> 42 U.S.C. § 18031.

<sup>264</sup> *Id.* § 18032.

<sup>265</sup> *Id.* at 10 (quoting 42 U.S.C. §§ 18031(d)(2)(A), 18032(f)(1)(A) (2012)).

<sup>266</sup> *Id.* at 13–14 (quoting 26 U.S.C. § 36B(f)(3)).

<sup>267</sup> Jonathan Gruber, *Health Care Reform Is a “Three-Legged Stool”: The Costs of Partially Repealing the Affordable Care Act*, CENTER FOR AM. PROGRESS (Aug. 5, 2010), [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing\\_reform.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/08/pdf/repealing_reform.pdf).

again to spread costs. Finally, the government will give subsidies to people, like McDonald’s workers, who can’t afford insurance on their own.<sup>268</sup>

Again and again it was emphasized that all three “legs” were necessary for the stool to stand. Against this backdrop, one would likely attribute to the author of § 36B the intention to refer to both state and federal exchanges. One would, in turn, understand her use of the phrase “Exchange established by the State” as a simple misstatement, i.e. a scrivener’s error.<sup>269</sup> This Part discusses below how to determine of what information context consists. As preview, the broader understanding of context is probably appropriate in this case.

This Article need take no position as to whether fictionalism about legislative intent is hermeneutic or revolutionary.<sup>270</sup> At least some jurists are plausibly fictionalists.<sup>271</sup> Others, however, are plainly not.<sup>272</sup> What matters for present purposes is that fictionalism is the best way to rationalize discourse about legislative intent. Whether some jurists are already fictionalists is a secondary concern.

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<sup>268</sup> David Leonhardt, *Health Care’s Uneven Road to a New Era*, N.Y. TIMES (October 5, 2010), [www.nytimes.com/2010/10/06/business/economy/06leonhardt.html](http://www.nytimes.com/2010/10/06/business/economy/06leonhardt.html).

<sup>269</sup> Doerfler, *supra* note 27; Gluck, *Imperfect Statutes*, *supra* note 203. As both of the cited articles suggest, so long as “context” includes the text of the ACA *as a whole*, the scrivener’s-error reading is probably—though not certainly—the best one.

<sup>270</sup> In other words, this Article need take no position as to whether fictionalism about legislative intent an *error theory*. Cf. JOHN L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977) (defending an error theory about moral discourse). The only ‘error’ to which this Article is committed is that of members of Congress to the extent that members regard their individual intentions as attributable to Congress as such. *But see supra* note **Error! Bookmark not defined.** (considering possibility that members share an intention that statutes be read as if written by a generic author).

<sup>271</sup> See *United States v. Mitra*, 405 F.3d 492, 495 (7th Cir. 2005) (Easterbrook, J.) (“Congress is a ‘they’ and not an ‘it’; a committee lacks a brain (or, rather, has so many brains with so many different objectives that it is almost facetious to impute a joint goal or purpose to the collectivity). Legislation is an objective text approved in constitutionally prescribed ways; its scope is not limited by the celebrations of those who voted for or signed it into law.” (citation omitted)); Scalia, *Common-Law Courts*, *supra* note 11 at 17.

<sup>272</sup> See *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 143-44 (2d Cir. 2002) (Katzmann, J.) (“If the meaning of the statute is ambiguous, the court may resort to canons of statutory interpretation to help resolve the ambiguity. The court may also look at legislative history to determine the intent of Congress.” (citations omitted)).

### C. Context of Enactment and Legislative Process

Context is the “mutually salient information” that an author exploits to make evident to her audience what she means.<sup>273</sup> Put another way, context is the information of which an author can reasonably expect her audience to be aware. Thus, to determine the context of enactment for some statute, one must determine that statute’s audience. For a given statute, the audience is, of course, diverse.<sup>274</sup> Because, however, context consists of *mutually* salient information, i.e. information salient *to all*, one can start by identifying the least informed segment of the audience. Where a statute operates on citizens, for example, the context of enactment is limited to information of which citizens should be aware.<sup>275</sup> So much is required for a statute to have an accessible meaning that is constant across that statute’s audience.<sup>276</sup>

Conversely, because context is cognitive “common ground,”<sup>277</sup> there is no reason to privilege the epistemic position of an author over that of her audience. Suppose, for example, that certain information (e.g., a wedding

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<sup>273</sup> Bach, *Content ex Machina*, *supra* note 13, at 19.

<sup>274</sup> See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1127 (2011) (“[S]tatutes are directed to multiple audiences, including courts and agencies.”); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 576 (1985) (observing that, in addition to the administering agency, “most regulatory statutes’ audiences also include private parties whose conduct or status is subject to regulation by the administering agency”).

<sup>275</sup> By contrast, where a statute operates only upon sophisticated parties, the information plausibly included in the context of enactment is much greater. See William N. Eskridge, Jr., *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 384 (1990) (“Highly technical statutes should not be read with the ‘common sense’ of the average person, but rather with the ‘common sense’ of the special audience to which the statute is addressed (such as gas and oil companies or tax lawyers).”); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984). (exploring the “idea that a distinction can be drawn in the law between rules addressed to the general public and rules addressed to officials”). Where, for example, a statute operates specifically upon financial institutions, an author can reasonably expect awareness of technical concepts in a way that she could not with respect to a general conduct statute. See, e.g., 12 U.S.C. § 1851(a)(1)(A) (prohibiting a “banking entity” from engaging in “proprietary trading”). Regulation of sophisticated parties in particular is thus one means by which Congress can regulate subject matter that an ordinary citizen could not be reasonably expected to understand.

<sup>276</sup> The legislative context thus contrasts with conversational contexts in which a speaker intends to communicate different things to different audience members. Suppose, for example, that A and B are planning a surprise birthday party for C. In that context, A might say to B, “I am looking forward to a quiet night in,” intending to communicate to B that the party is still on but to C that she is looking forward to a calm evening. For a partial dissent, see Dan-Cohen, *supra* note 275 (arguing that the same law can function both as a “conduct” rule directed at citizens and as a “decision” rule directed at officials).

<sup>277</sup> Stalnaker, *Indicative Conditionals*, *supra* note 16, at 67.

anniversary) is of much higher salience to an author (e.g., a law professor) than to her audience (e.g., her students). Here, it would be unreasonable for that author to try to exploit that information to make her intentions known (e.g., a take-home exam prompt indicating that the exam is due on “the special day” at 5 PM). Since her audience would predictably fail to call that information to mind, such an attempt by the author would predictably fail in turn.

Despite the above, much prior scholarship privileges the epistemic position of members of Congress when considering what information context of enactment includes. What results is the *eavesdropping* model of interpretation. On this model, legislation is treated as having been written *by* legislators *for* legislators. An interpreter is thus relegated to eavesdropper, listening in on a conversation between legislators.<sup>278</sup> So situated, an interpreter is to read legislation taking into account information that is salient to legislators. Scholars, in turn, debate whether sources such as legislative history contain such information.<sup>279</sup>

Adherence to the eavesdropping model is plainest in scholarship that urges greater attention to the legislative process. Judge Katzmann, for example, argues that an interpreter should pay special attention to those materials, such as committee reports, that “legislators” and “their staffs” use to “become educated about [a] bill.”<sup>280</sup> Likewise, Gluck and Bressman recommend consideration of different kinds of legislative history (e.g., committee reports, floor statements) as well as other non-textual sources (e.g., CBO scores) and structural cues (e.g., type of legislative vehicle) in proportion to the significance those indicators have to drafters.<sup>281</sup> Even those who oppose consideration of extra-textual sources such as legislative history, however, tend to accept the basic eavesdropping frame. Even Justice Scalia, for instance, has characterized the

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<sup>278</sup> See, e.g., Andrei Marmor, *The Pragmatics of Legal Language*, *RATIO JURIS* 423, 434 (2008) (“Judges and litigants are not parties to the legislative conversation, so to speak, and they have to rely on secondary sources to gather the relevant information.”).

<sup>279</sup> See, e.g., Nelson, *What Is Textualism?*, *supra* note 17, at 363 (“Justice Scalia suggests not that the legislature’s actual collective intent is always nonexistent or irrelevant, but rather that judicial decisions will better approximate that intent if courts generally disregard legislative history than if they take it into account.”).

<sup>280</sup> KATZMANN, *supra* note 8, at 19.

<sup>281</sup> See, e.g., Gluck & Bressman, *Part I*, *supra* note 17, at 989 (“[T]he real question about legislative history is not whether it should be consulted but, rather, how to separate the useful from the misleading.”); Gluck & Bressman, *Part II*, *supra* note 22, at 782 (recommending that courts “constru[e] legislation consistently with the [corresponding] CBO score” because of the “centrality of the CBO score” to drafters).

role of an interpreter as “read[ing] the words of [a] text *as any ordinary Member of Congress* would have read them, and apply[ing] the meaning so determined.”<sup>282</sup>

As an alternative, this Article puts forward the *conversation* model of interpretation. On this model, legislation is treated as having been written by legislators for those who administer the law (e.g., courts, agencies) and for those on whom the law operates (e.g., citizens). An interpreter, in turn, occupies the position of conversational participant, listening to statements directed at her and the other participants. From this position, an interpreter considers legislative text in light of information salient to legislators and, for example, citizens alike. Again, this approach involves attentiveness to the least informed segment of the group. To the extent that information has little or no salience to this segment, an interpreter will place little or no weight on that information when determining what an author means.

The conversation model of interpretation does not by itself dictate which sources of information an interpreter should consider in a particular case. Again, context consists of the information of which both speaker and audience should be aware. And, for example, how large a set of informational sources to which citizens should be attentive in a particular case is a question the model leaves open. By deemphasizing the epistemic position of legislators, the model does, however, alter the set of plausible answers to such questions. Go back to legislative history. As discussed below, different considerations speak for and against holding an audience accountable for non-textual, historical informational sources such as legislative history in different cases. That said, hard to imagine is a case in which it would be reasonable to hold an audience accountable for legislative history to the exclusion of other non-textual sources (e.g., newspaper articles, television reports, etc.). Especially so if the case involves a law that operates upon citizens. With the ACA, for example, can one seriously argue that, say, the Senate Finance Committee Report is of higher *mutual* salience than cotemporaneous front-page reporting from *The New York Times* or *The Wall Street Journal*? Or contemporaneous evening news reports featuring officials and experts discussing the proposed law? In short, legislative history is, on the conversation model, just one non-textual, historical source among many.

Even less plausible is the suggestion that an interpreter should sort carefully among different *kinds* of legislative history. Gluck and Bressman, for example, urge courts “to separate the useful from the misleading,” reasoning that attention to the legislative process reveals some kinds of legislative history

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<sup>282</sup> *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (emphasis added) (citation omitted).

as more “reliable” than others.<sup>283</sup> Gluck and Bressman base their comparative reliability assessments on the views of congressional staffers. Given this evidence, it is entirely plausible that, say, committee reports are of much higher salience than floor statements *to staffers*.<sup>284</sup> Conceivably the same is true of *agencies*, given their “multilevel and ongoing relationship with Congress.”<sup>285</sup> And perhaps the same is (somewhat) true of courts, given their (uneven) history of privileging committee reports over other legislative historical sources.<sup>286</sup> Add ordinary citizens to the conversational mix, however, and any difference in *mutual* salience quickly becomes de minimis. If *judicial* understanding of the legislative process is lacking,<sup>287</sup> popular understanding is woeful at best. More still, as explained in Part II, committee reports and the like have no claim to authority.<sup>288</sup> As such, it is hard to see how citizens have an obligation to be privy to such distinctions.<sup>289</sup>

Privileging the epistemic position of members of Congress can suggest textual clarity where there is none. In *Zuber v. Allen*,<sup>290</sup> for example, the Supreme Court invalidated a Department of Agriculture order requiring milk distributors within the Boston marketing area to pay premium prices to “nearby” milk producers.<sup>291</sup> The Court held that this “nearby” differential was inconsistent with a federal statute requiring that orders regulating the handling of milk provide for uniform prices to all producers within a given marketing area, subject to specific exceptions.<sup>292</sup> The Court rejected the Government’s argument that the “nearby” differential fit within the exception for “market ...

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<sup>283</sup> Gluck & Bressman, *Part I*, *supra* note 17, at 977.

<sup>284</sup> *See id.*

<sup>285</sup> Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 884 (2015) (observing that this relationship allows agencies “firsthand knowledge of the critical debates and the character of their resolution,” making them “more reliable readers of legislative history”); *see also* Gluck & Bressman, *Part II*, *supra* note 22, at 676 (noting that “drafters saw their primary interpretive relationship as one with agencies”).

<sup>286</sup> *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (“In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill ....”); *but see infra* notes 290-299 and accompanying text.

<sup>287</sup> *See infra* note 24 and accompanying text.

<sup>288</sup> Nourse, for example, argues that, owed to ignorance of the legislative process, interpreters routinely confuse the legislative history equivalents of “majority” and “dissenting opinions.” Nourse, *supra* note 1, at 73. As explained in Part II, however, Nourse is wrong to regard these alleged “majority opinions” (e.g., statements by a bill’s primary sponsors) as “authoritative statements of meaning.” *Id.*

<sup>289</sup> Any hierarchy of legislative history thus contrasts with, for example, statutory text or prior judicial decisions, both of which are formally binding on citizens and so more plausibly generate a duty of inquiry.

<sup>290</sup> 396 U.S. 168 (1969).

<sup>291</sup> *Id.* at 170-71.

<sup>292</sup> *Id.*



differentials customarily applied” by distributors, holding that “permissible adjustments are limited to compensation for rendering an economic service,” characterizing the “nearby” differential as a conferral of “monopoly profits.”<sup>293</sup> The Court based its interpretation on the accompanying House Report, which “suggest[ed] that ‘market differentials,’ as well as all the other differentials, contemplated particular understood economic adjustments.”<sup>294</sup> In dissent, Justice Black contended that the broader legislative history, in particular a colloquy on the Senate floor, “ma[de] it clear beyond any doubt that this provision was designed to allow the Secretary broad leeway in regulating the milk industry.”<sup>295</sup> This included leeway to preserve price advantages enjoyed by farmers near Boston prior to federal regulation.<sup>296</sup> The majority insisted that its “conclusions [were] in no way undermined by the colloquy on the floor,” reasoning that, whereas “[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation,” “[f]loor debates reflect at best the understanding of individual Congressmen.”<sup>297</sup>

What the exchange between the majority and dissent in *Zuber* suggests is that the statute was simply “silent or ambiguous with respect to the specific issue” before the Court.<sup>298</sup> Read in isolation, the language at issue admits of a

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<sup>293</sup> *Id.* at 181, 188.

<sup>294</sup> *Id.* at 181.

<sup>295</sup> *Id.* at 202-03 (Black, J., dissenting).

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 186; *but see* Gluck & Bressman, *Part I, supra* note 17, at 986 (finding that drafters regard “‘staged’ colloquies between the chair and ranking member of the committee as reliably indicating the common understanding on both sides”).

<sup>298</sup> *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, (1984). While *Zuber* is a pre-*Chevron* case, courts continue to consult legislative history when determining whether an agency interpretation is “reasonable,” and therefore authoritative under *Chevron*. *See id.* at 843 (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). While courts disagree as to whether it is appropriate to consult legislative history at Step One or Step Two of the *Chevron* analysis, *compare* *Halverson v. Slater*, 129 F.3d 180, 184 (D.C. Cir. 1997) (holding that “the lower court erred by failing to ‘exhaust the traditional tools of statutory construction,’” including consultation of legislative history, at *Chevron* Step One (quoting *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995)) *with* *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 122 (2d Cir. 2007) (“This court has generally been reluctant to employ legislative history at step one of *Chevron* analysis, mindful that the ‘interpretive clues’ to be found in such history will rarely speak with sufficient clarity to permit us to conclude ‘beyond reasonable doubt’ that Congress has directly spoken to the precise question at issue.” (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586, 590 (2004)) (citation omitted)), that distinction is likely irrelevant. *See* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 602 (2009) (“[N]othing of consequence turns on whether the set of permissible interpretations has one element or more than one element; the only question is whether the agency’s interpretation is in that set or not.”). Courts likewise continue to

broad or narrow reading. The same is true after taking into account information contained in available non-textual historical sources. The majority created an illusion of clarity by distinguishing “good” legislative history from “bad.” The reality, however, is that the text read against the backdrop of conflicting legislative history is unclear as to whether “market ... differentials” includes differentials that are “economically [un]sound.”<sup>299</sup>

To be clear, one could have reason to pay special attention to committee reports and the like *if* Congress as such formed intentions. Where an author’s intentions are unclear after taking into account in all mutually salient information, clarity will sometimes result from considering additional information salient to the author. Suppose, for example, that a diplomat were to write an unclear note to her aide (e.g., “Bring me the package.”), only to be taken hostage days later. Here, the aide might try to resolve the unclarity (e.g., “What package?”) by considering sources of information she ordinarily would not (e.g., the diplomat’s private email). Because considering such sources is non-standard (and, hence, the information contained therein was not mutually salient at the time the note was written), it would have been unreasonable for the diplomat to expect her aide to do so. Still, to the extent that the diplomat’s message was unintentionally unclear, the aide might gain insight by considering those sources all the same. The same would be true with respect to unclear statutes if Congress as such formed intentions. But it does not. As such, there are no unexpressed intentions to discover in Congress’ personal effects.

Because it places members of Congress on equal epistemic footing with other participants in the legislative conversation, fictionalism differs from the otherwise similar “deferentialist” approach to statutory interpretation advocated by Scott Soames. According to Soames, the “content of the law” as “what the lawmakers meant *and* what any reasonable person who understood the linguistic meanings of their words, the publically available facts, the recent history in the lawmaking context, and the background of existing law into which the new provision is expected to fit, would take them to have meant.”<sup>300</sup> As Soames explains:

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privilege some kinds of legislative history over others, both in the administrative law context and elsewhere. *See, e.g.*, *Kenna v. U.S. Dist. Court for C.D.Cal.*, 435 F.3d 1011, 1015 (9th Cir.) (“Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body. However, floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views.” (citation omitted)).

<sup>299</sup> *Zuber*, 396 U.S. at 210 (Black, J., dissenting).

<sup>300</sup> Soames, *Deferentialism*, *supra* note 15 at 598 (emphasis added).

*In general*, what a speaker uses a sentence *S* to assert in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to.<sup>301</sup>

In a circumstance where a speaker's communicative intention is unclear, however, what a speaker "meant" diverges from "what any reasonable person ... would take them to have meant." And, because Soames is a *realist* about legislative intent,<sup>302</sup> his account is thus consistent with, and, as a descriptive matter, appears to call for, special attention to committee report and the like where a statute is unclear.<sup>303</sup>

In addition to legislative history, the conversation model also calls into question whether it makes sense for courts to pay special attention to *customary legal usage*. In *Morissette v. United States*,<sup>304</sup> for example, Justice Jackson famously remarked:

[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.<sup>305</sup>

In the above-quoted passage, Justice Jackson appears to understand legislation as communication between members of Congress and courts, which is to say communication between *lawyers*.<sup>306</sup> If the statute at issue had been, say, the

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<sup>301</sup> *Id.* (emphasis added).

<sup>302</sup> See *id.* at 599-600 ("[T]here is thus no real alternative in [*Smith v. United States*, 508 U.S. 223 (1993)] identifying the legal content with *what Congress actually asserted* (as opposed to what it could have asserted using the same words had the arguments, debates, and legislative history been different).")

<sup>303</sup> See Scott Soames, *Toward a Theory of Legal Interpretation*, 6 N.Y.U. J. L. & LIBERTY 231, 239-40 (2011) (lamenting Justice Scalia's "conclu[sion] that inquiries into legislative history to discover the intent of the lawmakers are irrelevant").

<sup>304</sup> 342 U.S. 246 (1952).

<sup>305</sup> *Id.* at 263.

<sup>306</sup> See Manning, *The Absurdity Doctrine*, *supra* note 12, at 2464 (discussing *Morissette*, observing that "[f]or statutes, the lawyer's lexicon, of course, has particular relevance")

Judiciary Act of 1789,<sup>307</sup> Justice Jackson’s approach might have made sense. In *Morissette*, however, the statute at issue was a general conduct statute, specifically a criminal statute prohibiting the “embezzle[ment], steal[ing], purloin[ing], or knowing[] conver[sion]” government property.<sup>308</sup> The question before the Court was whether that statute prohibited only “embezzle[ment],” “steal[ing],” or “purloin[ing]” accompanied by criminal intent. The Government argued that no, contending that the express prohibition of “knowing[]” conversion implied the absence of an intent requirement for the other offenses.<sup>309</sup> Unconvinced, the Court reasoned that, at common law, intent was “inherent in the idea” of larceny and other such crimes, whereas certain “unwitting acts” constituted conversion.<sup>310</sup> Thus, on the assumption that Congress intended to retain common-law usages, an express intent requirement would have been superfluous for the non-conversion offenses.

The decision in *Morissette* was plausibly correct, on rule-of-lenity<sup>311</sup> grounds.<sup>312</sup> Justice Jackson’s general principle, that statutes should be read

<sup>307</sup> 1 Stat. 73.

<sup>308</sup> *Morissette*, 246 U.S. at 248 (quoting 18 U.S.C. § 641).

<sup>309</sup> See *id.* at 249-50.

<sup>310</sup> *Id.* at 252-53.

<sup>311</sup> In general, whether “substantive” canons of interpretation (e.g., the modern canon of constitutional avoidance, the federalism canon, etc.) are compatible with the conversation model is an open question. See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* \_\_ (2016) (discussing these and other substantive canons). To the extent that such canons are best understood as approximations of Congress’s intent, those canons likely reflect the sort of undue attention to the epistemic position of members of Congress criticized above (e.g., a special concern with maintaining the “usual constitutional balance of federal and state powers,” *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991), is probably not shared by most citizens). On the other hand, if such canons are best understood as something like judge-made law, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. \_\_ (forthcoming 2017), then it is plausible that those canons are on par with other prior judicial decisions in terms of mutual salience. See *supra* note \_\_. The latter possibility assumes, of course, that judges have the authority to make interpretive law. Regardless, the rule of lenity demands less justification than other substantive canons. The reason is that the rule of lenity acts as something like a doctrinal mechanism for enforcing the mutual-salience requirement imposed by the conversation model—or at least a greatly relaxed analogue. By prohibiting the enforcement of an uncertain interpretation against a criminal defendant, the rule of lenity, in effect, bars courts from giving legal effect to a reading of a criminal statute that is, from the epistemic perspective of the defendant, unduly esoteric. See, e.g., *U.S. v. Santos*, 128 S. Ct. 2020, 2026 (2008) (“When interpreting a criminal statute, we do not play the part of a mind reader.”); but see *U.S. v. Muscarello*, 524 U.S. 125, 138 (1998) (“The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended.” (quoting *United States v. Wells*, 519 U. S. 482, 499 (1997)) (internal quotation marks omitted) (alteration in original)).

<sup>312</sup> See, e.g., WEBSTER’S COLLEGIATE DICTIONARY, THIRD EDITION 940 (1916) (defining “steal” as “to take without right and *with intent to keep wrongfully*” (emphasis added)).

through the eyes of a lawyer, however, seems questionable as applied to statutes the audience of which includes ordinary citizens presumably—and reasonably—not well-versed in Blackstone.<sup>313</sup>

The question remains what sources to consider in a particular case. Because context is information of which speaker and audience *should* be aware, that question is irreducibly normative.<sup>314</sup> The normative character of the question is especially apparent where, as here, awareness is largely constructive.<sup>315</sup> In general, norms of statutory interpretation should promote at least two core values.<sup>316</sup> The first is *democracy*: norms should make it feasible for a legislator to comprehend a bill at the time she casts her vote. The second is *fair notice*: norms should make it feasible for an individual on whom a statute operates to comprehend that statute once it is in effect. So understood, democracy and fair notice work in tandem to facilitate communication between legislator and citizen. Democracy ensures that a legislator understands what she is saying. Fair notice ensures that a citizen understands what was said. Put another way, a commitment to the above values flows just from a commitment to legislation as an effective means of communication.<sup>317</sup> As Jeremy Waldron explains, when attempting to communicate by statute, a legislator must assume that her words mean the same thing to her as to citizens.<sup>318</sup> Together, democracy and fair notice help make it possible for that assumption to be a *reasonable* one.

Prior scholarship assumes both of these values, though often without explicit discussion. Textualists, for example, stress, on the one hand, the

<sup>313</sup> Important here is that the statute at issue in *Morissette* was enacted in 1948. 62 Stat. 725.

<sup>314</sup> See Fallon, *Three Symmetries*, *supra* note 85, at 694 (“If both textualists and purposivists need to specify the breadth of the context within which statutes should be interpreted, and if the judgments as to appropriate breadth will sometimes determine the outcome of cases, then issues bearing on the specification of semantic and policy contexts assume vital importance.”).

<sup>315</sup> See Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL’Y REV. 105, 105-06 (2003) (“The people who are subject to the law—the citizens—are almost certain never to read it. Average citizens do not peruse statute books even once in their lifetimes; most will never read even one full paragraph from a court opinion.”).

<sup>316</sup> See Nelson, *What Is Textualism?*, *supra* note 17, at 353 (“Textualists and intentionalists alike give every indication of caring both about the meaning intended by the enacting legislature and about the need for readers to have fair notice of that meaning ....”). See also Manning, *Inside Congress’s Mind*, *supra* note 28, at 1947 (arguing that the “construct” of legislative intent “necessarily depend[s] on normative” premises).

<sup>317</sup> More specifically, that legislation is an effective means of communication between legislator and citizen (as opposed to, e.g., other legislators, legal elites, etc.). As explained above, so much is required by basic notions of fairness and rule of law. See *supra* note 208-214 and accompanying text.

<sup>318</sup> WALDRON, *supra* note **Error! Bookmark not defined.**, at 129.

preservation of legislative “bargains,”<sup>319</sup> and, on the other, the public accessibility of the law.<sup>320</sup> What this shows is a commitment by textualists to both legislator (when she casts her vote) and citizen (post-enactment) being able to know “what the law is”<sup>321</sup> when it matters. And this, in turn, shows a commitment to effective communication between legislator and citizen. Purposivists, perhaps unsurprisingly, given their friendliness to legislative history, place more emphasis on legislator understanding.<sup>322</sup> Still, even purposivists accept that, for example, courts should consider only publicly available materials when making sense of a statute.<sup>323</sup> This concession shows that, in addition to legislator understanding, purposivists are to at least some extent committed to citizen understanding as well.

With respect to informational sources, both democracy and fair notice support, other things equal, norms that minimize the epistemic burden for involved parties. By minimizing epistemic burden, such norms increase feasibility of comprehension at all stages (e.g., enactment, compliance, enforcement, adjudication) for all interpreters (e.g., members of Congress, citizens, agencies, courts). To illustrate, take a highly restrictive source norm according to which one is to refrain completely from considering non-textual, historical sources when interpreting a statute. Pursuant to this norm, one would interpret a legislative text with an eye to *obvious conventions* (e.g., that Congress writes statutes in English) and to other *formally binding instruments* (e.g., statutes, regulations, judicial decisions).<sup>324</sup> In turn, one would attribute to Congress

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<sup>319</sup> See, e.g., Manning, *Legislative Intent*, *supra* note 11, at 441 (“[Textualists] believe that smoothing over the rough edges in a statute threatens to upset whatever complicated bargaining led to its being cast in the terms that it was.”); Easterbrook, *supra* note 12, at 541 (“In the case of interest group legislation it is most likely that the extent of the bargain ... is exhausted by the subjects of the express compromises reflected in the statute. The legislature ordinarily would rebuff any suggestion that judges be authorized to fill in blanks in the ‘spirit’ of the compromise.”).

<sup>320</sup> See, e.g., Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

<sup>321</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>322</sup> See Nelson, *What Is Textualism?*, *supra* note 17, at 351-52 (observing that purposivists “emphasiz[e] that statutes are mechanisms to convey the policy decisions of the people whom we have elected to legislate for us,” and courts should “try to enforce the directives that members of the enacting legislature understood themselves to be adopting”); see also, e.g., McNollgast, *Positive Canons*, *supra* note 99, at 716 (emphasizing that “legislators do not want judicial interpretation of statutes to introduce randomness and unpredictability into policy outcomes”).

<sup>323</sup> See Nelson, *What Is Textualism?*, *supra* note 17, at 359 (observing that purposivists are “happy to treat committee reports and other publicly available materials as part of the context” but “reject other information that is probative of lawmakers’ actual intentions but not spread out on the public record”).

<sup>324</sup> The reason for including other formally binding instruments is that their bindingness presumably generates a notice duty in just the same way as does the statutory text itself.

whatever intentions one would attribute to a generic author on the basis of her having written that text, given this limited additional contextual information. With this norm in place, the epistemic burden on an interpreter would be minimal at each stage. The non-obvious information one would have to consider—the text of other formally binding instruments—would be of reasonably limited quantity, easy to access,<sup>325</sup> and clearly designated.

What speaks against such a norm? As applied to *existing* legislation, one concern is that such a norm might conflict with legislator understanding at the time of enactment. Suppose that some legislator were to base her understanding of some statute, either directly or indirectly, on the assumption that the statute would be read with an eye to various non-textual, historical sources. Here, application of a highly restrictive source norm might render that legislator's understanding incorrect. In turn, application of that norm might hinder democracy if that legislator's understanding is representative. This sort of mismatch is, as Jarrod Shobe has argued, more likely with older statutes.<sup>326</sup> As Shobe explains, "Congress's drafting process has become increasingly sophisticated over the last forty years," with various reforms "allow[ing] professional drafters to be involved in virtually every legislative project."<sup>327</sup> The result is increased attention to textual "clarity,"<sup>328</sup> which is just to say decreased reliance on non-textual, historical sources. But even with contemporary statutes, mismatch is possible. Increased "unorthodox lawmaking,"<sup>329</sup> i.e. lawmaking outside the traditional committee structure, undermines, to some extent, efforts at clarity.<sup>330</sup> Further, use of "professional drafters," i.e. legislative counsel, remains entirely optional.<sup>331</sup>

The above suggests that application of a highly restrictive source norm to existing legislation would result in a sort of democracy gap, however minimal. For that reason, a less restrictive norm is probably appropriate with respect to such legislation. Application of a less restrictive norm would increase the epistemic burden on all participants, citizens in particular. For that reason, application of such a norm would impair fair notice to some degree. Under

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<sup>325</sup> Assuming internet access.

<sup>326</sup> See Shobe, *supra* note 159, at 856-60.

<sup>327</sup> *Id.* at 812.

<sup>328</sup> *Id.* at 831. *But see* Doerfler, *supra* note 27, at 815 (arguing that the size and complexity of contemporary statutes hinders efforts at textual precision); Gluck, *Imperfect Statutes*, *supra* note 203, at 97-103 (similar).

<sup>329</sup> BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (4th ed., 1997).

<sup>330</sup> See Shobe, *supra* note 159, at 859.

<sup>331</sup> *Id.* at 821-22.

current conditions, however, some tradeoff between fair notice and democracy is unavoidable.

By contrast, as applied to *future* legislation, a highly restrictive source norm would be appropriate if accompanied by reforms to the legislative process. If, for example, Congress were to mandate participation of legislative counsel at each stage of the drafting process, any democracy gap would close, at least in large part. Absent such a gap, it is unclear what would speak against such an epistemic-burden minimizing norm.

To be clear, the above discussion leaves open the possibility that values other than democracy and fair notice (e.g., judicial administrability) might inform the determination of what source(s) of information an interpreter ought to consider. The claim here is just that those two values are of paramount importance insofar as legislation is understood best as a means of communication. To promote democracy and fair notice in this context is, in effect, to reduce the burden on speaker and listener, respectively, and thereby to facilitate efficient communication between them.

#### CONCLUSION

Legislative intent is a necessary fiction. One can make sense of federal statutes only if one attributes to Congress various intentions, both communicative and practical. As an empirical matter, however, Congress qua “it” intends very little. The solution this Article proposes is to understand intent attributions not as aiming at the literal truth but rather as involving a pretense. The pretense this Article offers is that federal statutes have some author or other. Taken to involve this pretense, an attribution of intent is apt if and only if one would make it about the author of a statute as such.

Because legislative intent is a fiction, the ‘author’ of legislation, i.e. Congress as such, ‘intends’ what it appears to intend and no more. Oftentimes this will mean that federal statutes are less clear than one might have hoped. If Congress had ‘hidden’ intentions, statutes that appear uncertain might become certain upon further investigation. And if statutes were uncertain less often, interpreting courts and agencies would have fewer policy decisions to make when resolving concrete disputes. The draw of positive-political-science accounts of legislative intent comes in no small part from the promise that, with enough data and methodological savvy, one could, when confronted with hard policy questions, identify answers laid down by Congress in advance. What this Article suggests, however, is that that promise is false. Quite often, text gives



out, leaving a policy decision. Attention to the nuances of legislative process does nothing to change this.

Whether one should fill the remaining statutory “gaps”<sup>332</sup> by, for example, applying “legal rules of interpretation”<sup>333</sup> or by deferring to executive branch officials<sup>334</sup> goes beyond the scope of this Article.<sup>335</sup> What this Article shows is just that that question is more important than it would be if sifting through obscure legislative materials could provide meaningful guidance to a faithful-agent court.

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<sup>332</sup> E.g., Tun-Jen Chiang & Lawrence B. Solum, *The Interpretation-Construction Distinction in Patent Law*, 123 YALE L.J. 530, 537 (2013) (“[I]f a court chooses to follow the linguistic meaning of text, it must decide how to fill in the gaps when the linguistic meaning does not fully answer a legal dispute ....”); Scott Soames, *Interpreting Legal Texts: What Is, and Is Not, Special About the Law*, in PHILOSOPHICAL ESSAYS, VOLUME 1: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 419 (2008) [hereinafter Soames, *Interpreting Legal Texts*] (“This generation of new content by filling gaps in the original text is another respect in which legal interpretation is importantly different from some other kinds of linguistic interpretation.”).

<sup>333</sup> Baude & Sachs, *supra* note **Error! Bookmark not defined.**

<sup>334</sup> See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (recommending increased deference to administrative agencies on questions of statutory interpretation).

<sup>335</sup> See Soames, *Interpreting Legal Texts*, *supra* note **Error! Bookmark not defined.**, at 419-20 (“What considerations *should* be employed in exercising [gap-filling] authority is a normative question to which broad philosophical principles ... provide different answers. The philosophy of language, by contrast, provides none.”); cf. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 219 (1991) (“If meaning has run out, and we are faced with a linguistically hard case, then nothing about the nature of meaning suggests that we must then ask the ‘What would James Madison have thought about this?’ question.”).