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THE POLITICS OF LEGISLATIVE DRAFTING: A CONGRESSIONAL CASE STUDY

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In judicial opinions construing statutes, it is common for judges to make a set of assumptions about the legislative process that generated the statute under review. For example, judges regularly impute to legislators highly detailed knowledge about both judicial rules of interpretation and the substantive area of law of which the statute is a part. Little empirical research has been done to test this picture of the legislative process. In this Article, Professors Nourse and Schacter take a step toward filling this gap with a case study of legislative drafting in the Senate Judiciary Committee. Their results stand in sharp contrast to the traditional judicial story of the drafting process. The interviews conducted by the authors suggest that the drafting process is highly variable and contextual; that staffers, lobbyists, and professional drafters write laws rather than elected representatives; and that although drafters are generally familiar with judicial rules of construction, these rules are not systematically integrated into the drafting process. The case study suggests not only that the judicial story of the legislative process is inaccurate but also that there might be important differences between what the legislature and judiciary value in the

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drafting process: While courts tend to prize what the authors call the "interpretive" virtues of textual clarity and interpretive awareness, legislators are oriented more toward "constitutive" virtues of action and agreement. Professors Nourse and Schacter argue that the results they report, if reflective of the drafting process generally, raise important challenges for originalist and textualist theories of statutory interpretation, as well as Justice Scalia's critique of legislative history. Even if the assumptions about legislative drafting made in the traditional judicial story are merely fictions, they nonetheless play a role in allocating normative responsibility for creating statutory law. The authors conclude that their case study raises the need for future empirical research to develop a better understanding of the legislative process.

INTRODUCTION

Articles about statutory interpretation fill the pages of law reviews, but the vast majority of this scholarship focuses on courts. If the scholarship looks at legislatures at all, it does so from an external perspective, looking at Congress through a judicial lens. Little has been written from the legislative end of the telescope.[1] How does the legislative drafting process proceed? What do its participants believe about how courts interpret the bills that they write? To what extent are legislative drafters affected by judicial rules of interpretation, knowledge of which routinely is imputed to legislators by courts?

In this Article, we make a first step toward filling this gap in the literature with a case study of drafting in the Senate Judiciary Committee. Our interviews with staffers responsible for drafting bills provided us with a useful vantage point from which to view the assumptions and priorities of existing judicial accounts of the legislative process. Our aim in conducting these interviews was twofold. First, we sought to paint a more textured picture of the drafting process than is currently available, beginning with a close look at the work of one influential legislative committee. Second, we sought to begin empirical scrutiny of what might be called the judicial story of how laws are written—that is, the legislative drafting process as told by federal courts in the judicial opinions that interpret ambiguous

[1] For an exception, see David A. Marcello, The Ethics and Politics of Legislative Drafting, 70 Tul. L. Rev. 2437 (1996) (focusing on activities of, and ethical questions confronting, professional legislative drafters). Other notable exceptions include case studies that focus on particular pieces of legislation, but these have not focused on statutory interpretation in general. See, e.g., Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air 26-58 (1981) (exploring Congress's approach to proposed amendments to Clean Air Act); Philip G. Schrag, A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America (2000) (exploring enactment and aftermath of 1996 immigration reform legislation); Edward L. Rubin, Legislative Methodology: Some Lessons from the Truth-in-Lending Act, 80 Geo. L.J. 233, 242-81 (1991) (exploring Truth-in-Lending Act); see also Robert A. Katzmann, Courts and Congress 65-66 (1997) (exploring ways to improve legislative drafting).

statutory provisions. In these opinions, courts characteristically impute to Congress highly specific and sophisticated knowledge about both the rules of statutory interpretation and the substantive area of law into which a new statute will fit.[2]

We recognize that the judicial story of lawmaking may be based on fictions rather than actual judicial beliefs about the legislative process. Perhaps in portraying legislators as they do, judges mean to show respect for Congress, to bring greater coherence to the law, or to pursue some other prudential end. If these portrayals are fictions, however, they are not necessarily "benign."[3] Fictions, after all, may have normative power. By characterizing the legislative process as they do, courts may be placing responsibility in Congress for substantive legal decisions that, in fact, are traceable to the court. Accountability for statutory law thus is implicated by the rhetoric of judicial opinions. For this reason, we believe that the judicial story of the legislative process deserves closer scrutiny.

A preliminary caveat: It would be easy to read our findings and dismiss them with a cry of "sausage." Our aim, however, is not to debunk the legislative process, to encourage cries of illegitimacy, or to generate horror at what one of our respondents characterized as far from a "law school process." We are trying, in the tradition of social science research, to understand a phenomenon from *its* perspectives. We know that courts often believe that legislators should write statutes more clearly.[4] What we do not know is why drafting happens as it does. What follows, then, is not another normative theory of the process based on our assumptions about Congress or the courts.[5] In-

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[2] For examples of cases, see infra notes 24-25 and 42-48.

[3] See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (characterizing as "benign fiction" judicial assumption that Congress intends new statutory provision to be compatible with surrounding law).

[4] The sentiment of many judges is captured succinctly in an article coauthored by then-Judge Ruth Bader Ginsburg and Peter Huber: "Detecting the will of the legislature, however, time and again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes. Bad law breeds unnecessarily hard cases." Ruth Bader Ginsburg & Peter W. Huber, The Intercircuit Committee, 100 Harv. L. Rev. 1417, 1417 (1987).

[5] Elsewhere, each of us, in different forms, has asserted larger normative claims implicating theories of statutory interpretation. See Victoria Nourse, The Vertical Separation of Powers, 49 Duke L.J. 749, 768-71, 779-81 (1999) (arguing that any shift in power to courts should be scrutinized for representational risks it creates); Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 14-37 (1998) [hereinafter Schacter, Common Law Originalism] (arguing that Supreme Court's recent interpretive jurisprudence blends common law and originalist features); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 595-96 (1995) [hereinafter Schacter, Metademocracy] (arguing

stead, it is a first step at a view of what *drafters* have in mind—including their norms, constraints, and incentives—when they write statutes.

The results we report indicate that the standard judicial story of the legislative drafting process may be flawed in important respects. Our interviews also suggest that there may be important institutional differences between the judicial and legislative branches when it comes to the values that shape the drafting process—differences we characterize in terms of "interpretive" versus "constitutive" virtues.[6] In Part I of this Article, we briefly describe our methodology. In Part II, we set out our principal findings. In Part III, we sketch out the implications of what we found, both for courts' decisionmaking process and for the legislature's drafting process. In this final Part, we focus on judicial decisionmaking, legislative drafting, and the institutional misunderstandings between the two branches.

I
METHODOLOGY

This is a case study of legislative drafting. Its purpose is to provide a thicker description of the actual practice of drafting in a single committee in Congress, the Senate Judiciary Committee. We spoke to sixteen counsels working on the full Committee or one of its six subcommittees. Sixteen of the eighteen staffers we approached to give interviews for this project agreed to speak to us.[7] We carefully ensured partisan balance; eight of the respondent staffers worked for Republican senators, and eight worked for Democratic senators. Our respondents' respective tenures on the Judiciary Committee ranged from a few months to several years, with most of our respondents falling into the latter category. All of the staffers we interviewed were lawyers. We refer to them below as either "staffers" or "respondents." At the time we conducted all but two of our staffer interviews,

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that ideologically disparate theories of interpretation can be grouped into new, shared conception of democratic legitimacy). We agree, for example, that any full normative theory of statutory interpretation must take account not only of one institution (Congress) but more than one institution (the courts and Congress), as well as their relation to each other. See Nourse, supra (arguing that separation-of-powers analysis should focus on interbranch shifts in representative relations governing departments); Schacter, Common Law Originalism, supra at 4, 55-56 (explaining virtues of grounding statutory interpretation in "empirically informed normative analysis" of behavior of courts and legislatures). In this Article, we present no comprehensive theory or normative account of statutory interpretation. Our aim is more modest—it is simply to test the judicial story against a set of limited, yet illuminating, real life accounts.

[6] See infra Part III.A.

[7] The remaining two staffers we approached did not respond to our requests for an interview.

the Republican Party was the majority party in the Senate and the Democratic Party was the minority party.[8]

Although the focus of our Article is on committee staffers, we also spoke to two lawyers from the Senate's Office of the Legislative Counsel (Legislative Counsel or Legislative Counsel's office) who had worked on bills that emerged from the Judiciary Committee. Comments from these lawyers are identified as such. We conducted these interviews both to obtain some account of the Legislative Counsel's role in drafting Judiciary Committee bills and to use Legislative Counsel input to verify or challenge the portrayal of legislative drafting that emerged from our interviews with staffers.

A. The Interviews

Before we conducted our interviews, we constructed a questionnaire and engaged in a pilot interview. Our original questionnaire included a number of closed-ended questions requesting answers that could be quantified along a sliding numerical scale. We found, however, that most of the answers given in our pilot interview were in the middle range and that our respondents vigorously resisted questions asking them to quantify or simplify their widely varying drafting experiences. This signaled that we needed a style of questioning that was both more open-ended and, at the same time, more detailed. We decided to avoid questions based on numerical values and, instead, opened each interview by asking those interviewed about their "most recent" drafting experience. Based on the account given, we could then proceed to ask whether that drafting experience was typical or not of general practice. We followed up these general open-ended questions with more specific closed-ended inquiries on key topics. Each staffer or Legislative Counsel attorney was asked the same questions on specific topics: identity of drafters, sources of legislative ideas, senators' role in the drafting process, participation of lobbyists, use of canons of construction and other interpretive resources, awareness of Justice Scalia's critique of legislative history,[9] drafting of legislative history, and staffer freelancing.

The vast majority of the interviews were conducted by both of us. One of us took the lead in asking questions. We each took detailed notes that we later independently transcribed. We chose not to tape-

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[8] More specifically, the first fourteen interviews were conducted in August 1999, and the final two interviews were conducted in the summer of 2001.

[9] The essence of Scalia's critique is that judges should use textual language and reject legislative history when interpreting the meaning of statutes. Scalia challenges the legitimacy of legislative history because legislators do not vote on it, and, he argues, it is created for strategic purposes. For further discussion of this critique, see infra Part II.C.

record the interviews as we believed that taping would inhibit candor among those likely to be sensitive to public exposure of any negative comments. We guaranteed our subjects that neither their names, identifying characteristics, nor subject matter areas would be revealed, and that all quotes would be accurate but not attributed directly to individuals. Indeed, we have taken some pains to protect the anonymity of our sources, sometimes at the expense of clarity, detailed expression, or even a more thorough description of our methodology.[10]

B. The Limits of a Case Study

We chose the "case study" method because our aim was to study drafting behavior in context.[11] The case study is a qualitative social science method of studying a process and of asking "how" and "why" a phenomenon (such as legislative drafting) occurs.[12] Case studies are, of course, vulnerable to a number of methodological criticisms, including bias, structuring (e.g., choosing a venue or a set of interview questions that assume the question to be answered), or drawing socially desirable responses (i.e., generalizing from what respondents think the interviewer wants to hear).[13] As social scientists have recognized, however, large quantitative sample studies are also not free from bias.[14] Moreover, large-scale studies typically yield thin descriptions (such as discounting the possibility of randomness), while the case study affords the possibility of a richer stock of explanations for already-theorized accounts.[15] This makes case studies very useful in

[10] In constructing our interviews, we relied upon R. Peabody et al., Interviewing Political Elites, 23 Pol. Sci. & Pol. 451 (1990) (providing advice on how to structure studies involving "political elite" interviews).

[11] We use "case study" in the sense used by social scientists employing qualitative methods. See, e.g., Robert K. Yin, Case Study Research: Design and Methods 13 (2d ed. 1994) (defining case study as "empirical inquiry that investigates a contemporary phenomenon within its real-life context"). Unlike quantitative methods, case studies are not generalizable to populations or universes but, instead, to theoretical propositions: "[T]he investigator's goal is to expand and generalize theories (analytic generalization) and not to enumerate frequencies (statistical generalization)." Id. at 10.

[12] Id. at 6.

[13] E.g., id., at 9-11 (describing frequent criticisms of case study method).

[14] Gary King et al., Designing Social Inquiry: Scientific Inference in Qualitative Research 5 (1994) (asserting that "neither quantitative nor qualitative research is superior to the other" and noting "[t]he very abstract, and even unrealistic, nature of statistical models"); Randy Stoecker, Evaluating and Rethinking the Case Study, 39 Soc. Rev. 88, 93 (1991) ("[T]he probability sample and statistical significance tests ensure neither a valid explanation nor a valid generalization.").

[15] Harry Eckstein, Regarding Politics 119 ("Case studies . . . are valuable at all stages of the theory-building process, but most valuable at [the] stage . . . at which candidate theories are tested."); see also King, supra note 14, at 5-6 (arguing that quantitative studies frequently yield causal inferences that are ambiguous outside of context that case study data can provide).

situations such as ours, where we aim to test a standard judicial account of the legislative process in a real-life setting.[16]

We have tried to maintain checks against obvious sources of bias. Because one of us is a former staffer,[17] the interviews were generally done by both of us, and notes were compared to reduce overidentification with our respondents. Each interview began in a deliberately unstructured fashion; closed-ended questions, tailored more specifically to our theoretical agenda, were asked at the end of the interview.[18] The more specific answers were then used to assess consistency with the more general, unprompted accounts. We also sought to check staffers' responses against other internal perspectives. We considered, for example, whether the accounts staffers provided to us were consistent with the understanding of the two Legislative Counsel professional drafters we interviewed. We also checked the answers of subgroups of staffers against the answers of competing subgroups (full committee versus subcommittee, Republicans versus Democrats, minority versus majority on a single subcommittee). This yielded significant confirming information[19] and makes us more confident that the data present an accurate record of the staff drafters' perceptions.

We are acutely aware, however, that the venue for our study may mean that our results cannot be generalized. The Senate Judiciary Committee is likely to be an atypical committee; it is staffed primarily by lawyers and is far more likely to address legalistic or judicially focused issues. Yet we chose the Senate Judiciary Committee in part *because* of these characteristics. In choosing a case study site, the

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16 See Stoecker, supra note 14, at 109 ("The case study is the best way by which we can refine general theory . . . in complex situations."); see also King, supra note 14, at 44 ("Case studies are essential for description, and are, therefore, fundamental to social science.").

17 Although this might be a significant source of bias in some circumstances, in designing a qualitative study, past experience of the researcher is often seen as a benefit in constructing plausible explanations of complex data. See Yin, supra note 11, at 124 (emphasizing importance of prior expert knowledge of subject matter in making high-quality analysis); Stoecker, supra note 14, at 106 (describing arguments by case study researchers that "the researcher should begin with [his or her] own experience" and that this enhances likelihood that researcher will understand fully participants' situations).

18 This was designed to limit the risks of the interview setting; interviews "by their nature get only the information the interview solicits . . . ." Herbert M. Kritzer, Stories from the Field: Collecting Data Outside Over There, in Practicing Ethnography in Law: New Dialogues, Enduring Practices (June Starr & Mark Goodale eds., forthcoming 2002) (manuscript at 14, on file with author).

19 The aim was to triangulate our analytic technique, meaning to develop "converging lines of inquiry." Yin, supra note 11, at 91-94; see also Stoecker, supra note 14, at 92 (explaining attempts to add "greater scientific rigour into case study" through triangulation).

choice is determined, not by the "typicality" of the case (as it would be in a quantitative study), but by the case's "explanatory power."[20] Since courts often lament the fact that statutes are not clearer, we decided that the Judiciary Committee was a good laboratory for exploring legislative drafting. Of all committees, this is the one where staffers are *most* likely to be schooled in the rules of clarity, canons of construction, and statutory interpretation. If we were to find that this staff was finely attuned to judicial rules of interpretation, then we might seek confirmation for our findings from other nonlawyer drafters on other committees. If, on the other hand, we were to find that those who knew the interpretive rules failed to consider them central, that would suggest that the lawyer-dominated nature of the Judiciary Committee does not, itself, significantly differentiate the drafting experience of staffers on the Judiciary Committee from staffers on other committees.

Case studies, of course, present risks even if the venue is uncontroversial. We emphasize at the outset that the purpose of qualitative research of this variety is not to provide statistically reliable estimates of drafting behavior across Congress or even within a single committee. Obviously, we cannot draw firm conclusions from a case study such as this about drafting in other committees in the Senate, drafting in any committees in the House, or drafting in either institution as a whole. What we can provide is a limited test of the stated assumptions and implied theories of courts. In the end, our hope is to provide a look at the federal legislative drafting process that tests the plausibility of existing judicial accounts and provides a source for further empirical investigations in this area.

II
FINDINGS

We discuss below our principal findings. As to the general findings we report here, there was broad consensus among our respondents—if not unanimity, then a strong majority. On a few points, there was disagreement, and, where that is the case, we specifically note it in our discussion. The broad consensus on most points, however, suggested to us that partisan affiliation does not necessarily correlate with differences in our respondents' perceptions of the drafting process and of statutory interpretation more generally.

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[20] Stoecker, supra note 14, at 94.

We report four principal findings here:

- *Diversity in Drafting* The drafting process described to us is better understood as *multiple* drafting processes, varying along many axes. Our responses indicate quite strongly that there is no uniform process of legislative drafting followed in all cases. If this finding proves to be true beyond the Senate Judiciary Committee, it will suggest that courts and commentators should treat simple factual generalizations about congressional drafting with greater skepticism.
- *Drafting Virtues* There are significant points of contrast between the drafting virtues that are traditionally prized and sought after by courts and those conceived by our respondents. Such differences, if generalized, will call into question any simple critique of drafting as uninformed or unintelligent and suggest that conflicting institutional incentives and structures may make it difficult for congressional drafters to meet judicial standards.
- *Limited Impact of Justice Scalia's Legislative History Critique* Our interviews reflect a strong awareness of Justice Scalia's recent critique of legislative history and yet suggest that the critique may have had only a modest impact, if any, on actual drafting practice in this committee. While there was some difference of opinion among our staffers as to Justice Scalia's critique, all respondents either themselves continued to draft legislative history or knew others that did.
- *Regular Use of External Drafters* Our respondents uniformly reported that lobbyists are regularly involved in drafting the text of bills in this committee. Although staffers were cognizant of the potential risks this drafting role might create, they generally thought that lobbyists provided valuable information, and that the risks could be addressed with appropriate safeguards. If generalized, this finding, along with other factors, will tend to undermine the idea that lobbyists have limited or sporadic involvement in drafting text as opposed to legislative history, an assumption that is at least implied by Justice Scalia's critique of legislative history.[21]

A. Complexity and Variability in Legislative Drafting

The first strong theme to emerge from our interviews is that respondents repeatedly—and emphatically—rejected the notion of a

[21] The liabilities perceived by Justice Scalia are discussed infra at notes 61-65 and accompanying text.

monolithic drafting process and described in some detail the ways in which the drafting process can vary. This diversity begins at the very inception of a bill. Respondents told us, for example, that ideas for new legislation came from a broad array of sources—newspapers and court cases, lobbyists and the White House, Sunday-school teachers and law-review articles, to name a few. More pertinent for our purposes, the drafting process itself can look very different in different contexts, and our interviews made clear the rich array of contexts in which drafting takes place.

One staffer, for example, most recently had drafted an amendment on the Senate floor, in which he was attempting to work out compromise language for a juvenile justice bill during the debate over that bill. Another described a very different setting: He had most recently been reworking a long-pending constitutional amendment drafted in consultation with legal scholars, policy experts, and representatives of law enforcement. Yet another staffer, describing recent efforts on a complex intellectual property bill, characterized that process as largely having been "negotiated between the private parties." And one staffer was working on revising the text of a long-pending employment discrimination bill in response to recent Supreme Court decisions curtailing Congress's ability to subject states to liability for such discrimination.

In this section, we report in greater detail some of the diversity about which we heard, focusing first on multiple drafters and then on multiple processes. We approached our inquiry with the judicial story of the lawmaking process in mind.[22]

1. Multiple Drafters

To gain a better understanding of the drafting process, we asked staffers about the role of various potential participants in the drafting process. We specifically asked about staffers themselves, senators, professional drafters from the Legislative Counsel's office, and lobbyists.[23] Because we did not observe any drafting ourselves, what we report, of course, can reflect only the staffers' perceptions of the roles that these parties play.

In pressing this line of inquiry, we had in mind that the Supreme Court, for example, routinely has referred to legislators as the drafters

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[22] For a discussion of the judicial story generally, see supra notes 2-3 and accompanying text.

[23] We asked whether there were others who belonged on the list of regular drafters and did not receive additional suggestions. In part, this is probably because our respondents generally employed an understanding of "lobbyist" sufficiently broad to encompass a fairly wide range of actors. See infra Part II.D.

of federal law. Sometimes the Court refers simply to "Congress" as the drafter,[24] but frequently the justices specify "legislators" as drafters.[25] It may well be that the justices do not actually believe this to be true; they may be invoking a fiction or using a simple proxy for a process they know to be more complex.[26] Nevertheless, Supreme Court opinions typically place the legislator in the role of drafter.

a. Staffers Perhaps unsurprisingly, our staff respondents saw themselves as centrally involved in bill drafting efforts. They also richly described the role of others in drafting but consistently described staffers as having principal responsibility for producing bill drafts. The precise nature of their roles in drafting varied widely according to the bill. Some of this variability, of course, flows from the diversity of subject-matter areas under the Judiciary Committee's jurisdiction. When asked to describe their most recent drafting effort, for example, respondents covered a lot of substantive territory, including gun control, juvenile crime, bankruptcy, intellectual property, victims' rights, Y2K liability, employment discrimination, antitrust law, and more. Subject-matter area, in turn, influenced staffers' roles relative to other players. For instance, in the crime area, staffers saw themselves as more important because of a relative lack of lobbying interests, while in areas like intellectual property, there was a consensus that lobbyists had a significant role.

b. Senators Most staffers indicated that, as a general rule, senators themselves did not write the text of legislation:

"[My senator] does not draft. He is an idea guy."

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[24] See United States v. Rojas-Contreras, 474 U.S. 231, 235 (1985) ("It is clear that Congress knew how to provide for the computation of time periods under the Act relative to the date of an indictment."); Transam. Mortgage Advisors Inc. v. Lewis, 444 U.S. 11, 22 (1979) ("Congress did not intend to authorize a cause of action for anything beyond limited equitable relief.").

[25] See Osborne v. Ohio, 495 U.S. 103, 121 (1990) ("Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes . . . ."); Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 180 (1974) (Douglas, J., dissenting) (commenting that majority's construction will "amaze the legislators who drafted and voted for this statute"); Or. Ry. & Navigation Co. v. Oregonian Ry. Co., 130 U.S. 1, 30 (1889) (employing paradigm, "whatever may have been the intent in the minds of the legislators in using these words," in interpreting statutory language).

[26] Justices Breyer and Stevens, in particular, have been associated with a greater degree of institutional realism. Justice Breyer offered a sophisticated account of legislative history, and focused on the inevitability of delegation to staff, in Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992). For a recent account linking Breyer and Stevens to a more institutionally sophisticated conception of the legislative process, see generally Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wis. L. Rev. 205.

> "Senators are generalists. Very few senators write their own language."
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> "The vast majority of members deal at the conceptual level."
>
> "[Senators] rely upon staff. They set the goals and ask staff to 'work it out.'"
>
> "[T]here are very few instances when a senator is in the room when amendments are being drafted."
>
> "[T]here are only one or two senators who . . . write text. It is not common that senators draft."

Perhaps reflecting some variability among senators on this point, a few staffers were slightly more equivocal:

> "Sometimes [my senator] is involved in the concept, sometimes in the words of an amendment."
>
> "The role of a senator in drafting a bill varies by senator. Some are more detail oriented. Most . . . are conceptual."
>
> "Sometimes . . . [my senator] writes bills himself. That is pretty unusual . . . for the Senate."[27]

All in all, only a minority of staffers reported that their respective senators engaged in any substantial drafting of language for a bill. Three staffers said that their senators did draft at least some language on amendments or bills. But even these staffers tended to characterize drafting by a senator as unusual. Two of these three staffers said that involvement with words was not typical for their particular senators or for most senators. Overall, eleven of twelve responding staffers[28] said that senators, as a general rule, do not draft text as an original matter.

Respondents expressed little concern about the relative lack of involvement by senators in drafting text. Some of their explanations suggest it is a question of time and the vast range of issues on which senators must legislate: "Senators have no time to actually write language. [My senator's] schedule is amazingly dense." Other comments seemed to suggest that, over the years, senators built up expertise and a track record in a particular area such that, in that area at least, they easily could delegate to staffers the responsibility to translate their well-known positions into legislative language. Another staffer's response suggested that the same legislative matters often repeated themselves and it was therefore unnecessary for senators to be per-

[27] Indeed, that staffer's senator was relatively new to the institution, and the staffer questioned whether the senator "might stop doing it" if in the Senate for a longer period of time.

[28] Four staffers did not provide direct answers to this question in their interviews, but three of these four staffers gave accounts of drafting that did not mention senators' roles.

sonally involved in each redrafting effort. Still others indicated that the senator's role would vary depending upon the political importance of the bill—the more important or controversial an area of law or particular language, the more involved the senator likely would be in actual word choice.

Although staffers placed themselves at the center of the drafting process, they also insisted that they sought to implement the policies of their senators, not to impose their own views. They saw themselves as faithful agents in the drafting process. As one put it: "It's a member's power, not the staffer's." Another considered it "laughable" to believe that staffers routinely act outside the parameters of their bosses' positions on legislative matters. Some staffers emphasized that senators reviewed staff work carefully and that staffers had strong incentives—including keeping their jobs—to ensure that their drafting efforts did not diverge from their bosses' positions and remained loyal to their senators' missions.[29]

c. Lobbyists Every staffer we interviewed told us that lobbyists regularly were involved in drafting bills.[30] Staffers seemed to use a broad concept of lobbyist, one that included *any* group—profit or nonprofit—that had an interest in influencing legislation and either had information relevant to the issue or potentially would be affected by the legislation. Thus, the term "lobbyist" sometimes included administrative agencies, the White House, the Justice Department, or even federal judges, as well as church groups, universities, and homeless shelters. When a bill touched on a substantive area in the committee's jurisdiction that was heavily lobbied, staffers indicated that it was highly likely that lobbyists would offer up draft language, be asked to do so by staff, or receive from staff proposed language for the lobbyists' comments. Intellectual property, bankruptcy, and "hot button" issues like gun control, abortion, and pornography were areas in which staffers indicated there was extensive lobbyist involvement.[31] Lobbyists were active even in areas that lacked strong financial interests, for example, matters affecting children's interests. The only area in which we heard that paid lobbyists had a limited role was standard

[29] The hypothetical concern of staffers overstepping their legislative drafting authority is addressed in more detail infra at note 71 and accompanying text.

[30] The repeated references to lobbyists suggests to us that interviewing them would be a worthwhile endeavor. For various reasons, however, we concluded that the subject merited separate investigation and should not be pursued as part of this case study.

[31] One staffer suggested that, as a general matter, there was particular lobbyist influence on "dogma" issues—issues of substantial political controversy such as abortion and gun control—where legislation was seen "expressively," meaning, in this context, seen as expressing the senator's solidarity with a particular point of view.

criminal law issues, where there is no real lobby but where the Department of Justice is a regular player. We address in some detail, in Section II.D below, the dynamics of lobbyist involvement in drafting. But for purposes of understanding the complexity of the drafting processes as seen by respondents, it is sufficient at this point simply to note the rather significant role of outside interests in the drafting process.

d. Legislative Counsel The Legislative Counsel's office is specifically constituted to assist the Senate in drafting legislation.[32] In our interviews, we discussed Legislative Counsel's role in the drafting process with both staffers and with two Legislative Counsel attorneys with extensive experience with the Judiciary Committee. Unlike the practice in some states,[33] no law or rule requires that Senate legislation be drafted by Legislative Counsel attorneys. Legislative Counsel attorneys told us that, because of the nonmandatory nature of their role, their involvement in writing any particular bill is "strictly up to the client" (i.e., the senator or the committee). Legislative Counsel attorneys, therefore, "live on [their] reputation and good relationships."

i. Legislative Counsel from the Perspective of Committee Staffers

Every respondent said that Legislative Counsel attorneys had some role in the drafting process. Respondents differed, however, in how they described the nature and importance of that role. Many staffers told us that the role of the Legislative Counsel's office varied from bill to bill. On some occasions, the staffer would send a memo describing what the proposed legislation would do and then would receive back a first draft from the Legislative Counsel's office. More typically, however, a staffer would prepare a first draft and then for-

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[32] According to the Senate's web site:

> The Office routinely drafts original measures for introduction in the Senate. The measures range from simple private relief bills to omnibus measures of considerable technical complexity. The Office also reviews draft legislation prepared in executive agencies and elsewhere to make such revisions as may be necessary for technical sufficiency, before introduction in the Senate.

U.S. Senate History Briefings: Office of Legislative Counsel, at http://www.senate.gov/learning/brief_10c.html (last visited Feb. 21, 2002).

[33] Wisconsin, for example, assigns a mandatory drafting role to the Wisconsin Legislative Reference Bureau, Wisconsin's analogue to the Legislative Counsel. See Wis. Stat. § 13.92(1)(b)(1) (1999-2000); About the LRB, at http://www.legis.state.wi.us/lrb/Legal/index.htm (last visited Feb. 21, 2002) (discussing drafting role of Legal Services section of Wisconsin Legislative Reference Bureau). For an overview of the development of professional drafting bureaus in the states, see Michael Burns, The Legislative Reference Movement in Ohio: From Progressive Ideal to Session Satisfying, 32 U. Tol. L. Rev. 485 (2001).

ward it to Legislative Counsel attorneys for what was repeatedly characterized as "stylistic" or "technical" input:

> "[The Legislative Counsel's attorneys] make sure [the bill] gets in the right section of the Code, clarify language, [make] sure it's clear what's being amended, 'get it right.'"
>
> "Legislative Counsel does things like check cross-references, check subsection references, etc."
>
> "I use Legislative Counsel to format, not so much for substantive purposes."
>
> "Legislative Counsel gets involved in almost all cases. They put [drafts of the statute] in the proper form. You need Legislative Counsel input to be sure about the form, conventions of drafting, etc."

Comments by some staffers suggested an inverse relationship between how long a staffer had been on the job and the use of Legislative Counsel attorneys. As one put it, "especially because many staffers have not been here that long," the Legislative Counsel's office "has an important role." One staffer explained that he works with the Legislative Counsel's office, but that its role for him has changed as he has become more experienced:

> Early on, [Legislative Counsel] would draft the bill. Now, I do the first draft and give it to them to tighten and polish. They will take out extra words, see certain aspects of the big picture for drafting when [I am] lost in the details of one subsection, etc.

Several staffers emphasized the importance of political and institutional context in shaping Legislative Counsel's role. One staffer, for example, generally asks the Legislative Counsel's office to draft bills but not if particular language in the bill is politically sensitive and requires special attention. Similarly, if language is being drafted on the floor or in conference, then input from Legislative Counsel attorneys might not be available.

Most staffers praised the Legislative Counsel's office. One staffer, however, reported working for a senator who was wary of Legislative Counsel's drafting on the grounds that "they add more words." Another staffer noted the frequent usage of Legislative Counsel services but observed that there was "a tension with the Judiciary Committee because there are so many lawyers here." This staffer opined that the Legislative Counsel attorneys see themselves as professional drafters and fear that they are being treated by staffers as mere "typists."

ii. Legislative Counsel from the Perspective of Legislative Counsel Attorneys

Legislative Counsel attorneys reported that they receive work from the Judiciary Committee in a variety of ways. This can range from receiving the most amorphous "specs" for a bill (e.g., "We want to make the tax code more fair") to reviewing a comprehensive first draft of a bill written by someone other than a Legislative Counsel attorney. When Legislative Counsel attorneys receive bills written by others, it is usually a staffer, a lobbyist, or an administrator who has drafted the bill.

Legislative Counsel attorneys see their principal objective as to produce a clear, well-sequenced statute. Legislative Counsel's style favors certain elements, such as setting out general rules and exceptions, making liberal use of definitions, including an effective date, and providing coordination rules. When called upon to improve a bill drafted by someone else, Legislative Counsel attorneys say that they frequently encounter problems like a lack of definitions, inconsistent usage of statutory terms, poor organization, or ambiguity in identifying the statutory actors or statutory exceptions.

Despite the considerable variability in the sources and content of assignments given to the Legislative Counsel's office, one near-constant is that the request for assistance comes from committee staffers rather than senators themselves.[34] Legislative Counsel attorneys strongly assert their nonpartisan nature and emphasize that they stand in an attorney-client relationship with senators and staffers. "We are lawyers first," one told us. Because of this attorney-client relationship, Legislative Counsel attorneys do not communicate with any outside groups, except in the presence of a staffer. Legislative Counsel attorneys sometimes do observe the role of lobbyists or others in the drafting process, but only in the presence of staffers. More often, their knowledge of the role played by any outside group is both limited and filtered through staffers.

2. Multiple Drafting Processes

The picture of the drafting process that emerged from our interviews is one of striking variability. There was widespread agreement among staffers that different drafting processes are engaged for different kinds of bills. Sometimes more than one process is applied to the

[34] It is relatively uncommon for members to deal directly with Legislative Counsel attorneys at any stage in the process. One Legislative Counsel attorney reported that, some years ago, when the sizes of committee staffs and the Legislative Counsel's office were smaller, direct member involvement with Legislative Counsel attorneys was less rare than it is today.

same bill, and the use of one drafting process at a later time (for example, drafting on the floor or in conference) can wipe out the results of an earlier process. We describe below several versions of the drafting process that emerged in our interviews.

a. The Extended Drafting Process The most thorough drafting process that staffers told us about was described by one in these terms:

> We [the staffers] will come up with an idea, make a list of points to cover. Legislative Counsel will then draft or revise the draft written by staff. We might consult with the [full committee] staff before sending it to Legislative Counsel or other . . . offices to reach some kind of consensus. We might vet language with lobbyists whose clients would be affected by the bill or would be concerned about the bill. [The] final layer [might involve a] check with the [presidential] administration.

This general outline suggests that thorough, time-consuming drafting of this sort is staff driven and that the process involves more negotiation and consultation than exacting word choice. This description was consistent with several stories we heard about various pieces of major legislation. In describing work on drafting a large bankruptcy bill, for example, one staffer said:

> We began with [staff] meetings asking [about] the goal of the [party] caucus. We met with consumer groups, credit card companies, and banks, looking at what would be feasible. After a first draft [by the staff], we sent it to Legislative Counsel and then vetted it with groups and others in the Senate.

Another staffer, who worked on the same bill in a different office, also indicated that the process had begun with a staff draft prepared after consulting with various affected entities and other members' staffs. Because this was to be a high-profile bill, the process was quite extensive; staffers had worked on the bill, met, consulted, and researched for as much as a year:

> A lot was anticipated in advance, input was widely sought, multiple drafts were generated before introduction. Our subcommittee used academics, people who had been involved in the '78 reform bill [the last big bankruptcy bill], [and] Legislative Counsel, along with [our] subcommittee's own ideas. . . . There was about one year of drafting and a hearing.

The staffer contrasted this process with the process that generated the House companion bill, which the staffer characterized as having been negotiated and drafted by lobbyists and introduced with only "minor changes."

b. Consensus Drafting In a variant of this extended process, staffers told us that some bills were drafted jointly by staffers working for several senators. Language would be negotiated jointly in order to achieve consensus in a committee markup. Sometimes, staff of members who supported and opposed a bill would meet before the markup, and a bill would be hammered out by the principal interests in a "committee substitute." Staffers provided two examples of this alternative. The first pertained to an internet bill. In that instance, the minority leader in the committee (or "ranking member") thought the bill raised a number of substantive issues; in committee, a number of these issues were addressed by offering a substitute that had been agreed upon by the ranking member and the chair. In this way, the drafting process produced a committee consensus. The second example was of an antidrug bill in which the original mandatory minimum penalties section was amended to include provisions for prevention, research, and training. Once again, a compromise was reached by staff before the committee markup.

Staffers noted, however, sharp limits on this kind of consensus-oriented drafting process. On some issues there was no room for compromise. Abortion and pornography were cited by one staffer as the kind of "edgy" partisan issues as to which accommodation was unlikely. In other cases, compromise did not represent consensus-driven decisionmaking but, instead, was forced by powerful decisionmakers on the committee when, for example, a member "needed" to have a bill for reelection purposes and the committee chair was willing to push the issue.

c. Drafting on the Floor A strikingly different kind of drafting process was "doing a bill on the floor." In the Senate, where there are virtually no rules, it is possible that senators will choose to construct a bill during debate. Indeed, at least a part of every major bill is so constructed in the form of "managers' amendments," which are typically provisions deemed acceptable to both political parties and included in one omnibus attachment.[35] If this is where a bill is drafted, then the normal processes of drafting change. As one staffer put it, "There is no chance to do legal research here. . . . There is no 'adult supervision.' We do a quick read and correct it on the fly."

Several staff members complained about the dangers of drafting bills on the floor, as this increased the risks of the process becoming

[35] See Walter J. Oleszek, Congressional Procedures and the Policy Process 217-19 (5th ed. 2001) (describing Senate amendment procedure). In fact, there may be hundreds of specific provisions included in a managers' amendment to a large piece of "must pass" legislation. Id.

"ugly," haphazard, and driven by political imperative.[36] Staffers expressed concern about last-minute drafting without a lot of public scrutiny. Specific fears included provisions being "slipped in," people losing track of whether one provision squared with another, or a provision being added to satisfy the needs of a senator in trouble for reelection. Staffers expressed the dangers of rapidly drafted bills in pointed terms:

> "A lot of it popped out of nowhere. . . . You're trying on the floor to find someone with the actual language, not just talking points. A key is . . . the floor manager . . . and their staff . . . and whether they're willing to back off the crazy crap that people want in there [referring to an amendment offered on the floor to require the posting of the Ten Commandments in schools]."

> "Sometimes no one is focusing on the text. Thank God for a bicameral legislature. Things can happen quickly, in the dark, in the long bills where no one has seen it. On the other hand, it is the worst process except for the alternatives."

d. Drafting in Conference Several staffers identified, as another venue for drafting, the House-Senate conferences that legislators use to reconcile differences in bills that are passed by both bodies. Like drafting on the floor, drafting in conference was described by staffers with a significant measure of concern. Several staffers thought that pressures of time, and the political imperative to get a bill "done," bred ambiguity. Indeed, one staffer emphasized that while it was well and good to draft a bill clearly, there was no guarantee that the clear language would be passed by the House or make it through conference. Staffers noted that in House-Senate conferences:

> "They can do behind closed doors what can't be done on the floor."

> "[T]here are deals cut with four people in the room, deals on the floor are dropped, nobody knows what's in the bill. There is a big incentive for people to be in conference because it is a big site of action. You can draft carefully and then it gets dropped in conference, and they put in something from the House that you never saw."

> "You work hard, and someone in the House will want to put their fingerprints on something and will mess it up at the end."

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[36] Indeed, staffers also voiced complaints about various recent institutional changes in the Senate that facilitated evasion of the "normal" process by increasing incentives to push amendments on the floor. For example, some staffers mentioned an institutional change permitting greater leeway in legislating on appropriations bills.

B. Institutional Differences: Divergent Drafting Virtues

The second strong theme to emerge from our interviews is an intriguing contrast between how our respondents saw the production of legislative language and what courts identify as important in writing statutory text. We found that the institutional imperatives governing congressional action suggested a different and sometimes conflicting set of legislative drafting virtues. In this Section, we explore staffers' views of two judicial drafting virtues: clarity and interpretive awareness. We then consider how the legislative drafting process described by staffers meshes with these judicial virtues.

1. The Virtue of Clarity

Perhaps the single most significant judicial drafting virtue is *clarity*, the simple idea that legislative language should be written to be as unambiguous as possible.[37] Staffers did not disagree with that fundamental proposition. All agreed that language should be as clear as it can be under the circumstances. Whether simply as the common sense of drafting or as a matter of getting a bill passed, staffers recognized the need for clarity in statutory language:

> "People do use words carefully. Everyone is a lawyer, everyone is careful."
>
> "Congress has an obligation to the reader of statutes to try to make them as clear as possible."
>
> "We do try to think of what a court will do with certain language. In [one bill], we thought about how a court might look at the term 'clear and conspicuous disclosure.'"

While sharing the general notion that clarity is a drafting virtue, many staffers were sensitive to dynamics that undermine the ideal of statutory clarity. They tended to see these dynamics as an intrinsic part of the legislative process, rather than as some sort of aberration requiring apology or rationalization. Staffers regularly cited two clarity-undermining dynamics: the lack of sufficient time and the phenomenon of deliberate ambiguity. Here, our findings tend to confirm assertions in the scholarly literature on statutory interpretation about both time pressures and deliberate ambiguity as factors in the lawmaking process.[38] Both of these dynamics were attributed by staff to

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[37] See Ginsburg & Huber, supra note 4, at 1431-35 (describing pleas by judges for clarification of federal law and proposing methods for increasing statutory clarity).

[38] See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation 38 (1994) (identifying deliberate ambiguity within legislative drafting process as contributing factor to statutory interpretation problems); Samuel Mermin, Law and the Legal System 223-24 (2d ed. 1982) (discussing situations where legislature "deliberately enacts a vague provision" to

what might be seen as a conflicting set of *legislative* drafting virtues: action and agreement (e.g., "we had to get a bill"; "there was no other way to achieve agreement"). Staffers viewed deliberate ambiguity and timing pressures as justified by the felt need for action or the perceived threat that inflexible political positions would thwart passage of any bill at all.

Staffers repeatedly told us that there was often insufficient time to achieve textual clarity: "Time pressure . . . is the key here. . . . This pressure leads to errors, inertia, [and] not understanding completely the potential . . . pitfalls" of a law. When bills are drafted on the floor or in conference, time pressures can be intense; a staffer may have only "thirty minutes to get something done" on a "high profile issue." Another reported that she might get the actual text only twenty minutes before the vote: "This happened with the juvenile-crime bill, when the stuff on gun shows came out of the woodwork, and there was no time to even check what the current law is. So sometimes you can't be more clear because you don't know what you're addressing." One staffer said that these time pressures can become particularly problematic if the staffers working on the bill are young and inexperienced:

> Sometimes it's sloppy drafting. And sometimes it's because the people doing the drafting are young and inexperienced. There is a lot of turnover, and [there] are a lot of young people in these jobs. They can be smart but still inexperienced. Then the issue gets litigated by someone with great expertise.

Although staffers most often spoke of drafting on the floor or in conference as sites where time pressure was at its greatest, this was not invariable. Time pressure was seen as a function not of venue but, instead, of political or institutional imperatives. The "need to get a bill done" was an important source of time pressure and, therefore, of ambiguity. "Necessity" sometimes meant "political" necessity: A particular member "needed" a bill for reelection purposes, and it was therefore rushed through committee or the floor. At other times, the

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provide flexibility for changing conditions or just because "indeterminate language was the only way to get the statute passed"); Joseph Grundfest & Adam C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 Stan. L. Rev. 627, 640-42 (2002) (listing "innocent and socially responsible rationales" for legislative ambiguity, including lack of legislative expertise and increasing efficiency costs necessary to make rules more specific). For broader perspectives on deliberate ambiguity and its implications, see Murray Edelman, The Symbolic Uses of Politics 22-43 (2d ed. 1985) (exploring reasons for success of political decisions that are substantively ambiguous but symbolically significant); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 92-126 (2d ed. 1979) (discussing delegation of legislative power in context of its abstract and ambiguous nature).

"need" to get a bill was not directed specifically toward reelection but reflected the perceived public urgency of the matter. In still other cases, as we explain below, the need to get a bill reflected the relative intransigence of political positions and the need to compromise.

Deliberate ambiguity was seen by staffers as a second, equally powerful force working against statutory clarity. With virtual unanimity, staffers confirmed this phenomenon.[39] One circumstance frequently cited as likely to produce a willful lack of clarity was the absence of consensus on a particular point in a bill:

> "Why [deliberate ambiguity]? To get a bill passed where there is a distinct difference of opinion."
>
> "[A]mbiguity was essential, in some cases, to get a bill passed."
>
> "It is all compromise."
>
> "Politics drives the ambiguity. . . . The decision is made to kick the can."
>
> "We know that if we answer a certain question, we will lose one side or the other."

As these comments reflect, staffers felt constrained in their quest for clarity by conflicting legislative imperatives and the fact that consensual ambiguity on one point could be essential to getting action on a bill.[40] Staffers repeatedly insisted that having something done could be better than nothing. One staffer, for example, cited the Violence Against Women Act and claimed that the committee chair and the ranking member had decidedly different views about a single key phrase, but since both wanted a bill, they agreed to let it go. Another said that "[p]eople want a bill, and therefore they want to come away with different interpretations." As one staffer summed it up: "This is not a law school process, it is a political process. Sometimes one cannot allow the perfect to be the enemy of the good."

On the whole, staffers seemed quite aware that the principal effect of deliberate ambiguity was to leave it to the courts to decide. Indeed, this course was sometimes chosen precisely for this reason: "You can't get someone to agree to it your way, and you hope that the courts will give you the victory." Staffers also realized that statutory ambiguity created an opportunity to let an agency, as opposed to a

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[39] There was near unanimity among our respondents (15/16) that deliberate ambiguity existed. Among those with that view, nearly all (14/15) agreed that it was a result of "politics" or the need to "compromise."

[40] The demands of coalition building may create an additional incentive for ambiguity in a different sense, particularly in the case of controversial legislation. One staffer noted that a sort of inertia can keep vague language in a bill: "If we have a large coalition, we don't want to make every single clarifying change if we have to go and run it by a jillion people."

court, resolve the issue, and sometimes they specifically desired this result as well.

2. The Virtue of Interpretive Awareness

a. Interpretive Awareness in General A second traditional judicial drafting virtue might be understood as an expectation that statutory language be drafted with interpretive law in mind. By "interpretive law" we mean not only general norms of interpretation and canons of construction, but the wider range of legal sources that courts typically consult in construing statutes, such as case law, other statutes, relevant regulations, and similar provisions.[41] Indeed, the Supreme Court has been quite explicit about the expectation of interpretive awareness, saying that, as a general matter, the Court "presum[es] that Congress legislates with knowledge of [the] basic rules of statutory construction."[42]

Moreover, the Court has gone beyond this generalized expectation by specifically imputing all sorts of knowledge to Congress. The Court repeatedly has said, for example, that it presumes Congress to be aware of Supreme Court decisions, reasoning that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law."[43] Indeed, the Court has gone so far as to attribute to Congress knowledge of scholarly writing on law.[44] In a similar vein, the Court on occasion has said that it will understand Congress to have ratified a judicial interpretation of a statute by inaction when Congress does not change the law in the wake of the ruling.[45] The Court has said that it assumes that Congress legislates against the backdrop of various canons of construction, including, for example,

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[41] The range of interpretive resources commonly employed by the Supreme Court is analyzed empirically and enumerated in Schacter, Common Law Originalism, supra note 5, at 10-37.

[42] McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

[43] Cannon v. Univ. of Chi., 441 U.S. 677, 696-97 (1979); see also United States v. Alaska, 521 U.S. 1, 35 (1997) (asserting that Congress passed statute "against the background of our [previous relevant] cases"); EPA v. Mink, 410 U.S. 73, 88-89 (1973) (applying same analysis to interpretation of Freedom of Information Act).

[44] See, e.g., Holloway v. United States, 526 U.S. 1, 9 (1999) ("[I]t is reasonable to presume that Congress was familiar with the cases and the scholarly writing [on the conditional nature of specific intent].").

[45] See Bob Jones Univ. v. United States, 461 U.S. 574, 599-601 (1983) (ratifying interpretation of Internal Revenue Code as to tax-exempt status of racially discriminatory educational institutions); Flood v. Kuhn, 407 U.S. 258, 283-84 (1972) (ratifying prior interpretation of antitrust law's applicability to professional baseball, given Congress's fifty-year failure to overturn such decision).

the presumption against extraterritorial application of statutes,[46] the presumption against finding any change in the law upon a statutory revision unless such change is clearly expressed,[47] and the canon disfavoring repeals by implication.[48]

The logic of the Court's proliferating "clear statement rules" similarly assumes congressional knowledge of those rules, given the inferences that arise from congressional silence or ambiguity on a particular point.[49] The Court's decision in *Gregory v. Ashcroft*[50] typifies the use of such clear statement rules. In that case, the Supreme Court held that the Age Discrimination in Employment Act did not apply to a mandatory retirement age set for state judges, even though states unquestionably were "employers" under the Act, and there was no specific exemption for judges.[51] The Court based its conclusion on a clear statement rule derived from previous cases requiring Congress to be "unmistakably clear" when it seeks "to alter the 'usual constitutional balance between the States and the Federal Government.'"[52]

At a general level, the staffers to whom we spoke knew and appreciated these sources of law. They were all lawyers with impressive backgrounds and elite resumes that landed them in the positions they held. The interviews revealed that there was no question about the staffers' familiarity with the use of canons of construction, judicial opinions, and other interpretive resources. The real issue was whether

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[46] See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (applying presumption against extraterritorial application in holding that Title VII does not apply to American employees working abroad for American employers).

[47] Muniz v. Hoffman, 422 U.S. 454, 468-74 (1975) (reviewing history of clear statement canon and determining that "Congress expected [that this canon] would be applied" in interpreting revisions of Criminal Code).

[48] United States v. Fausto, 484 U.S. 439, 462-63 n.9 (1988) (Stevens, J., dissenting) ("We can presume with certainty that Congress is aware of this longstanding presumption [against implied repeal] and that Congress relies on it in drafting legislation.").

[49] Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994) (holding that statutes will not be applied retroactively absent congressional clear statement to that effect). Additional applications of clear statement rules include Gregory v. Ashcroft, 501 U.S. 452, 460-61, 464 (1991) (holding that federal statute will not be interpreted to reach area traditionally regulated by states absent clear statement); United States v. Goodyear Tire & Rubber Co., 493 U.S. 132, 145 (1989) (applying canon that "tax provisions should generally be read to incorporate domestic tax concepts absent a clear congressional expression that foreign concepts control"); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds . . . ."); McLanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174-75 (1973) (applying canon construing vague statutes in favor of Indian tribes). For an overview of clear statement rules, as employed by the Burger and Rehnquist Courts, see William N. Eskridge, Jr. & Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 598-629 (1992).

[50] 501 U.S. 452 (1991).

[51] Id. at 464-70.

[52] Id. at 460-61 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

and how this knowledge was used. Was it true, as courts seem to assume, that drafters self-consciously paid attention to these kinds of interpretive tools?[53]

We asked staffers specifically about their use of lawyers' tools to craft statutes. To what extent and in what way did staffers focus on what they expected courts to do with a particular provision? How much, and how often, for example, did they do legal research in connection with writing a bill, and to what extent did such research involve canons of construction, case law, or statutes potentially relevant to interpretation?

When we asked, at a general level, how much legal research staffers did, the responses varied, but staffers seemed to agree that research depended upon the institutional and political context. If, for example, a bill was drafted on the floor or in conference, the institutional venue made it highly unlikely that legal research would be done; there simply was no time. Political context mattered as well. Political saliency was often an indicator that research would be done. Consider one staffer's comment: "Reg[ulatory] reform was a hot issue with lots of litigation, and there [we] looked at what courts [had] done."

The political importance of the bill, however, did not invariably mean more research. In one case, a staffer indicated that little research was done because there was nothing to research—there had never been a bill like this before, and it was unclear whether this bill (being quite controversial) would ever pass. Interestingly, one staffer said that research might also depend upon the political goal. She explained that sometimes research was primarily used *offensively*—to kill a bill by raising questions about its constitutionality.

Subject matter also affected the use of legal research. If the bill was triggered, for example, by a judicial decision, it was likely that there would be substantial legal research.[54] By contrast, it was unlikely that legal research would be done if the legislation concerned a "program"—that is, the distribution of benefits by an administrative agency. This is presumably because the administrative details of such legislation rarely come before courts.

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[53] For accounts skeptical about courts imputing to Congress knowledge of canons and other judicial principles of interpretation, see Robert A. Katzmann, Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory, 80 Geo. L.J. 653, 662-65 (1992); Abner J. Mikva, Reading and Writing Statutes, 48 U. Pitt. L. Rev. 627, 629-31 (1987).

[54] More than one staffer, when asked about legal research, cited as an example a bill to change the result of an appellate court ruling that unexpectedly had applied the federal bribery statute to plea bargaining. See United States v. Singleton, 144 F.3d 1343, 1351-52 (10th Cir. 1998), rev'd en banc 165 F.3d 1297 (10th Cir. 1999).

Finally, at least some staffers believed that legal research was often done by others. Staffers said that research was provided, for example, by lobbyists, agencies, and the congressional research service. One staffer specifically told us that research was done by the Legislative Counsel's office.[55] Sometimes staffers did legal research in order to substantiate the research provided to them by someone else. For instance, one staffer noted that advocacy groups often alerted staff to a perceived problem created by a judicial ruling. This same staffer said that when proposed legislation originated in this way, her subcommittee often conducted independent legal research because of a reluctance to rely solely on what a lobbyist might present.

Staffer perceptions about the extent to which legal research, as a general matter, was done helped supply some context for the question that was more significant for us: whether staffers are conscious of and specifically attuned to interpretive law, including whether they did legal research about interpretive questions. Here the answer was clearer. While staffers are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing, in the ordinary course of drafting they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted. As we discussed in the previous section, clarity in drafting, to the extent possible, is important to staffers. But delving deeply into interpretive law as a way to maximize clarity does not seem to be part of what staffers do on a regular basis.

In our questioning along these lines, we were particularly interested in canons of construction. As we discussed above, many canons both impute to Congress knowledge of the relevant interpretive principles and make strong inferences about statutory meaning based on the canon's very existence. We will separate our findings based on what staffers and Legislative Counsel attorneys, respectively, told us about canons.

b. Staffers on Canons We learned that staffers certainly are aware of canons, and, on occasion, canons did surface in the drafting process. By and large, however, staffers did not view canons as a central factor in drafting legislation[56] nor did there appear to be any sys-

[55] Legal research done by Legislative Counsel attorneys is discussed infra at Part II.B.2.c.

[56] The overall trend of answers (13/16) shows that canons were not seen as important. Only three staffers said that they were used "sometimes," one of whom said it was "not often," another of whom seemed to confuse canons with something else. All staffers appeared to be aware of canons, but three staffers' answers indicated that they may have

tematic mechanism or practice for anticipating which canons might be applied in construing a particular term in a bill. Staffers told us that:

> "[In most instances, canons are] not a big deal."
>
> "[Canons] are grammar."
>
> "Canons and maxims are not discussed in so many words . . . ."

In considering the importance of canons, a number of staffers said that they were not important because such rules paled in comparison to what they were trying to do. Consider these assertions:

> "Staffers don't care about canons but are looking at what the bill is going to do."
>
> "[Even if we don't care about canons,] we do try to think about how the bill would apply to different situations."
>
> "We do try to think of what a court will do with certain language, [giving, as an example, a consumer bill that would require *clear and conspicuous disclosure* of certain facts] but we don't have time for things like canons; it's not at that level."

One staffer succinctly summed up the answers we received about canons, saying that "we are conscious of the question [of] what a court will do, but not at the level of *expressio unius* . . . ."

This is not to say that the staffers were oblivious to canons. As one staffer put it, "[Of course] we know about . . . canons." And, indeed, respondents volunteered several interpretive principles: the rule of lenity, the avoidance of constitutional questions, and the *Chevron* doctrine, for example. Three staffers indicated that even if canons were not used specifically by name, there was a "common sense" of drafting that incorporated them: "No one talks about clear statement rules but they do it anyway." One staffer noted that if a drafter is trying to "accomplish something in a straightforward way," then the language will be economical and calculated not to raise difficult issues.

Another staffer called this "good legislating." He used, as an example, the idea of a "severability clause." Presumably, if one wanted a bill with potential constitutional issues to have effect in the event of an adverse constitutional ruling, then it was wise to include a severability clause. This strategy was not seen as applying a rule of statutory construction, but simply a pragmatic way of accomplishing something because the bill would have no effect if it were struck down as unconstitutional.

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been using canons to talk about case law in general. Five of sixteen staffers volunteered directly or indirectly that canons were "technical" or "detail" matters; four said that addressing canons was the Legislative Counsel's job; one said that lobbyists or lawyers might do this in their proposals.

Interestingly, at least a few staffers seemed to premise their views on a sophisticated understanding about statutory interpretation, which led them to believe that canons do not really help all that much in predicting how the law will be applied. Echoing Karl Llewellyn's famous assault on the canons, in which he showed that for each canon there was a countercanon that could lead to the opposite result,[57] one staffer put it quite bluntly: "Lots of people think there's a [canon] for almost anything, so . . . we just try to make it as clear as possible."

Indeed, in the few specific instances in which respondents recounted thinking about canons in drafting a bill, the contemplated canons, in retrospect, did not aid in achieving clearer drafting. In one example, a staffer specifically had in mind the rule that statutes should be construed to avoid constitutional questions. Keeping that canon in mind, the staffer drafted, with particular clarity, a bill limiting the authority of courts in a particular set of cases. When the statute later was construed judicially, however, the court invoked a canon that the staffer neither had anticipated nor even heard of: that a court's equitable powers should be preserved. The staffer found irony here, for the driving purpose of the law had been precisely to limit the courts' powers. In another case, the court used the very canon this staffer had anticipated (avoiding constitutional questions) to reach precisely the opposite outcome.

Another staffer described an incident in which he had invoked a canon—the rule of lenity—in a drafting meeting. The context in which the canon was invoked, however, suggested that it was not intended to resolve, but instead to perpetuate, ambiguity. During the meeting, another staffer had complained about particular statutory language. In order to quell this complaint, our respondent reports having said that "there is always the rule of lenity." Here, the canon was being used not to advance statutory clarity in drafting but, instead, to *avoid* greater clarity and to achieve agreement. As recounted by staffers, these examples illustrate the hit-or-miss quality of predicting the application of canons.

c. Legislative Counsel Attorneys on Canons In discussing the role of canons, one staffer told us that he did not "go through canons of construction" but that he thought Legislative Counsel did. This remark raised the question for us whether Legislative Counsel, compared to staffers, plays a more consistently active role with respect to

[57] Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401-06 (1950).

canons and, for that matter, other types of legal research about statutory interpretation.

Responses from Legislative Counsel lawyers showed substantial expertise in federal drafting and statutory interpretation. One attorney told us with some laughter that it is the Legislative Counsel attorney's job to try to draft something that "puts a federal judge into a box with a wall so high he can't get out." Yet the Legislative Counsel attorneys with whom we spoke were split on the general question of how much legal research they did. One said it was done "rarely"; the other said that he did "quite a bit."[58] They agreed that research was more likely to be done when the matter involved a statutory scheme that was heavily judicialized, such as the antitrust laws, than when the law was mostly codified. They also appeared to agree that when such research was done it often did not pertain to statutory interpretation. Legislative Counsel attorneys think "quite a bit" about how a judge might construe the language they draft, but they do not believe they have to do interpretive research in order to make that assessment.

Indeed, both Legislative Counsel attorneys whom we interviewed regard themselves as essentially having internalized the drafting norms and conventions reflected in the canons, saying that the canons have become "intuitive," "second nature," and an "unconscious type of thing." One attorney cited as an example of such an internalized idea the principle of *ejusdem generis*, the rule that general words following an enumeration of specific words will be construed to include only things of the kind specifically enumerated. Both attorneys consider the canons important and mentioned that materials on canons were included in training materials provided to new Legislative Counsel attorneys. But neither saw this as an area requiring ongoing legal research. When asked about the proliferation of clear statement rules

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[58] Further probing suggested that there was not necessarily a large difference between the two after all. The attorney who considered legal research rare noted that Legislative Counsel attorneys could usually "accomplish the client's purpose" by providing drafting and organizational assistance alone. The attorney who characterized legal research as more frequent acknowledged that the intense demands on the limited resources of Legislative Counsel attorneys, together with the priority structure followed in the office, meant that "time concerns dictate[d] how much legal research you can do." The result was that, in practical terms, legal research was not done in every case. Moreover, this attorney told us that the legal research that is done by Legislative Counsel attorneys is "overwhelmingly" statutory (as opposed to involving case law). It frequently focuses on establishing clearly what existing law is, in order to draft the requested provision more effectively. Since establishing the state of current law is virtually a predicate to drafting a bill and is one of the first items on the Legislative Counsel's drafting checklist, it may be that the attorney who reported doing little legal research did not even consider this task to constitute "legal research" within the meaning of our question.

in particular,[59] one attorney pointedly told us that this was not part of what he thought about. He asserted that the Legislative Counsel's principal purpose was to be clear, but he felt that it did not entail focus on clear statement rules in particular.

To some degree, the Legislative Counsel's office might be situated to be an intermediary of sorts between staffers and members on the one hand and courts on the other. The expertise of the office, combined with the relative longevity of its staff, potentially enables Legislative Counsel attorneys to insert the judicial "interpretive" virtues—the virtues of clarity and of interpretive awareness—into the political process. Our interviews with the Legislative Counsel's staff, however, suggest that their expertise does not necessarily position them to play such a "judicializing" intermediary role.

Most significantly, there is no Senate rule requiring that the Legislative Counsel's office be consulted at all. It is instead up to individual members or staffers to choose to engage Legislative Counsel lawyers to work on any particular bill. In addition, some staffers indicated that Legislative Counsel attorneys may be excluded from the drafting process on some politically sensitive matters—potentially the matters on which intense statutory scrutiny might be the most useful to courts.[60] And drafting suggestions of Legislative Counsel attorneys may be trumped at any time by the political will of members and/or staffers. Despite the expertise of the Legislative Counsel's office, attempts to stay abreast of legal precedent, or efforts to incorporate canons into the drafting process, there is no guarantee that their work will find its way into the law. At any time, its efforts may be rejected or ignored by their "clients," by the rest of the Senate, or by the House.

Moreover, even if Legislative Counsel attorneys are engaged, they acknowledge that they may be consulted relatively late in the drafting process, after other drafters already have made critical decisions and have set the parameters of the bill. Indeed, a draft bill frequently will reflect work done in previous Congresses on the same bill, and there is often no inclination to revisit all of the drafting decisions made in the earlier version. Finally, substantial time and resource constraints would seem to preclude a top-to-bottom review complete with comprehensive interpretive analysis of every bill the office helps to draft. Because of the sheer volume of legislation it

[59] For a discussion of clear statement rules, see supra notes 49-52 and accompanying text.

[60] Staffers may choose to exclude the Legislative Counsel's office because, on politically sensitive matters, they may want to ensure secrecy before floor debate or because they place priority on achieving political objectives rather than maximal drafting precision.

sees, the Legislative Counsel's office faces considerable barriers to the implementation of its expertise.

C. The Continuing Production of Legislative History

Like canons of construction, legislative history is a familiar part of judicial interpretation of statutes. We probed respondent staffers about their perceptions of legislative history and its use as a tool of interpretation. The traditional intent-based approach to statutory interpretation looks to committee reports, floor statements, and the like as the evidence of legislative intent when the court deems the relevant statutory language ambiguous. In recent years, however, the very idea of legislative intent has become controversial as Justice Scalia has argued for a text-based approach instead.[61] One principal part of Justice Scalia's attack on intentionalism has been to call for the abandonment of legislative history as a legitimate device of statutory construction.

For Justice Scalia, legislative history undermines the proper role of both the courts and Congress. He argues that it undermines the role of the courts because it enables judges to reach the result they like by rummaging through committee reports and floor statements to find something supporting their preferred outcome.[62] He argues that it undermines the proper role of Congress in three ways. First, it allows legislators essentially to make "law" without mustering a majority vote and satisfying the rigors of Article I.[63] Second, it delegates power to staffers and lobbyists, whom Scalia sees as principally responsible for the creation of legislative history, and it encourages them to plant in legislative history items that could not garner a majority vote.[64] Third, it frees lawmakers from the discipline of writing into statutory text provisions intended to have the force of law.[65]

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[61] Justice Scalia sets out his critique of legislative history, and some responses to it, in Antonin Scalia, A Matter of Interpretation 29-37 (1997). His arguments are explored and elaborated in greater detail in Breyer, supra note 26, at 852-53, 863; see also Eskridge, supra note 38, at 42-47; Schacter, Common Law Originalism, supra note 5, at 6-9.

[62] Scalia, supra note 61, at 36.

[63] See id. at 35; Schacter, Common Law Originalism, supra note 5, at 8.

[64] See Schacter, Common Law Originalism, supra note 5, at 8-9 (noting that critics associated with Scalia object on these grounds to use of legislative history). Scalia's view is that legislative history often reflects the ideas of staff or lobbyists and may include ideas for which there is no legislative consensus. Schacter, Metademocracy, supra note 5, at 642-43 (citing Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring in the judgment); Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

[65] See Schacter, Common Law Originalism, supra note 5, at 9 (noting that critics associated with Scalia advance this view); Schacter, Metademocracy, supra note 5, at 645 (noting

This critique struck us as crying out for empirical testing, and our respondents offered a place to begin. We wondered whether our respondents were aware of Scalia's critique. Has it affected—or "disciplined"—the way in which they write federal laws? What is the role of staffers and, particularly, lobbyists in producing legislative history? And how does that role compare to the role of these same actors in producing statutory text?

When asked about the relevance of legislative history to statutory interpretation, respondents clearly recognized that the "general idea" was to put "as much as possible" into the text of a statute rather than the legislative history. At the same time, however, a vast majority of staffers either had drafted legislative history themselves or told us that other staffers wrote legislative history.[66] Indeed, staffers reported to us that legislative history continued to be seen as one avenue for addressing issues that were not resolved specifically in the statutory text.

Every respondent except one had heard of Justice Scalia's critique of legislative history. But there was some difference of opinion about the effect of the Scalia critique on drafting in the Senate. Four staffers indicated that the Scalia critique had made staff members, in the words of one, "more conscious of the limits of report language. There is more pressure to put things in the text." As one put it, "I remember writing a committee report and joking about whether it would matter." Another said, "We know we need to try to get it in the language because there is no assurance it will count if it is in the legislative history." One Democratic staffer expressed a belief that the writing of committee reports had declined while the Republicans held the Senate and wondered whether the Scalia critique might have been related to this decline.

Most respondents, however, said that the critique has had little resonance.[67] Perhaps this is predictable. Because Justice Scalia's critique never has commanded a majority on the Supreme Court, its principles cannot be attributed to the Court as a whole, let alone to

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Scalia's view that abandoning reliance on legislative history will "break[ ] legislators of the bad habit of relying on courts to clarify ambiguous statutes").

[66] Thirteen of sixteen staffers gave us this response; three did not specifically answer this question.

[67] Fifteen of sixteen staffers were aware of the critique; one was not. Fourteen staffers answered one way or another on the specific question of the effect of the critique (two provided what amounted to ambiguous or nonresponsive answers). Of the fourteen staffers who specifically answered this question, ten doubted that the critique had affected legislative practice or that it was based on realistic assumptions about rogue staffers. Four of fourteen staffers (two Democrats and two Republicans) thought it had changed practice "some"—by increasing skepticism that courts would look to report language or raising consciousness among staffers about the importance of putting material in the text. These four staffers, however, acknowledged that they had drafted legislative history.

lower courts. This was not, however, the explanation offered by our respondents. One Republican staffer, for example, volunteered the belief that members as a general rule "disagreed with" Scalia's critique. Another staffer argued that the critique's effect was on courts, not on Congress. He recognized that "it is less certain than it used to be that a court will look to legislative history," but noted that he did "not think [the Scalia critique] ha[d] much weight; it affects what weight district court judges give to legislative history," not "the actual legislative practice."

Along similar lines, most staffers said that the critique would not change drafting practices because legislative history served institutional purposes. Reports may be used, for example, to explain a bill and to obtain support from other offices. Because reports frequently are negotiated among staff, they may serve as a way to facilitate political consensus, as well as to inform the public. And courts are not the only interpreters of language; as one staffer put it, committee reports "tell" agencies how to look at the law: "It sends a signal to them about regulations."[68] Indeed, one staffer who agreed with the Scalia critique nevertheless indicated that committee reports are ways that Senate staff can prepare their arguments for floor debate, respond to critics, and "advocate" for a position on a bill. This staffer suggested a different reason why the critique would have little effect: "People don't like the 'no legislative history' position because it undermines their prerogatives. No one is paying attention to their words." Other staffers less sympathetic to Scalia's critique expressed similar sentiments:

> "They are going to write legislative history anyway because they are going to be protecting their institutional prerogative."
>
> "Staffers will stop writing reports when clerks stop writing Supreme Court opinions."

Some staffers did acknowledge the possibility of abuse. As one staffer put it: "[T]o maintain agreement, people often prefer to leave language ambiguous and put things in legislative history." Some saw this as a serious risk; others said simply that "you cannot say it all in [textual] language." In a former life as a judicial law clerk, one staffer had felt little sympathy with the difficulties of drafting. This staffer still thought it was a bad idea to use legislative history as an escape

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[68] The extent to which participants in the federal legislative process are aware of the doctrine of judicial deference to ambiguous regulatory statutes—set forth in Chevron, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)—is a question that merits empirical scrutiny, but the Judiciary Committee did not provide a good setting for that inquiry because relatively few of the committee's substantive areas involve conventional regulatory agencies.

hatch, but professed a better understanding of drafting problems and a greater appreciation of the uses of legislative history.

In addition to soliciting general reactions to the Scalia critique, we asked about some of the specific claims that comprise that critique. One of these claims is that legislative history should be rejected by courts because it frequently is drafted by staffers—as opposed, presumably, to senators themselves.[69] Respondents readily acknowledged that staff, rather than senators, drafted legislative history.[70] Staffers regularly wrote committee reports, floor statements, conference reports, and colloquies on the floor. Although staffers are perhaps not best situated to assess the force of this claim, it is worth noting that none saw the staffer role in writing legislative history as a powerful reason, in and of itself, to reject its interpretive use. Many staffers volunteered that members did not even read committee reports, except perhaps those pertaining to the bills they themselves had sponsored. Many staffers also candidly acknowledged that senators generally did not read the *text* of bills either:

> "Senators reading bills? Not if they are not authors or [don't] have a big involvement in the bill."

> "Senators don't read the bill, don't read the conference report . . . . Most work—bills and reports—[is] totally staff driven."

> "My senator doesn't read committee reports, probably has never read one. Other committee staffers read the report."

A few staffers said that "some" senators read the committee reports and the bills, but it appeared that most just read "their own provisions." One said that senators read the bill and not the report. One explained that the reason her senator does not read the committee reports is that "his position is already established. Many issues have been around a lot, so there's no need for him to read every report."

In focusing on the power of staffers in the realm of legislative history, Justice Scalia's critique has been read to suggest that judicial consultation of legislative history allows staffers too much power to follow a personal agenda.[71] As a general rule, staffers believed that

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[69] See, e.g., *Blanchard*, 489 U.S. at 98-99 (Scalia, J., concurring in part and concurring in the judgment) ("What a heady feeling it must be for a young staffer to know that [his or her citation of obscure district court cases in a committee report] . . . can transform them into the law of the land . . . .").

[70] Indeed, one went so far as to characterize as "laughable" the underlying notion that senators either do or should write their own legislative history, and attributed the Scalia critique along these lines to insufficient experience with the legislative process.

[71] See Schacter, Common Law Originalism, supra note 5, at 8-9 (citing claim by Scalia-aligned critics that legislative history enables staffers to write into law items not in statutory text).

the staff role was necessary, given the demands on senators' time. Moreover, staffers did not think unauthorized staffer freelancing was likely, in the realm of legislative history or elsewhere:

> "Staffers do have lots of power, but it's not the function of staff to make big decisions. Staffers do have influence, but it's the member's call."
>
> "A lot of things are staff driven and the staffer sells it to the senator, but that's not freelancing. It's a member's power, not the staffer's."
>
> "The biggest disincentive against staffer freelancing is that if you are caught, you are likely to get fired. It would never occur to me to freelance, to act contrary to my boss. He's my client."

Several staffers noted that there were grave risks in freelancing because it would mean that you would lose your ability to do your job: "If the staffer truly freelances and is not supported by the senator, then [that staffer] lose[s] credibility." When the senator comes in "to seal the deal, and [a staffer] has been posturing, then there will be trouble"; in other words, there will be no agreement, and that will make the staffer and the boss look bad. Most staffers seemed to believe that there were viable checks against freelancing:

> "It does happen, but other staffers serve as a check. Usually, someone on the other side is involved."
>
> "Even within the same party staff disagree and can check one another."

Finally, some indicated that freelancing depended upon the culture set by the senator and that some senators are better at monitoring than others: "If a staffer were to freelance, it only would be because his boss was permitting it." Indeed, "[t]he senator sets the culture," implying that some senators are engaged and others are not. It is important to note that these comments about freelancing seemed to apply both to text and legislative history. Although we occasionally heard that freelancing was more likely to occur in committee reports than in bills themselves, most staffers made no distinction between text and legislative history on the question of "rogue" drafting by staffers.

In addition to focusing on the role of staffers, Scalia also targets the role of lobbyists in drafting legislative history.[72] Two staffers indicated that they saw the possibility of lobbyist abuse as greater in the context of legislative history than statutory language because there

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[72] See, e.g., *Blanchard*, 489 U.S. at 98-99 (Scalia, J., concurring in part and concurring in the judgment) (theorizing that citations in committee report were inserted "by a committee staff member at the suggestion of a lawyer-lobbyist" in order "to influence judicial construction" of statute at issue).

were fewer "eyes" on committee reports. Most staffers, however, did not make this distinction. As we explore in detail in the next section, staffers approved of lobbyists' role in drafting legislative history to the same extent and under the same conditions as they approved the practice of lobbyists' role in drafting statutory language.

D. Lobbyists as Drafters

We asked specific questions about the role of lobbyists in the drafting process. We were interested in both the extent to which staffers considered lobbyists to be involved in drafting bills and in their impressions of any role they observed lobbyists to play. Our interest in this issue was piqued by the reaction that followed a story published several years ago revealing that industry lobbyists had assisted Republican members of Congress in drafting a bill relating to environmental law.[73] In light of the firestorm created by that story, we wondered whether staffers thought that lobbyist involvement in drafting was really as rare as the reaction to that news story might have suggested. As we discussed above, one argument against the use of legislative history by courts is that lobbyists frequently draft it.[74] We wondered, therefore, about staffers' views on the prevalence and particulars of lobbyists drafting legislative history and whether staffers saw lobbyists as equally involved in the drafting of statutes as well.

Every staffer we talked to said that lobbyists were involved in at least some drafting of statutory language. As we have noted above, staffers were quick to define "lobbyist" in the broadest terms possible, including everyone from the White House to the local church group to the silk-suited K-Street telecommunications lawyer.[75] The "average person," one staffer told us, does not understand the "broad spectrum" of interests offering their views, like universities who lobby on everything from immigration to healthcare reform. But with that caveat, the sentiment was uniform that lobbyists can have a strong influence on statutory text and that this was not a rare event but, instead, a normal part of the drafting process:

> "Lobbyists serve an important and useful role."
>
> "[Lobbyists add] expertise, legal research, information to the process . . . ."

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[73] Steven Engelberg, Business Leaves the Lobby and Sits at Congress' Table, N.Y. Times, March 30, 1995, at A1 (reporting that lobbyists representing regulated polluters helped write bill to weaken Clean Water Act); see also Elizabeth Drew, Showdown: The Struggle Between the Gingrich Congress and the Clinton White House 116-17 (1996) (describing *New York Times* report and discussing role of lobbyists generally).

[74] See supra note 72 and accompanying text.

[75] See supra Part II.A.1.c.

> "The good ones have a lot of information and you can turn to them for information."
>
> "As experienced and trained as we are, outsiders have the practical experience—they know the problems in the area and the law in detail."

One staffer confessed that he had changed his mind: Before moving to the Senate, he had been skeptical about lobbyists and had been supportive of lobbying reforms. Now, he said, he had a "more nuanced view of what's appropriate," given the scarcity of time and resources available to staffers. Over time, this staffer has come to ask for proposed language or other help from outsiders. "I have concerns about the power of interest groups," he said, "but the alternative might be worse—i.e., to write the bill without the necessary knowledge." Another staffer saw lobbyist drafts as a "form of free assistance" that staffers can take or leave, noting that some outside interests have a "cadre of lawyers" available for information and drafting attempts.

Staffers repeatedly sought to justify the use of lobbyists in terms of the legislative drafting virtues—as essential to effective action. They said that outsiders were the ones who could give them the necessary information about how the legislation would "affect the world." Lobbyists are the closest to the people who will be affected by the bill, explained one staffer. Another said that lobbyists are a part of "open government," and that they "aren't so sinister as the public image . . . but [instead provide] a way to know how the bill will affect those with a stake." Others suggested that the point of lobbyist involvement was actually a form of deliberation and participation:

> "At the beginning, you want to have their input. You show them language . . . ; you want to make sure that the interests affected[, for example, the Department of Justice, the National Institute of Justice, or other executive branch departments,] will sign off on the bill."
>
> "You bring [the groups] in to invest them in the process and make people feel 'in the tent.'"

Most staffers suggested that the process was better off because of lobbyist expertise:

> "They can see things we might miss. . . . [They are u]seful to help flesh out potential problems. It makes sense to use them because they have the necessary information."
>
> "When I first got to the Senate I said 'no way' [to lobbyists]. Now, I am less adamant. I scrutinize their positions. But, occasionally, in areas of technical expertise, I will ask people to draft . . . something.

> The problem is information and expertise and time. Sometimes the issue is so technical that . . . they provide useful information."

Indeed, one staffer went so far as to suggest that, in cases where there are few or no organized interests, as for example in the area of criminal law, the quality of information on which staff relied was particularly poor, suggesting that the legislation might suffer from the *lack* of lobbyists' information and expertise.

As a general rule, staffers were cognizant of the risks of lobbyist self-interest, but they felt that appropriate safeguards could reduce those risks and preserve the benefits of lobbyist involvement in drafting bills. One important safeguard noted widely by respondents was to use lobbyists' language as the initial basis for a draft, but not to accept it conclusively or uncritically. Although staffers repeatedly noted the need to use outsiders, they insisted that they never used lobbyists' language verbatim:

> "No one simply drops in the language of the lobbyist."
>
> "I don't know anyone who relies entirely on lobbyists to draft a bill."
>
> "Lobbyists may provide draft language, but I wouldn't use it unedited."
>
> "[My senator] wouldn't just accept language as is and introduce it . . . ."

Staffers insisted that they always "scrutinized" what outsiders provided them: "You have to scrutinize what interest groups give you. They have institutional knowledge, but you have to be careful." Along these lines, one staffer posited that the demands of political compromise serve as an effective constraint on excessive lobbyist influence in drafting: "On a scale of one to three, [the interest groups] want four. If you go too far . . . you fall off the table, and there is no room for reaching a compromise." The point was that a staffer cannot simply take interest groups' language on anything controversial because it is likely to discourage the kind of compromise necessary to get a major bill enacted into law. Another staffer suggested that there was an inherent disincentive to taking language verbatim: "[I]f publicly revealed, it will leave a very bad impression."

Another safeguard frequently mentioned was to employ a variety of checks against abuse, such as soliciting the input of other interest groups, other staffers, and policy experts. Along these lines, respondents said:

> "[It is the job of the staff] to correct excesses and/or ambiguities. Interest-group material is scrutinized."

> "The bankruptcy bill is a poster child for what should not happen in Congress. Maybe when there are two opposing powerful [interest groups], you get a wash, but in the bankruptcy bill, there is a real imbalance [in money and firepower]."
>
> "Over time, you learn to separate out facts from advocacy; some groups are very good with their facts, others are not."
>
> "I always talk to both sides . . . . A good member always challenges his staff to make sure that the staff[ers] have heard from both sides, that they are not just looking to one side."
>
> "You can improve the product . . . if you work with a range of people."

Finally, respondents noted several particularized factors that might heighten the risks associated with lobbyist drafting. For example, in a strange union of opinion, most staffers left us with an impression that, if there were risks in reliance on lobbyists, they were risks undertaken by others—a kind of "good office/bad office" story, in which offices other than their own were seen as permitting inappropriate lobbyist influence in drafting. When asked about lobbyist influence, for example, it was common to hear things like the following:

> "[My senator's office] is very careful; other offices are mere conduits for interest groups."
>
> "The better offices know what lobbyists to trust and what to trust them for."
>
> "Depends on the office. On the bankruptcy bill, for example, there's one office that won't take a step without vetting it with the credit card companies."

Along similar lines, some respondents suggested that lobbyists had more free rein in drafting bills for the House. Still others cast responsibility for undue lobbyist influence on young and inexperienced staffers:

> "Capitol Hill staff [members] are young, and there is some danger that they will be snookered by a lobbyist."
>
> "The younger and more junior the people, the more likely it is that they will rely upon lobbyists."
>
> "Sometimes in [a senator's personal office], staff [members] who are so young might simply accept what a lobbyist is offering. It is a scary thing, because sometimes it can cause the [committee and personal] staff to take inconsistent positions."

III
IMPLICATIONS

Our case study has some intriguing implications for the practice and study of both statutory interpretation and the legislative process more generally. Given the limited focus of our study, we view these implications as tentative and their significance as only potential. While we will avoid drawing sweeping conclusions, we think the study points in some promising directions and underscores the need for more empirical research in this area.

A. Clashing Institutional Virtues

Our study yields some sharp contrasts with the conventional story of legislative drafting found in judicial opinions. As we suggested at the outset, it may be that the judicial story of legislative drafting adopts a set of fictions not intended to portray the reality of the legislative process. Yet there is still the need to subject the judicial story to empirical scrutiny. Without regard to whether judges actually believe that the assertions they make about legislative drafting are based in fact, important questions of accountability and responsibility for the making of federal law can turn on the picture of the legislative process drawn in judicial opinions.

While the standard judicial story is relatively simple, ours is a good deal more complex. For example, the judicial story seems to suppose that legislators write bills, or at least it employs the fiction that they do; our study suggests that drafting on the Senate Judiciary Committee is a complex work of negotiation among a variety of players, including staffers, lobbyists, and professional drafters. Where the standard story seems to assume a unitary drafting process, our study suggests that the process varies widely according to the subject matter of the bill, its political context, the personality or prior experience of the senator, and whether the bill is drafted in committee or on the floor. Perhaps most significantly, where the standard judicial story assumes that those who write bills share the judicial drafting virtues, our study suggests that staffers' behavior is shaped by their own institutional position and experience, as well as the particular norms, expectations, and audiences that have currency in the legislative context.

The institutional demands of the legislature are particularly apparent in the findings that statutory language cannot always be made clear (because of time pressures) and sometimes is intended to be unclear (in the case of deliberate ambiguity). It is also evident that canons of statutory construction are not systematically a central part of the drafting enterprise in which staffers participate, nor, for that mat-

ter, is interpretive research more generally. It would be easy to dismiss this as a matter of staff incompetence or lack of knowledge. But such assumptions, often implied in judicial critiques of congressional drafting, are not substantiated by our respondents' statements. While we found that staffers, as a general matter, do not focus on what we have called the "interpretive virtues," we also found that this phenomenon did not reflect a failure of training, competence, or sophistication. Quite to the contrary, we found that staffers knew the rules, could cite canons, and, in particular (though limited) circumstances, did significant legal research.

Staffers' drafting choices seem to be driven not by issues of legal dexterity but by the demands of a competing set of virtues—what we are calling "constitutive virtues."[76] The interpretive virtues are the virtues, generally, of courts: precision in drafting, consciousness of interpretive rules, discovery of meaning in past precedent, and detached reflection on the language of particular texts. Constitutive virtues, by contrast, tend to prize the institutional values of legislatures: action and agreement, reconciling political interests, and addressing the pragmatic needs of those affected by legislation.

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

In a sense, the difference between interpretive and constitutive virtues reflects obvious institutional differences. Staffers, after all, are not being asked to interpret legislation; they are being asked to create it. More importantly, staffers are asked to create legislation in an institution whose incentives and institutional attributes are quite differ-

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[76] For a concise explication of the nature of constitutive rules, see John R. Searle, Mind, Language & Society: Philosophy in the Real World 122-23 (1998) (describing distinction between constitutive and regulative functions of rules while noting that "[s]ome rules not only regulate but also constitute, or make possible, the form of activity that they regulate"). But see Joseph Raz, Practical Reason and Norms 108-09 (1990) (arguing that all, not some, rules are both regulative and constitutive). Legislating, like playing chess, is often given as an example of an act based on constitutive rules. See id. at 108.

ent from those of courts. Staffers operate in a world dominated by the demands of direct collective action. Legislative institutions require the agreement of many; members thus value compromise and negotiation as a means to action. In part, agreement is prized because it is difficult to obtain. In the Senate alone, any piece of legislation of any controversy likely will require, at the very least, the concurrence of sixty independent, resourceful, and powerful individuals. And that, of course, is simply in the Senate; there is still the House, as well as the President, interest groups, and party leadership to consider.

More fundamentally, perhaps, action is prized because this is, in large part, how representatives view their job. The Senate does not depend upon how courts perceive it. Instead, the Senate lives and breathes, to paraphrase Charles Black, based on "what [the voters] think" of senators "back home."[77] Whether that means bringing "home" a civil rights bill or a government building, action is prized because senators believe that action is what their constituents want and expect from their representatives.

B. Stakes for Theories of Statutory Interpretation

1. If Not the Standard Judicial Story, Then What?

If our findings are borne out in further research, and the standard judicial assumptions cannot, in fact, withstand empirical scrutiny, the question becomes what should be done about that fact. Should judges trade in empty fictions for robust truths? In other words, should they attempt to develop an empirically sustainable understanding of the legislative process? Or do the fictions employed in the judicial story retain pragmatic or institutional value?

Any ambitious project of requiring judges to rely only on factually verifiable assessments of the legislative process would face overwhelming obstacles. The significant variability in the legislative process that our case study suggests would seem to preclude any prospect of efficient judicial empiricism. Expecting judges to launch contextualized inquiries into the "actual" legislative process that produced statutes would be both onerous and institutionally unrealistic. We do not, in short, suggest that judges don the hats of political scientists or look behind the record to recreate a "true" picture of particular legislative negotiations. As we explain below, however, we do think that the findings of our study cast some distinctly skeptical

[77] Charles L. Black, Jr., The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13, 16-17 (1974).

light on originalist theories of statutory interpretation[78] and, at the same time, support the notion that judges more forthrightly should acknowledge and embrace their own inevitable role in giving meaning to the laws they interpret.[79]

At the most basic level, our study raises questions about the purchase of any single abstract theory of statutory interpretation that depends solely on simple assumptions about the legislature. Contemporary scholars and judges, for example, debate the merits of "intentionalism," "purposivism," and "textualism,"[80] to name three leading originalist theories of statutory interpretation. But the heterogeneity of the federal drafting process suggested by our study—even within a single senate committee—suggests that any theory dependent upon a monolithic picture of legislative drafting may reflect more about courts' needs than congressional reality. For example, to the extent that intentionalism assumes a legislative intent *always* exists or that textualism assumes deliberate and precise legislative word choice, these theories may rely on questionable empirical assumptions across the run of cases. Thus, if the wide variability in drafting that we observed is true of other committees—and the general nature of the factors cited by our staffers makes this likely—it suggests caution in building a theory of interpretation upon any simple picture of the legislative process.

To press the point further, several of our findings raise questions for any strongly originalist notion of statutory construction—that is, any theory premised on limiting courts to locating the meaning invested in a statute by the legislature alone and, conversely, forbidding courts to play any substantive role in making statutory meaning. Much of what staffers told us is strikingly inconsistent with the idea that a court, whether professing to follow textualism, intentionalism, or purposivism, can always or even often identify what Congress said or meant on the sorts of issues that arise in interpretive litigation.

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[78] By "originalism," we mean to refer to theories of interpretation that place emphasis on the identification of congressionally inscribed statutory meaning and that deny the need for judges to make substantive decisions in assigning meaning to contested statutory provisions.

[79] This notion has been argued in Schacter, Common Law Originalism, supra note 5, at 55 (concluding from study that judges likely do make substantive decisions when construing statutes); Schacter, Metademocracy, supra note 5, at 595 (arguing that courts employ interpretive rules that "not only . . . assign[ ] meaning in a particular case, but also . . . advanc[e] a larger democratic project" and advocating that interpretive law should aim not to eliminate judges' discretion in statutory interpretation, but to channel that discretion using certain principles and rules).

[80] See Eskridge, supra note 38, at 14-47 (discussing and evaluating these three theories). For a collection of the recent literature challenging and defending textualism in particular, see Tiefer, supra note 26, at 206 nn.1-2.

First, an originalist search for an identifiable meaning will fail when the political price of a law's passage was consensual ambiguity. Second, even if clarity is intended, the intense time pressures under which laws often are written make it unrealistic to believe that the drafting process did or could have foreseen—let alone resolved—the sorts of detailed questions of application that generate interpretive litigation. Third, although courts often draw purportedly originalist conclusions about statutory meaning based on canons of construction, prior cases, or the like, our study suggests real caution in imputing this sort of consciousness—or better put, this sort of *concern*—to staffers. Fourth, responsibility for drafting a bill often is diffused among many people and groups, chief among them staffers from different offices, Legislative Counsel drafters, and lobbyists. This dispersal of responsibility makes it problematic for a court to try to isolate any single moment, actor, or event that decisively conferred meaning on a contested provision.

Instead, what our study suggests is that our respondents, at least, fully expect courts to do Congress's bidding when the law is clear, yet they have no illusion that laws are always clear. It was readily apparent in our interviews that staffers expected courts to fill gaps and refine imprecisions in statutes. We did not seek from our respondents their views (if any) about how courts *should* resolve statutory ambiguity, and certainly there are difficult normative questions about how a court should proceed if it concludes that those who produced the statute deliberately failed to answer a particular question.[81] The basic point suggested by our research is that it is implausible for judges to treat legislation as if it, itself, can or does answer all interpretive questions.

This point, in turn, illustrates the complexity of ideas like "judicial activism" and "judicial restraint" in the context of statutory interpretation. If the expectation in a particular circumstance among those responsible for drafting a bill is that a court will resolve the meaning of a particular provision, is it activist or restrained for a court to insist that Congress answered that question and to attribute responsibility for its reading of the language to Congress? There is something ironic, if not perverse, about condemning, as intrusive on the legislative branch, judicial action that was sought affirmatively by the bill's legislative drafters. Viewed in this light, this puzzle opens up the

[81] For perspectives on the problem of deliberate ambiguity, see Grundfest & Pritchard, supra note 38, at 637-49. For an overview of different normative positions on the resolution of ambiguity in general (as opposed to deliberate ambiguity) see Schacter, Metademocracy, supra note 5, at 613-46.

larger question of how (if at all) to account for the expectations of legislative actors in framing what counts as judicial activism.

Our findings thus provide a perspective on the legislature that raises both empirical and normative questions about statutory interpretation. If we are to take seriously the assumptions about legislative behavior embodied in the standard judicial story, then our findings raise questions about the empirical viability of that story. If replicated, these findings will point toward the implausibility of many judicial assumptions, such as that legislators draft bills themselves, that legislative drafters have interpretive rules and other legal principles firmly in mind when drafting, and that legislative drafters always intend for statutory words to have a particular meaning.

If, on the other hand, the standard judicial story is based only on fictions that cannot be taken seriously as an empirical matter, then our findings pose normative questions. They do so by suggesting that the fictions deployed in judicial opinions are a kind of diversion, allowing judges to exercise significant discretion in determining statutory meaning while attributing their discretionary choices to Congress. This raises significant questions about institutional accountability for legislative law, for it allows judges to use the soothing rhetoric of the standard judicial story to distance themselves from their own interpretive creations. In this way, our study supports the notion that judges should be more forthright and candid about what goes into their interpretive choices and about the extent to which *both* legislators and judges participate in making statutory law.

2. Problems for Textualism in Particular

Our study also raises particular questions about key principles of textualism as espoused by Justice Scalia.[82] One core notion in Justice Scalia's theory is the idea that courts ought to choose interpretive rules that "discipline" Congress into using text and not legislative history to convey intended meaning. Our interviews suggest that this disciplinarian posture either misconceives the legislative branch or tries to remake that branch in the image of the court itself. For one thing, while a consistent judicial practice of textualism likely would have some effect on legislative drafting, judicial practice is hardly consistent across multiple courts.[83] Moreover, the sheer diversity of approaches

[82] Nevertheless, it is worth noting that many of our findings, in fact, dovetail with Scalia's critique of traditional intent-based interpretation. For instance, Scalia has also evinced skepticism toward the legal fictions underlying the intentionalist approach to statutory interpretation. Scalia, supra note 61, at 16-17.

[83] For an argument that the variability of individual judicial approaches inevitably limits the disciplinary effect of rules, see Adrian Vermeule, Theories of the Political Process

to the drafting process, the multiplicity of drafters, and the different points in time at which text is drafted suggest the limited disciplinary effect of judicial rulings. Justice Scalia's disciplinarian aspirations could be realized only if text were consistently available not only to staffers but also to a whole host of other players throughout a complex and lengthy process in the Senate, in the House, and in conference.

More importantly, if we are right about the "constitutive" virtues, then there are strong incentives for congressional drafters to reject the disciplining demands of courts—to achieve action rather than precision, to arrive at agreement rather than precise language, to signal meanings in legislative history rather than in the text. After all, our staffers knew the "rules"—they knew that language was supposed to appear in text, and they knew of the Scalia critique, for example, yet they continued to draft legislative history. Not surprisingly, given the role of the constitutive virtues, staffers explained their continued drafting of legislative history largely in terms of the demands, not of courts, but of their own institution: to flesh out arguments for floor debate, to persuade other senators to sign on to a bill, to communicate between committees, and, most importantly, to help secure passage of a bill. Notwithstanding Justice Scalia's critique, then, the business of producing legislative history continues to thrive in the Senate Judiciary Committee, and our survey suggests that this is unlikely to change.

More specifically, our respondents' answers raise questions about particular aspects of the Scalia critique, including two important bases for privileging statutory text over legislative history. First, our study raises questions about whether legislative history is, as Justice Scalia suggests, produced strategically just for courts. While that is clearly one motive, it is not the only one, and for reasons specific to Congress (such as the need to persuade colleagues and to talk to the public), it appears that floor statements, committee reports, and similar forms of legislative history would be created even if courts stopped consulting them for statutory interpretation purposes.

Second, our interviews raise questions about whether one can distinguish text from legislative history on the strength of staffer involvement. To the extent that Justice Scalia suggests that a proper metric for assessing interpretive tools is the level of drafting involvement by legislators, as opposed to staffers, we discovered no strong basis for categorically distinguishing between statutory language and legislative

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and Theories of Interpretation, Address at the Association of American Law Schools Annual Meeting (Jan. 6, 2001), at http://www.aals.org/am2001/mat_vermeule.html (last visited Apr. 4, 2002).

history on this score. Congress votes, of course, on the text in bills but not on legislative history. But the Scalia critique focuses on the lack of legislator input in writing legislative history, not merely the absence of a vote. Thus, the issue of who writes statutory text remains relevant. As to both legislative history and statutory text, our study suggests that staffers and lobbyists seem to have a substantial role. More importantly, if our staffers are to be believed—and we found no reason to doubt them on this score—legislators have a sharply limited role in drafting *both* text and legislative history. In sum, if our findings are generalized to other legislative settings, they will pose significant challenges for the textualist argument that presumes legislators have a distinct role in drafting text as opposed to legislative history.

C. Process Reforms

We have already argued, in a sense, for one sort of "reform": for courts to be more candid and forthright about the value-laden decisions they must make in interpretation, rather than to hide behind the often-misleading shroud of originalism through which judicial choices are packaged as legislative choices.[84] Consistent with our resistance to court-centeredness in understanding the drafting process, we similarly resist the notion that the only serious implications of our case study are for interpretive theory or for judicial interpretation of statutes. There are also intriguing possibilities from the standpoint of congressional reform.

We should say at the outset that we doubt that law reforms, however nuanced and targeted, could—or for that matter, *should*—bridge the gap we have sketched between the legislative and judicial drafting virtues. That gap is, to some degree, permanent and enduring because it is the product of differences in institutional incentives, design, and competencies. It would be misguided to suggest that the two branches of government could be aligned fully in their approaches to legal drafting, and it would be unwise, we think, to look for ways to recreate the legislative branch in the image of the courts.

Having said that, there are some incremental reforms that we believe might have some positive effect. One would be to explore an expanded role for the Legislative Counsel's office. Institutionalizing the role of the Legislative Counsel's office in drafting all bills probably would increase the extent to which rules of construction and other judicial principles are made part of the drafting process, even if the role of Legislative Counsel remained only an advisory one, as we think it should. Realistically speaking, this would be only an incre-

[84] See supra Part III.B.1.

mental step. Increasing the role of the Legislative Counsel surely would be insufficient to support, as an empirical matter, the highly detailed knowledge of rules and law that courts routinely impute to Congress.

Nevertheless, more regularized input from the Legislative Counsel's office could increase congressional awareness of potential interpretive outcomes and more systematically enable drafters to make drafting choices in light of these potential outcomes. Failing this, it might be useful, as Robert Katzmann and others have suggested, for the Legislative Counsel's office to prepare drafting guides or checklists for staffers who do not engage Legislative Counsel to draft bills for them.[85]

Along similar lines, it would be valuable to create frameworks for more systematic communication between the branches, such as the regular receipt by congressional committees of recent judicial decisions that construe federal statutory law and proliferate new principles of interpretation. Proposals of this sort have particular resonance in light of our findings. There is, in fact, a literature supporting initiatives like these that dates back to Justice (then-Judge) Cardozo's call in 1921 for the creation of a "Ministry of Justice" to institutionalize communications between the two branches of government.[86] Salient proposals include Justice Ginsburg's call for the creation of a statutory revision committee comprised of legislators and retired judges;[87] Wisconsin Chief Justice Shirley Abrahamson's call for expanded use of executive and legislative oversight mechanisms, law revision commissions, and statutorily mandated judicial oversight mechanisms to assist the legislature;[88] and Judge (then-Professor) Robert Katzmann's call for regular transmission to congressional staff of judicial opinions identifying interpretive problems.[89]

While we see merit in proposals like these, it would be naive to expect too much out of such initiatives because a lack of congressional knowledge of judicial practices is by no means the sole—or even principal—factor responsible for the gap that we have described. Deeper institutional factors are involved. Moreover, some of the most vexing problems of statutory interpretation are grounded in judicial, rather

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[85] E.g., Katzmann, supra note 1, at 65-66.

[86] Shirley S. Abrahamson & Robert L. Hughes, Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation, 75 Minn. L. Rev. 1045, 1048 (1991).

[87] Ginsburg & Huber, supra note 4, at 1432-33.

[88] See Abrahamson & Hughes, supra note 86, at 1054-75 (describing various mechanisms as possible solution for statutory interpretation issues).

[89] Katzmann, supra note 1, at 77-79 (describing project to increase interbranch communication and discussing receptiveness of participants).

than legislative, practices. Take the canons of construction. It might be beneficial if the knowledge of canons imputed to legislative actors were grounded more solidly in fact. But, as Karl Llewellyn's work decades ago suggested,[90] even encyclopedic knowledge of the canons would not eliminate uncertainties because there are many canons potentially relevant to a case, and they so frequently conflict. There simply are too many interpretive resources—canons and beyond—for even the most conscientious drafter to anticipate meaningfully all of the interpretive moves that a court might make. Knowledge of these resources is only the start, not the end point, in making intelligent predictions of how a court will construe particular legislative decisions.

One final area for exploring process reforms might be in relation to lobbyists as drafters. Here, however, we particularly see the need for more research and study. Lobbyists and interest groups seem to be fairly invisible in the judicial story of drafting.[91] Our study brings this role into relief and suggests a fertile area for future research. We see a particular need for both empirical and normative assessments of the nature and quality of the lobbyist's role as drafter, with a view toward considering whether the role that lobbyists currently play is appropriate from a policy standpoint, as well as whether that role should be made more transparent—to the public and perhaps to judges. Our respondents emphasized the value of the lobbyist's drafting work, so long as it was tempered by safeguards such as declining to adopt a lobbyist draft verbatim and hearing from a wide spectrum of interests. But staffers are not best positioned to assess the effectiveness and frequency of these or other safeguards. Further research pursuing these issues, perhaps accomplished by interviewing lobbyists themselves, former lobbyists, and former staffers, might be an effective way to begin critical empirical analysis of this little-understood but potentially important aspect of the federal drafting process.

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[90] See Llewellyn, supra note 57, at 400-06 (discussing frequently conflicting results of various canons of statutory interpretation).

[91] For an exception to this rule, see Kosak v. United States, 465 U.S. 848, 858, 863 (1984) (Stevens, J., dissenting), which chides the majority for, in construing the Federal Torts Claim Act, according interpretive weight to a report written by a judge who had been largely responsible for drafting the Act. The dissent argued that "[t]he intent of a lobbyist—no matter how public spirited he may have been—should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist's intent." Id. at 863.

Conclusion

The aim of this case study has not been to encourage courts or scholars to adopt a single, "realist" picture of drafting. It is, instead, to probe divergent understandings of a mutual effort. A certain cross-institutional skepticism may be demanded by our Constitution, but so too is a working relationship. In the encounter between courts and legislatures that statutory interpretation represents, courts conventionally define their own role in passive terms. Rather than articulating a positive judicial mission, courts routinely claim that they are deferring to the decisions of others, namely those in Congress. The question then arises: If the judicial vision of the political process is incomplete or misconceived, are courts applying a faux deference? Put another way, when courts claim to be relying on the will of others, are they simply looking in the mirror? Our case study provides no definitive answers, but it does underscore the importance of pressing these questions. We hope that this study will push that project ahead by identifying potential areas for future study.